



International Commission of Jurists
Danish Section

www.icj.dk

October 2008

Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility

By Camilla Wee*

Abstract

Amidst the increasing focus on human rights and corporate regulation generally, questions have arisen as to the regulation of State-owned enterprises (SOEs). Inadequate corporate regulation coupled with corporate capacity for human rights violations create a dangerous disparity which applies equally to SOEs. The understanding, grounded in the traditional division of the public and private spheres, that corporations are not generally subject to international human rights obligations is increasingly being challenged by new developments¹. However, in the interim, the SOEs' special nature arguably engenders the potential to achieve a stronger regulative hold over the acts and omissions of this category of corporate enterprises, than is presently possible in respect of corporate actors generally. This is because SOEs are entities which, although they typically function as commercial actors, straddle the public and private spheres by virtue of their State ownership. The dual nature of SOEs may result in higher expectations being placed on these particular entities to adhere to international human rights standards. It may further increase the likelihood of SOEs' conduct engaging the traditionally State-centred international responsibility framework; both by attribution to State and under the duty to protect. The conceptualisation of SOEs, as a distinct category of corporate actors, which in general may be subject to wider regulation of its conduct in respect to human rights, is illustrated both by international and regional case law concerning SOEs and State responsibility, but also by regulative measures at national level, some of which tie regulation of SOEs to business level accountability instruments.

*The author would like to thank the International Commission of Jurists, Danish Section, for the opportunity to draft the present report and its chairperson, Mr. Sune Skadegaard Thorsen, for his support and guidance. Any inaccuracies are the author's and the views in presented in the report do not necessarily reflect the position of the International Commission of Jurists, Danish Section.

¹ Apart from the further general development of corporate responsibility, there are developments in the area of international criminal law, and in particular corporate complicity. While significant to corporate responsibility this is not dealt with in the present paper. The International Commission of Jurists has convened an Expert Legal Panel to work on the legal and public policy meaning of corporate complicity.

Information available at: http://www.icj.org/news.php3?id_article=3961&lang=en

See also discussion of corporate complicity in Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 20-21

Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

Contents

I.	Introduction.....	p. 2
II.	Development of Corporate Responsibility.....	p. 6
III.	The Nature of State-owned enterprises.....	p. 8
IV.	Voluntary Business Initiatives and National Regulation.....	p. 10
V.	State Responsibility for SOE Activities: Attribution.....	p. 17
	i. ILC Article 4.....	p. 22
	ii. ILC Article 5.....	p. 23
	iii. ILC Article 8.....	p. 27
VI.	State Responsibility for SOE Activities: Duty to Protect.....	p. 31
VII.	Conclusion.....	p. 36

I. Introduction

When viewed against the backdrop of the challenges of corporate regulation generally, State-owned enterprises (SOEs) emerge as a form of corporate actor in respect of which there exists significant potential for stronger regulation.

As international actors, corporations today are wielding global influence and their activities are having significant social impact. This has led to calls for more regulation of, and accountability and responsibility for, corporations in light of the risk of human rights violations through corporate activities. According to the Special Representative to the Secretary General on Business and Human Rights (SRSG)²: ‘*The root cause of the business and human rights predicament today lies in*

² The Special Representative, Professor John G. Ruggie, was appointed in 2005 by the Secretary General of the United Nations. The SRSG has in April 2008 submitted his final report in fulfilment of the initial mandate which a. o. required the identification and clarification of standards of corporate responsibility and accountability, and the elaboration on the role of States in regulating and adjudicating the role of business with regard to human rights. The Human Rights Council has subsequently extended the mandate of the SRSG by three years. The extended mandate includes providing practical and concrete recommendations on how to strengthen the fulfilment of the State duty to protect, to elaborate on corporate responsibility to respect human rights and provide concrete guidance to business. Information about, and reports by, the SRSG are available at: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>

*the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge*³. The underlying sentiment of the momentum for more corporate regulation is clear; human rights represent inalienable global fundamental values and their protection should not be jeopardised by the fact that today, the international actor whose activities have human rights implications may be a commercial corporation.

Traditionally international law has been concerned with regulating the behaviour of States and corporate regulation has taken place by way of national law and policy. The fact that corporations have conceptually been construed as private sphere actors may initially have rendered them beyond the immediate reach of the international human rights regime⁴ because focus has been on imposing direct obligations on the State, as the primary subject of international law⁵. Pressure is now mounting to move away from the traditional division between corporate law and human rights law; the private and the public spheres. This division has been described as 'dysfunctional'⁶, but despite the potential for significant social impact by corporate activities, the SRSG has concluded that international customary law does not yet impose direct and binding obligations on

³ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 3
Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁴ Subject to individual exceptions and current developments referred to in footnote 1 above.

⁵ The traditional strong State-centred focus should not be considered conclusive on the question of future international corporate legal regulation. As Alston notes, the State may be the primary subject of international law, '*But the concept of international legal personality, and the acknowledgement of the International Court of Justice in its famous comment in 1949 that the "subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community", holds open the possibility that the categories might be meaningfully reconsidered in time*'. See Alston, P.: 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Alston et al: 'Non-State Actors and Human Rights'. Oxford University Press, Oxford: 2005. p. 19

⁶ Steinhardt, R. G.: 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria'. In Alston et al: 'Non-State Actors and Human Rights'. Oxford University Press, Oxford: 2005. p. 177

corporations⁷. Further, in respect to the textual development of corporate human rights responsibilities, in 2003 the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms)⁸ failed to gain sufficient support, and there has not since been a similar concentrated push for international binding corporate obligations. Perhaps the current state of affairs, with regards to the lack of corporate regulation, can be taken as a signal that recourse to traditional sources of international law cannot, in and of itself, address the challenge of the ‘governance gap’⁹. Rather, the SRSG at a consultation in Copenhagen in 2007 stressed that we should not be pursuing a ‘silver bullet’ approach to address issues of human rights violations stemming from corporate activities¹⁰. In recent times the calls for greater corporate regulation have increasingly started to be met by the combined force of a broader spectrum of measures. These are formed by a number of business level accountability initiatives as a form of voluntary business ‘self regulation’, *as well as* by increased national and international focus on legal and policy regulation of corporate acts. The strengthening of a corporate regulative framework may therefore be seen to be developing at, at least, three interrelated levels: the business level, the national level, and the international level¹¹.

⁷ Ruggie, J. G., ‘Current Developments, Business and Human Rights: The Evolving International Agenda’. American Journal of International Law, Vol. 101:820, 2007 p. 832-3

⁸ For discussion of conceptual problems of the Norms see *ibid*, p. 822-7
The Norms available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En)

⁹ Nielsen, K. R., ‘Mind the Gap! Closing the Governance Gap- A Critical Step for Corporate Social Responsibility’. The Copenhagen Centre.
Available at: <http://www.copenhagencentre.org/closing-gap.pdf>
See also Report of SRSG: ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights’. 7 April 2008, p. 3-5
Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

¹⁰ Expert Consultation, Copenhagen 7, 8 November 2007 on ‘The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights’. Summary Report p. 1
Available at: <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>

¹¹ For an alternative four-way division of ‘regimes of corporate responsibility’ see Steinhardt, R. G.: ‘Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria’. In Alston et al: ‘Non-State Actors and Human Rights’. Oxford University Press, Oxford: 2005. p. 180-212

Achieving a comprehensive corporate regulative framework to protect against human rights violations by corporations arguably means pursuing all possible avenues to achieve the fullest protection of human rights. In respect of the particular corporate actor category of SOEs, it is suggested that the traditionally stronger human rights obligations of State, foster expectations of human rights observance by SOEs. Therefore, considering the strongest possible combination of regulative measures entails exploring how State ownership may bolster regulation of SOEs.

Arguably, State ownership may have the following three effects of:

- heightening the standard of human rights observance expected and demanded of the SOEs, as compared to other corporate actors, through national and business level instruments (see section IV below);
- engaging the direct responsibility of States in circumstances where SOEs act in violation of international law and the conduct can be attributed to such States (see section V below) and;
- increasing the likelihood of State responsibility for the failure to protect against human rights violations of SOEs (see section VI below).

It is important at this point to clarify the varying subject foci in the abovementioned sections. While section IV focuses on the accountability of the SOE itself, section V looks at the direct responsibility of State, i.e. situations where conduct of the SOE may be deemed to constitute conduct of the State. Section VI also considers the responsibility of State, but under the duty to protect when the SOE is construed as a non-state party. The dual-faceted nature of SOEs thus enables different constructions of accountability and responsibility; whether based on a conception of the SOE as independent, but affiliated with the State through ownership, or as part of the unity of State. Overall, this paper seeks to discuss how SOEs fit into the current regulative framework as it relates to corporations, to touch on developments in respect of voluntary business initiatives and national regulation, and to consider how SOEs, as a special category, is treated under international State responsibility. However, in order to ground the discussion, brief consideration will first be given to the wider context of development of corporate responsibility (section II) and to the nature of SOEs (section III).

II. Development of Corporate Responsibility

The direct regulation of the human rights impact of corporations, which is presently mainly found at national and business levels, develops with reference to international human rights standards.

The SRSG describes the 'responsibility to respect human rights' as the '*baseline expectation of all companies in all situations*'¹². The extent to which this expectation is supported by direct regulation of corporations, at present, largely depends on national legislation and policy, and voluntary business level accountability initiatives. At the international level, the UN Norms constituted a significant attempt to create a textual basis in the international legal sphere for corporate regulation in relation to human rights. The UN Sub-Commission on the Promotion and Protection of Human Rights had sought to formulate direct international legal obligations for corporations, but it failed to win sufficient support to be adopted by the UN Commission on Human Rights (now succeeded by the UN Human Rights Council). The aim was to ensure comprehensive human rights observance even when States, as the primary duty bearers, failed to regulate corporate activities which violated human rights¹³. Arguably, the UN Norms were too much too soon, and too far removed from the international responsibility framework, leaving them without a solid base to stand on. In addition they were not specific enough to guide corporations on their human rights responsibilities and would therefore essentially have opened a Pandora's Box of liabilities¹⁴. However, the underlying rationale of the UN Norms - that power obliges - continues to direct the development of corporate regulation in respect of human rights.

¹² Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 9

¹³ Ruggie, J. G., 'Current Developments, Business and Human Rights: The Evolving International Agenda'. American Journal of International Law, Vol. 101:820, 2007 p. 824-7

¹⁴ For discussion on the nature and content of the UN Norms see also: Skadegaard Thorsen, S. and Meisling, A.: 'Perspectives on the UN Draft Norms'. Lawhouse.dk (now Global CSR Consultants) 2004; and Skadegaard Thorsen, S.: 'Lawhouse Submission on UN Norms to OHCHR'. Lawhouse.dk, 2004.

Both available at: <http://www.global-csr.com/?ID=6>

It is not contended that the corporate ‘responsibility to respect’ means that the responsibility of corporations is the same as that of States¹⁵. Corporations have not historically exerted a comparable degree of power over society as States, but today corporate responsibility must develop to address the fact that the power and reach of corporations are rapidly increasing. On the other hand, it is still true that, as they are a different sort of body; corporations do not on the whole exert the same quality, as opposed to degree, of power over society as States do and consequently their responsibilities differ even if some of the rhetoric mimics that of the human rights obligations of States. The current dynamic development of corporate responsibility can only meaningfully be viewed in light of international human rights standards which were primarily developed in a State-centred setting. The central point to reiterate is, however, that human rights are inherent in the human being, not the State, and therefore they may be violated by States, corporations and natural individuals alike¹⁶. The reason that international law has traditionally been geared towards developing human rights standards vis-á-vis States is that these were traditionally the relevant powerful actors. The present-day corporate capacity for human rights impact means that they have now emerged as relevant powerful actors warranting stronger regulation. International law may well provide a point of departure but regulative developments at all levels will be measured by their effectiveness in protecting human rights in relation to corporate activities. According to the SRSG, corporate responsibility requires exercise of due diligence and an initial guiding reference for corporations to meet this responsibility exists in the International Bill of Rights and the core Conventions of the International Labour Organization¹⁷. Therefore, while concrete corporate regulation is found mainly in national legislation and policy,

¹⁵ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 4, §6 and p. 16-17, §53-55
Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

¹⁶ McBeth, A. 'Privatising Human Rights: What happens to the State's Human Rights Duties when Services are Privatised'. Melbourne Journal of International Law, Vol. 5, 2004, p. 143

¹⁷ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 14-19
Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

and in business level regulative initiatives, international human rights standards inform the notion of corporate responsibility in general. The particular application of international human rights standards to SOEs, however, stems from the view among some States, and possibly SOEs themselves¹⁸, that they must meet the standards to a greater extent than other corporate actors.

III. Defining State-owned enterprises

Categorising SOEs by their State ownership makes for an apparently straightforward definition, however, it is at the same time very widely encompassing.

According to the Organization for Economic Co-operation and Development (OECD) SOEs are entities typically '*...prevalent in utilities and infrastructure industries, such as energy, transport and telecommunication, whose performance is of great importance to broad segments of the population and to other parts of the business sector*'¹⁹. To an extent, the term 'State-owned enterprises' is self-explanatory; it applies to those corporate entities which are owned by the State. Thus in Sweden the guidelines issued in 2007 relating to external reporting for SOEs are applicable to companies which are wholly or partly owned by the State²⁰. A similar approach is found in the OECD Guidelines on '*Corporate Governance of State-owned Enterprises*' (OECD Guidelines on SOEs) where the term 'SOE' is used to cover '*commercial enterprises under central government ownership and federal ownership*' and with the State enjoying '*significant control, through full, majority or significant minority ownership*'²¹. It follows that, the foremost defining

¹⁸Wang Zhuoqiong: 'Bosses of State Firms should be 'more responsible''. (referring to view expressed by executive vice-president of the China Enterprise Confederation) China Daily 07/03/2007 p. 3 Summary available at: http://www.chinadaily.com.cn/china/2007-07/03/content_908384.htm

¹⁹ Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 9
Available at: <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

²⁰Swedish Ministry of Enterprise: 'Energy and Communications: 'Guidelines for External Reporting by State-owned companies'', November 2007, foreword.
Available at: <http://www.sweden.gov.se/content/1/c6/09/35/06/453ac39d.pdf>

²¹ Further, the OECD Guidelines on SOEs state that the usefulness of the Guidelines might also extend to the governance of corporations in which the State holds a relatively small stake. Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 11

characteristic of SOEs is clearly ownership by the State. However, the seeming simplicity of the category of SOEs, as defined by State ownership, is upset once consideration turns to how SOEs should be regulated and the responsibility that their acts may attract. The fact is that the term SOE constitutes a very large category indeed, and this complicates the determination of how SOEs are to be regulated; they are unlikely to constitute a homogenous grouping and hence a 'one size fits all' regulatory approach could seem ill-advised. One illustration of this may be seen in the situation of Export Credit Agencies (ECAs) which may constitute a form of SOE. While some State-owned ECAs are wholly integrated in the State structure, others are independently managed but mandated by the State. In each case the determination of international responsibility hinges on the given 'type' of ECA in question²². Similarly, some SOEs may be deemed part of the 'unity of State', while others, but for their State ownership, look more like private corporate actors. The category potentially spans all types of corporate entities in which States might acquire some ownership, and there is presently no clear delimitation of the size of the State's ownership share required for a given entity to be classed as an SOE.

Achieving a measure of clarity of the scope of this category is important, firstly, to ensure a common understanding of which entities are covered by the term and secondly, in light of the fact that an entity which falls within the definition of an SOE may be subject to a higher standard of human rights observance than other corporate actors. Due to the uncertainties surrounding the delimitation of the category it is important not to lose sight of the fact that the term covers a broad range of entities. The need for clearly defined boundaries of the category and a common understanding is equally relevant to regulative measures at the international, national and business levels. It is the developments of SOE regulation at the latter two levels which the paper now turns to consider.

Available at: <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

²² Can, Ö. and Seck, S.L.: 'The Legal Obligations with Respect to Human Rights and Export Credit Agencies'. July 2006, p. 6-10

Available at: <http://www.halifaxinitiative.org/updir/ECAHRLegalFINAL.pdf>

IV. Voluntary Business Initiatives and National Regulation

States making use of business level corporate responsibility instruments to regulate their SOEs illustrate a growing recognition that SOEs should be held accountable and responsible in relation to human rights to a greater extent than other corporate actors.

Of the multitude of business level accountability instruments, few make specific mention of their applicability to SOEs²³. The ‘Extractive Industries Transparency Initiative’ (EITI) is one exception which explicitly extends the requirement of full disclosure of payments and government revenues of the extractive industries to SOEs²⁴. At the time of writing, 23 countries²⁵ have signed up as candidate countries to EITI and have in this way expressed their support for the EITI Principles, which declare: ‘*We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.*

*We affirm that management of natural resource wealth for the benefit of a country’s citizens is in the domain of sovereign governments to be exercised in the interests of their national development*²⁶. The EITI principles here identify sustainable economic growth as a central concern of the State and, recognising the mutual influence between economic and social developments, allude to the State’s responsibility, in the widest sense, to its people. This may be seen as an acknowledgement that the State has responsibilities towards the people also in respect to its corporate activities and that the ‘economic’ corporate sphere cannot be artificially detached from the public sphere.

²³For an overview business level corporate regulative instruments see Goel, R., and Cragg, S. W.: Guide to Instruments of Corporate Responsibility: An overview of 16 key tools for labour fund trustees, Pensions at Work. October 2005. Available at: http://www.pensionsatwork.ca/english/pdfs/conference_2005/goel_guide_to_instruments.pdf

²⁴ Available at: <http://eitransparency.org/eiti/criteria>

²⁵ Azerbaijan, Cameroon, Congo, The Democratic Republic Of The Congo, Cote D’Ivoire, Equatorial Guinea, Gabon, Ghana, Guinea, Kazakhstan, Kyrgyzstan, Liberia, Madagascar, Mali, Mauritania, Mongolia, Niger, Nigeria, Peru, Sao Tome And Principe, Sierra Leone, Timor-Leste, Yemen.
Available at: <http://eitransparency.org/>

²⁶ Available at: <http://eitransparency.org/eiti/principles>

While most business level accountability initiatives do not purport to apply specifically to SOEs, there are several examples of States taking this step themselves by making use of the various instruments created at the business level to meet the need they perceive for responsible behaviour of SOEs. The Swedish 'Guidelines for External Reporting by State-owned Companies' are a prime example, requiring Swedish SOEs to report using the Global Reporting Initiative²⁷. Interestingly, Sweden explains this specific requirement for SOEs as follows: *'A responsible and professional owner should, among other things, take responsibility for issues relating to sustainable development, for example ethical issues, the environment, human rights, gender equality and diversity. All companies bear this responsibility but the state-owned companies are to set an example and be at the leading edge of this work'*²⁸. The Swedish initiative is based on an understanding that SOEs should be a 'model' of responsible and professional ownership.

Sweden's conceptualisation of the role of SOEs should be considered in light of the position taken in the OECD Guidelines on SOEs, which probably constitute the most extensive guidelines on SOEs to date. To a degree Sweden's acknowledgement that SOEs stand apart from corporate actors generally, may be contrasted with the division between the State's public and private sector activities which is advocated by the OECD Guidelines on SOEs: *'There should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulation'*²⁹. This separation may be an especially pertinent consideration when viewed from a business perspective, but the extent to which it can be maintained in practise is uncertain. It at least seems clear that Sweden considers SOEs a separate category from other corporate actors precisely due to the fact that the State is

²⁷ Swedish Ministry of Enterprise: [Energy and Communications: 'Guidelines for External Reporting by State-owned Companies'](#), November 2007.
Available at: <http://www.sweden.gov.se/content/1/c6/09/35/06/453ac39d.pdf>

Global Reporting Initiative website: <http://www.globalreporting.org/Home>

²⁸ Swedish Ministry of Enterprise: [Energy and Communications: 'Guidelines for External Reporting by State-owned companies'](#), November 2007, p.1
Available at: <http://www.sweden.gov.se/content/1/c6/09/35/06/453ac39d.pdf>

²⁹ Organization for Economic Co-operation and Development: [OECD Guidelines on Corporate Governance of State-owned Enterprises](#) 2005, p. 13.
Available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

owner, and that this in turn gives rise to a heightened demand for responsible behaviour. However, while the OECD Guidelines on SOEs do not directly address the question of human rights obligations, the recommendations are more nuanced in their approach than simply advocating separation of State and ownership functions. The OECD Guidelines on SOEs recognise that SOEs may be '*expected to fulfil special responsibilities and obligations for social and public policy purposes*'³⁰, and in recommending that States establish a co-ordinating or ownership entity to distance the ownership functions from State functions³¹, they also state that such an entity should be accountable whether '*directly or indirectly, to bodies representing the interests of the general public, such as the Parliament*'³². In this sense the OECD Guidelines on SOEs acknowledge the special nature of SOEs but arguably seek to minimise its effects on the market by advocating a separation of State and ownership functions.

One concern expressed in the OECD Guidelines on SOEs, which ties in with view that the State's ownership functions ought to be separated from its other State functions, is that SOEs should not be used by the State to distort the market³³. It is interesting to consider this guideline in the specific context of the Chinese reform of the centrally planned economy in which SOE reform has formed an essential part³⁴. The reform has effected partial privatisation of a large public sector under the strategy of '*grasping the big and letting go the small*'³⁵. One point of view is that '*the development of an effective corporate governance system is indivisible from the restructuring*

³⁰ Ibid. p. 20

³¹ Ibid. p. 26

³² Ibid. p. 27-28

³³ Ibid. p. 12 and 18-22

³⁴ Büchelhofer, C.: Corporate Control and Enterprise Reform in China. An Econometric Analysis of Block Share Trades. Physica-Verlag, Heidelberg: 2008 p. 7-12

³⁵ Zheng, Yongnian and Chen, Minjia: China's Recent State-owned Enterprise Reform and its Social Consequences. China Policy Institute, Briefing Series Issue 23, June 2007 p. 2
Available at: http://www.nottingham.ac.uk/china-policy-institute/publications/documents/Briefing_23_China_State_Owned_Enterprise_Reform.pdf

process of SOE³⁶; another is that turning over small and medium-sized enterprises to the private sphere, with the result that they struggle to survive, is having negative social consequences³⁷. The criticism which has been levelled against the strategy is that it is too profit-focussed: '*SOEs belong to the State and should perform the governmental function of providing public services. The target of government should not be maximisation of SOEs' profits or fiscal revenue, or the maximisation of the state-owned assets, but the maximisation of social interests, i.e., their utility to the public*'³⁸. The Chinese SOE reform demonstrates that requiring the State to apply a strict division between its public and private interests may be a difficult proposition. In China it remains the case that the State enjoys a great deal of control over business and that '*it is difficult to separate business from politics in China*'³⁹. This by no means disputes the OECD guideline against market distortion through SOEs, but merely makes the point that it must be viewed in the context of a given country's circumstances. It is clear that because State control has traditionally been a strong feature of the political system, in whichever way China chooses to deal with SOE reform significant market and social impacts will ensue. It is undeniably a difficult balance between moving towards a more liberal market and protecting social interests, but in relation to human rights at least, it is useful to return to the SRSG's statement that respect for human rights is a baseline expectation of all companies⁴⁰. To this guiding position it must be added that '*Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business*'⁴¹. It

³⁶ Büchelhofer, C.: 'Corporate Control and Enterprise Reform in China. An Econometric Analysis of Block Share Trades'. Physica-Verlag, Heidelberg: 2008 p. p. 18

³⁷ Zheng, Yongnian and Chen, Minjia: 'China's Recent State-owned Enterprise Reform and its Social Consequences'. China Policy Institute, Briefing Series Issue 23, June 2007 Available at: http://www.nottingham.ac.uk/china-policy-institute/publications/documents/Briefing_23_China_State_Owned_Enterprise_Reform.pdf

³⁸ Ibid. p. 10

³⁹ Büchelhofer, C.: 'Corporate Control and Enterprise Reform in China. An Econometric Analysis of Block Share Trades'. Physica-Verlag, Heidelberg: 2008 p. 18

⁴⁰ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 9

⁴¹ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008 p. 10

follows that the pursuit of profits and commercial gains for SOEs must take place within a context which takes human rights into account. In other words, when SOEs pursue corporate objectives, this is arguably subject to maintaining a standard of respect for human rights which may be higher than that of privately owned corporations.

Recently China has indicated that it too will be requiring SOEs to report based on Corporate Social Responsibility (CSR) Guidelines⁴². While CSR is a fairly wide concept⁴³ and one which some consider encompasses only purely voluntary commitment⁴⁴, the Chinese Guidelines which emphasise both profitability and sustainability also specify that a key component of SOEs' implementation of CSR is the protection of labour rights and workers' interests⁴⁵. Hence even if CSR is considered a voluntary concept the express inclusion of labour rights introduces a distinctly legal aspect to the Chinese Guidelines. Further, the explicit acknowledgement of the public expectation that SOEs act under CSR guidelines is notable: '*CSR is a public expectation for SOEs. As key players in the Chinese economy influencing many important industrial fields, SOEs have a major impact on peoples' lives. Consequently, CSR is not only the mission statement of SOEs, but also a public expectation.*'⁴⁶ Accordingly, this Chinese initiative would seem to bring the rhetoric of the State closer to that of the critics of the Chinese SOE Reform, in acknowledging the social responsibility of the State when acting as a corporate owner.

Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁴² Comment available at:
<http://www.globalreporting.org/NewsEventsPress/LatestNews/2008/NewsJan08Chinese.htm>

⁴³ Mullerat, R. 'Still Vague and Imprecise Notion of Corporate Social Responsibility'. International Business Law. Vol. 32, 2004 p. 236

⁴⁴ For example the European Commission defines CSR as '*a concept whereby companies integrate social and environmental concerns in their business operations and their interactions with their stakeholders on a voluntary basis*' Commission of the European Communities: 'Communication from the European Commission concerning Corporate Social Responsibility: A business contribution to sustainable development' (COM(2002) 347 final) 2 July 2002

⁴⁵ State-owned Assets Supervision and Administration Commission (SASAC): 'CSR Guideline for State-Owned Enterprises (SOE)'. PR China publicly issued on Jan 4, 2008.

Available at: http://www.syntao.com/E_Page_Show.asp?Page_ID=6407

⁴⁶ *Ibid.*

Also in New Zealand, where SOEs are regulated by the State-owned enterprises Act 1986 (SOE Act) and monitored by the Crown Company Monitoring Advisory Unit⁴⁷, there are now indications that SOEs will be subject to extended accountability measures. The Minister for SOEs has proposed establishing a CSR framework which would use the various business level initiatives such as Global Reporting Initiative, AccountAbility's AA 1000 and triple bottom line reporting as models for the framework⁴⁸. The Minister has relied on obligations in the SOE Act which are akin to CSR principles, in stating that these obligations are not voluntary for SOEs but assume a higher legal dimension. In other words, while the Minister does not make the direct link between the nature of SOEs and their higher obligations, it is nonetheless recognised that there is a qualitative difference from purely private corporations which is already reflected by the existence of the SOE Act. It is this difference which a Cabinet paper has proposed further reflected in a special CSR framework for SOEs, with the understanding that: '*The ... objectives of the SOE Act are very similar to the typical definition of CSR in every respect, except that they are compulsory rather than voluntary. Therefore, SOEs have responsibilities that go beyond other companies*'⁴⁹.

The steps taken for increased accountability in Sweden, China and New Zealand demonstrate an emerging interplay between pure business initiatives and regulative measures taken at the national level in relation to SOEs. They also illustrate a growing recognition in some States that special duties are attached when the State enters into commercial activities through SOEs.

On one reading of the OECD Guidelines on SOEs they seem to seek an assimilation of SOEs with the broader private commercial sector to the widest extent possible. At the same time, however, the OECD Guidelines on SOEs recognise that the objectives behind SOEs may not be purely commercial: '*Over the years, the rationale for state ownership of commercial enterprises has varied among countries and industries and has typically comprised a mix of social, economic and strategic interests.*'⁵⁰ A complete separation of the State's responsibilities to its public and its

⁴⁷ <http://www.ccmau.govt.nz/>

⁴⁸ See Corporate Social Responsibility for SOEs 2007.
Cabinet Paper available at: <http://www.ccmau.govt.nz/pdfs/CSR-Framework-for-SOEs-CabinetPaper.pdf>
Cabinet Minute available at: <http://www.ccmau.govt.nz/pdfs/CSR-CabinetMinute.pdf>

⁴⁹ Ibid, Cabinet Paper p. 2, §10

⁵⁰ Ibid.

ownership functions seems untenable; it would conflict both with the fact that the purpose of SOEs is not ordinarily purely commercial, and with the privileged position of SOEs. SOEs typically gain some advantages through their link to the State, such as avoidance of takeover and bankruptcy⁵¹, but at the same time their special position renders it likely that they are required to observe a higher standard of human rights observance and protection. State ownership sets SOEs apart from other commercial actors, and they must therefore also be subject to corresponding accountability and responsibility measures. It seems plausible that it is a realisation along these lines which has prompted countries as diverse as Sweden, China and New Zealand to take steps to ensure accountable and responsible behaviour of their SOEs.

Finally, in respect of the corporate regulation through judicial action at national level, mention should be made of the United States' *Unocal* case where a joint venture with a Burmese state-owned partner opened up for application of international human rights standards in the national court⁵². In the United States such application is possible where the formally private entity has a public function, acts under State compulsion, has a nexus to a State, or when the case involves a joint action⁵³. The rationale that State involvement leads to an expectation of a certain standard of human rights observance can be seen to underpin both the *Unocal* decision and the national regulative measures discussed. This example of national courts applying international human rights standards is an indication of State practise supporting holding otherwise private

⁵¹ Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 10

Available at :<http://www.oecd.org/dataoecd/46/51/34803211.pdf>

By analogy, the same conclusion can be reached in relation to Export Credit Agencies (ECAs), where the public or quasi-public nature allows ECAs to be recognised among international organizations such as the World Trade Organisation; a privilege which comparable private sector institutions do not enjoy. In turn, this link to the State has consequences for the construction of responsibility.

See: Can, Ö. and Seck, S. L.: 'The Legal Obligations with Respect to Human Rights and Export Credit Agencies'. July 2006, p. 4-10

Available at: <http://www.halifaxinitiative.org/updir/ECAHRLegalFINAL.pdf>

⁵² Steinhardt, R. G.: 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria'. in Alston et al: 'Non-State Actors and Human Rights'. Oxford University Press, Oxford: 2005. p. 194-202
Doe v Unocal, 963 F. Supp. 880 (C.D. Cal. 1997) (*Unocal 1*), 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (*Unocal 2*).

⁵³ *Ibid.* p. 199-200. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1999)

corporations responsible under international legal standards, when there is sufficient State involvement. Further to this, the grounds for finding sufficient 'State action' bear similarities with bases for State responsibility at the international level which will be considered next.

V. State Responsibility for SOE Activities: Attribution

State ownership of SOEs renders it relevant to consider the direct attribution to the State of acts and omissions of SOEs under the international responsibility framework. The nature of the SOE's relationship to the State will be determinative of the possibility of, and applicable basis for, State responsibility.

When turning to discuss State responsibility for human rights violations by SOEs, an initial observation is that State responsibility for corporations generally would tend to be considered under the heading of the duty to protect against acts of third parties. However, in relation to SOEs their special 'quasi-public' nature makes it equally relevant to consider direct attribution to the State⁵⁴. Therefore, this section focuses on the possibility of responsibility of State where conduct of SOEs can be directly attributed to State, whereas the following section (VI) considers State responsibility for failing to protect against the conduct of SOEs when construed as non-state actors. The question of direct attribution to State for conduct of SOEs has yet to receive a clear response in international, regional and national case law. However, as noted by the SRSG the tendency of human rights treaty bodies is not to spell out whether the question is decided on the basis of the duty to respect or the duty to protect, but to hold States responsible nonetheless for violations by SOEs '*even where the State argues that it has minimum control of the enterprise's daily decision-making*'⁵⁵.

⁵⁴ The possibility of a State being held directly responsible for acts of an SOE hinges on the question of attribution. International Law Commission Articles on State Responsibility, Article 2.
Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

⁵⁵ Ruggie, J. G.: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Kennedy School of Government and Harvard Law School. February 2007, p. 22, §79
Available at <http://doc.politiquessociales.net/serv1/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf>

The reason that focus is normally on the duty to protect against acts of corporations is the conceptual understanding that companies have legal personality: *'a company as a body corporate has a legal personality distinct from its members. A company is not, therefore, the same as its shareholders'*⁵⁶. In respect of SOEs, this means that even if the State owns a majority share in a SOE this does not necessarily mean that it has control in practise. Within a corporate entity it is not a given that shareholders as 'owners' can direct the corporation; actual control may well lie with the Board of Directors or management⁵⁷. Accordingly, the fact that the State is among the shareholders of the SOE does not, *prima facie*, render its acts attributable to the State⁵⁸. As stated by the SRSG: *'It is understood that under general international law the issue of whether particular business entities are State-owned or not is of less importance in deciding whether their acts are attributable to the State; if a company has legal personality distinct from the State, it will be treated like any other entity'*⁵⁹. It is clear that the existence of separate legal personality forms an analytical starting point. Nonetheless, it would be premature to draw from this the conclusion that separate legal personality excludes the possibility of direct State responsibility in respect of SOEs. Arguably, while SOEs are to be treated as other corporations, their distinctive nature can be seen to bring about a different result, as direct responsibility emerges as a possibility in respect of SOEs where this would seem unlikely when the same assessment is made in respect of corporations generally.

⁵⁶ Cadbury, A.: *'Corporate Governance and Chairmanship'*. Oxford University Press, Oxford: 2002 p. 41-42 as quoted in *ibid* p. 67-69

⁵⁷ Clarke, T.: *'International Corporate Governance, A Comparative Approach'*. Routledge, New York: 2007. p. 4-6

⁵⁸ *Commentary to International Law Commission Articles on State Responsibility*. ILC Annual Report 2001, Ch. IV, commentary on article 8 p. 107-108

Available at: <http://www.lcii.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

Similarly, in respect of the legal effects of conduct of SOEs, the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 article 10(3) provides that the immunity of State is not affected by acts of SOEs if the enterprise has separate legal personality.

⁵⁹ Ruggie, J. G.: *'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties'*, Kennedy School of Government and Harvard Law School. February 2007, p. 22, §78
Available at <http://doc.politiquessociales.net/serv1/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf>

The argument for direct State responsibility for acts of SOEs is based on the nature of the relation between the State and the SOE. The Board of Directors is typically in charge of the overall strategic planning and direction of a corporation, and the Board is answerable to its shareholders, which in the case of SOEs, includes the State⁶⁰. The central question for attribution concerns the nature of the State's involvement in the SOE. According to the OECD Guidelines on SOEs, while the State must respect the independence and autonomy of the Board and management⁶¹, where the State is a controlling owner '*it is in a unique position to nominate and elect the board without the consent of other shareholders*'⁶². The OECD Guidelines on SOEs also observe that '*In many instances, SOE boards are not granted full responsibility and the authority required for strategic guidance, monitoring of management and control over disclosure. SOE boards may see their roles and responsibilities encroached from two ends; by the ownership entities⁶³ and by management⁶⁴*'. This entails that the State can possibly encroach on the Board's functions both as an 'ownership entity'⁶⁵ and also through management, as the SRSG has noted that '*Senior management in SOEs is typically appointed by and reports to State entities*'⁶⁶. In addition, the OECD Guidelines

⁶⁰ Clarke, T.: 'International Corporate Governance, A Comparative Approach'. Routledge, New York: 2007. P. 65-69

⁶¹ Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 24-25
Available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

⁶² *Ibid.* p. 25

⁶³ The centralised entities which the OECD argues should be established to separate State and ownership functions in respect of SOEs. See Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 26
Available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

⁶⁴ *Ibid.* p. 48

⁶⁵ The function of these entities, as recommended by the OECD in the SOE Guidelines, is to separate the typical and traditional State functions from its functions as an owner. Yet, whether such entities truly achieve a separation is questionable. For instance, in China the State-owned Assets Supervision and Administration Commission (SASAC) has been established precisely for the purpose of separating the State's public and ownership functions. However, in China there are arguably still a great deal of politics in business, as well as a general tendency for the State to retain ultimate control of its SOEs. See Büchelhofer, C.: 'Corporate Control and Enterprise Reform in China. An Econometric Analysis of Block Share Trades'. Physica-Verlag, Heidelberg: 2008 p. 11 and 18

⁶⁶ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'.

7 April 2008, p. 11
Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

recommend that the ownership entities which coordinate the State's SOEs should be accountable to '*bodies representing the interests of the general public, such as the Parliament*'⁶⁷. Accordingly, the State's ownership over the enterprise engenders three potential doors of influence which are open to the State but which would most likely be closed to a private owner: a) The State may influence the composition of the Board (especially if the State is a dominating shareholder), b) the State may exercise some authority over senior management of SOEs, and c) finally, the State's coordinating or ownership entity may be made accountable to a political State institution such as Parliament. It follows, that apart from any normative force there may be in the argument that, even as a corporate owner, the State can never be entirely relieved from its obligations as State, these circumstances distinguish State ownership from private corporate ownership. Therefore, the substantive features of State ownership constitute grounds to argue that direct attribution to State for conduct of some SOEs must be considered as one possible avenue of regulation.

The particular aspects of State-ownership clearly do not lead to State attribution of SOE conduct in all instances; the factual circumstances of the relationship between the State and the SOE in each case will be central to whether consideration of direct attribution is relevant. It is likely to be highly significant whether the State holds a controlling, significant or minority share in a given SOE. Typically the more shares the State has, the stronger its influence will be and the more relevant it consequently becomes to consider direct attribution. Another factor is that there may well be substantial differences, as between countries, in the type and degree of State involvement with SOEs⁶⁸. The wide-ranging nature of SOEs makes it particularly necessary to consider each case on its own facts. Accordingly, the point made here is simply that direct attribution to State cannot be disregarded in respect of SOEs when certain circumstances are present. As stated in the SRSG's

⁶⁷ Organization for Economic Co-operation and Development: 'OECD Guidelines on Corporate Governance of State-owned Enterprises' 2005, p. 27

Available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

⁶⁸ Generally, there may be an understanding that shareholders typically play a greater role in directing a corporation in civil law countries than in common law countries. Clarke, T.: 'International Corporate Governance, A Comparative Approach'. Routledge, New York: 2007 p. 91-93. For overview of partly culturally determined conceptions of shareholders see: Siems, M. S.: 'Convergence in Shareholder Law'. Cambridge University Press, Cambridge: 2008 p. 60-67

final report of 2008,; '*...the State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or are acting on behalf, or under the orders, of the State*'⁶⁹. This statement reflects the potential grounds for attribution which will be discussed further with reference to the State responsibility framework which was codified and developed by the International Law Commission in the Articles on State Responsibility 2001 (ILC Articles)⁷⁰.

The ILC Articles concern responsibility for obligations owed to States by States, although there is some reference to the position of non-state actors⁷¹. State responsibility and the ILC Articles do not purport to cover the area of international responsibility in its entirety; other branches of responsibility, possibly with a different 'subject-focus', such as international criminal responsibility already exist, and other may develop further under international law. However, arguably, any realistic discussion of the possible future trajectories of international law requires initial consideration in light of the current State-centred responsibility framework⁷². In this context, it is interesting to explore how SOEs, as a consequence of their ownership by the State, are treated under the State responsibility framework. The ILC Articles provide several bases for State responsibility. Of these, article 4 constitutes a starting point in providing that acts of State organs are attributable to the State. Of more specific relevance to attribution to the State of acts or omissions by SOEs are articles 5 and 8, which will be considered each in turn. The former provides for responsibility where an entity is authorised by the State to perform governmental functions, and the latter provides for responsibility where the State instructs, directs or controls an entity. It

⁶⁹ Report of SRSG: 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights'. 7 April 2008, p. 11

Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁷⁰ International Law Commission Articles on State Responsibility 2001.

Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

⁷¹ Article 33(2) provides that the ILC Articles are without prejudice to rights, stemming from State responsibility, that are owed to a non-state entity or person, although the enforcement of international human rights obligations under the ILC Articles will still depend on a complaint being brought by a State. Further, articles 57 and 58 explicitly state that the State responsibility framework is without prejudice to international responsibility of, respectively, international organisations and persons acting on behalf of the State.

⁷² Subject to developments already referred to in footnote 1.

is argued that, in certain circumstances, these articles constitute potential bases for holding the State directly responsible for acts of its SOEs. If this is accepted as being the case, it shows that the international responsibility framework is capable of regulating SOEs to a greater extent than it presently can in respect of their privately owned counterparts.

i. Article 4 - Organ of the State

Attribution under article 4 of the ILC articles requires that the SOE forms part of the State; Article 4 reads as follows: (1) '*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of central government or of a territorial unit of the State*' and (2) '*An organ includes any person or entity which has that status in accordance with the internal law of the State*'. The first part of article 4 expresses the principle of the 'unity of State', i.e., the conceptualisation that the State constitutes one unit, though it may operate through a number of different organs, and despite any internal hierarchy between these⁷³. It follows from this principle that acts by a State organ are attributable to the State.

The second part of article 4 provides a starting point for determining whether an entity is a State organ by referring to the internal law of the State. Thus if national law should classify a given entity or SOE as part of the State its conduct will attract State responsibility. Yet the non-exclusive phrasing of article 4(2) should not be overlooked; an entity which is not determined by internal law to be a State organ may still be deemed a State organ in certain circumstances. The Commentary to the ILC Articles provides that entities or institutions which are traditional State organs, such as e.g. the police force, will inevitably be considered organs of the State in light of

⁷³ The perspective of the international law on this point is illustrated by the *LaGrand* case (LaGrand, Germany v United States of America. International Court of Justice, Judgement of 27 June 2001). In this case, the International Court of Justice made it clear that its indication of the provisional measure to stay the execution of Walter LaGrand pending the Court's judgement on the merits was addressed to the US, and therefore also to the Governor of Arizona, under whose jurisdiction the prisoner was held under national law. On the principle of unity and *LaGrand* cases see 'Commentary to International Law Commission Articles on State Responsibility'. ILC Annual Report 2001, Ch. IV, p. 84-92

Available at: <http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

their public function⁷⁴. While in less clear cases deference to the internal law determination seems likely, this does provide a safeguard against questions of attribution being dictated by a State's internal law where this is not truly reflective of the 'unity of State'. On balance, however, the application of article 4 to SOEs does appear quite limited. In the absence of national legislation designating a SOE as a State organ, the SOE would have to perform traditional State organ functions to be construed as part of the State. This generally seems unlikely, given the commercial focus of most SOEs, though considering the broadness of the category it probably cannot be ruled out that some SOEs might exceptionally be seen as State organs depending on the tradition of the State in question.

ii. Article 5- Authorised exercise of governmental functions

Article 5 can be seen to make provision for the situation that public functions are increasingly privatised, by ensuring that this does not necessarily mean that the responsibility of the State for such functions falls away. Responsibility under article 5 depends on the private entity being authorised by national law to exercise functions which are public in nature. Article 5 provides: '*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of State under international law, provided the person or entity is acting in that capacity in the particular instance*'. The relevance of article 5 to SOEs is apparent from the following comment: '*The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned*'.⁷⁵ If the entity is linked to the State through law (empowerment by law) and by its public function, its acts will be considered acts of State. Arguably, SOEs would by their nature be more likely than private corporate actors to fulfil the requirements for attribution under article 5, although the

⁷⁴ Ibid. p. 82

⁷⁵ Ibid. p. 92

relevance of article 5 would in any event inevitably depend on a case by case assessment. As was seen in the discussion of business and national regulative measures it may be difficult to separate the State's ownership and governmental functions and SOEs may be '*expected to fulfil special responsibilities and obligations for social and public policy purposes*'⁷⁶. The ability of State to affect SOEs differently than a private owner could, is arguably present in the three possibilities of State involvement in the SOE's conduct outlined above (selection of the Board, influence on senior management, and accountability to State body such as Parliament). Hence it is possible that some SOEs may be mandated by State to perform functions to further wider State interests falling outside typical commercial activity⁷⁷.

While the case-law is somewhat limited, one example where the reasoning seems to run along the lines of article 5, though not stated explicitly, is *Nahlik v Austria*⁷⁸. The UN Human Rights Committee, while finding the claim inadmissible for other reasons, rejected the State's argument that the case was inadmissible as it related to a private agreement over which the State had no influence. The Committee noted that the discrimination complaint under article 26 of the International Convention on Civil and Political Rights 1966 concerned the Social Insurance Board, and that the agreement in question was subject to confirmation by the Minister for Labour and Social Affairs. The Committee stated that '*States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment*' and went on to stress that the Board acted as '*an institution of public law implementing public policy*'. Although it is not clear in this case whether the Social Insurance Board was treated as a State body or non-state actor, the case deals with the interface between the public and private and the focus of the Committee

⁷⁶ Organization for Economic Co-operation and Development: '[OECD Guidelines on Corporate Governance of State-owned Enterprises](#)' 2005, p. 20

Available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

⁷⁷ In fact, the OECD suggests that the need to formally separate State and ownership functions arises because the State may be pursuing ownership interests alongside market regulation and industrial policy objectives which may lead to conflicts of interest. *Ibid* p. 18-19

⁷⁸UN Human Rights Committee. *Nahlik v. Austria*. Selected decisions under the Optional Protocol (ICCPR), Vol. 6. Fifty-sixth to sixty-fifth sessions (March 1996 – March 1999) Communication No. 608/1995. p. 9-12
Available at: <http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf>

seems to reflect the elements of empowerment by State and exercise of public function as required by article 5.

A case in which the relationship between ownership and responsibility was treated more directly is that of *Maffezini*. In *Maffezini* the International Centre for the Settlement of International Disputes (ICSID) tribunal approached the question of the required elements for attribution by way of a structural test and a functional test. For the satisfaction of the structural test what was required was a formal link to the State, while the functional test required performance of governmental functions⁷⁹. Interestingly, the tribunal stated in relation to the structural test that '*(h)ere a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity*'⁸⁰. In this sense the ICSID tribunal articulated a view that State ownership does influence the starting point for determination of attribution. In *Maffezini* the Spanish SOE was found to satisfy both tests; the SOE which was primarily State-owned had been established by State entities (structural) and its functions were public in nature as they included strengthening regional industry (functional)⁸¹. It is important to note that while the two-tiered test was satisfied, the ICSID tribunal looked at the acts overall and determined that only some were governmental in nature while others were commercial, and found that Spain could only be held responsible for the former. This illustrates the limited attribution, which is also inherent in article 5, insofar as responsibility for an individual act is conditional on '*the person or entity [is] acting in that capacity in the particular instance*'. That the requirement of 'public functions' may work to limit the extent of the State's responsibility could possibly prove a useful way to reflect the duality of the nature and functions of a given SOE. So if conduct of a SOE is

⁷⁹ For discussion of *Maffezini* and the functional and structural test see Wälde, Thomas W.: 'Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues'. *Transnational Dispute Management*, Volume I, issue #02 - May 2004. Section 3.1

Available at: http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article224b.htm#_ftn1

⁸⁰ International Centre for Settlement of Investment Disputes. Case of *Maffezini v. Spain*, CASE NO. ARB/97/7 Decision of the Tribunal on Objections to Jurisdiction. 25.01.2000. §77

Available at:

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163

⁸¹ *Ibid.*

found to be attributable to the State under article 5, this will be limited to those acts and omissions which are deemed to be particularly governmental or public in their nature.

In terms of approaches to regulating entities in which public and private sphere elements may coexist, the approach taken in the European community case of *Foster v British Gas*⁸² makes an interesting comparison. Whereas under article 5 attribution is directed against the State, in *Foster* the State's obligations could be enforced against the privatised company. It was held that the claimants could rely on an equal treatment directive⁸³ directly against the privatised entity rather than the State, when the State had failed to implement the directive within the prescribed period. Because British Gas still performed public functions and was mandated by the State, the Court considered that the State's failure to implement the directive should not work in its favour⁸⁴. The point to note here is that the European approach allows obligations of the State to be relied upon against private corporations which are mandated by State to perform public functions, when the State has failed to implement its obligations. The rationale is that letting private sphere entities perform public functions will not allow the State to evade its responsibilities as the State will not be able to rely on its own failure to implement⁸⁵. This approach seems *prima facie* to accept the formal transition of the entity from the public to the private sphere, but only until this adversely affects rights, at which point the privatised entity 'inherits' some of the State's obligations. From this perspective, the European framework seems to allow an approach which is both flexible in recognising the existence of the privatised entity in the private sphere, and progressive in ensuring that public function responsibilities follow the now, strictly speaking, private sphere entity. Therefore, rather than depending on the possibility of attributing conduct of the corporation to State, the European approach allows the obligations of the State to pass to the privatised entity in the limited circumstances outlined. The significant effect of this European decision is arguably that

⁸² *Foster v. British Gas Plc.* [1991] ICR 84, ECJ Case C 188/89

⁸³ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁸⁴ *Foster v. British Gas Plc.* [1991] ICR 84, ECJ Case C 188/89, see especially § 16-20

⁸⁵ *Ibid.* § 16

the private entity which performs public functions under governmental authority may in limited circumstances be bound by obligations of the State.

There is clearly scope to consider attribution of SOE acts and omissions to the State under article 5, where the facts suggest that there is formal empowerment by State to exercise public or governmental function. The cases discussed were decided by different forums but all demonstrate a treatment of the elements of empowerment and public functions which form the basis of attribution to State under article 5. By requiring for attribution the existence of government functions article 5 has an inherent flexibility which could prove useful when applied dual-natured entities such as SOEs.

iii. Article 8 – Control of third party

Under article 8 there is no requirement of constituting a State organ or of performing government functions; rather the act is attributable to State by virtue of the high degree of control which the State exercises over the entity. Article 8 provides: '*The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*'. In considering the wording of article 8, two initial observations should be made. Firstly, contrary to article 5, it does not require legal empowerment by the State and also does not require that the activity be governmental in nature⁸⁶. Secondly, the State involvement is stated as one of instruction, direction or control of the State. Although the Commentaries to the ILC Articles explain that '*In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them*'⁸⁷, the situation where the State 'directs and controls' the entity is distinguished from the situation where it is clear that the State directly 'instructs' an entity to perform certain activities⁸⁸. Given the potential for State involvement in the

⁸⁶ 'Commentary to International Law Commission Articles on State Responsibility'. ILC Annual Report 2001, Ch. IV, commentary on article 8 p. 103-109
Available at: <http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

⁸⁷ Ibid. p. 108

⁸⁸ Ibid. p. 104

conduct of SOEs discussed in the beginning of this section, it is worthwhile considering how the more general situation of responsibility based on ‘direction and control’ may apply to the relationship between the State and its SOEs⁸⁹.

The case most commonly referred to when discussing ‘control’ under article 8 is the *Nicaragua* case⁹⁰. In that case the International Court of Justice (ICJ) set a very high threshold for the required control in holding that the acts of the paramilitary contra groups could not be attributed to the United States because it did not have ‘effective control’⁹¹ over the contras⁹². However, with regard to cases involving SOEs it is arguably uncertain to what extent the ‘effective control’ test would inform the application of article 8 given the significant difference between a situation where the State is involved with the direction and control of, respectively, SOEs and paramilitary groups. Apart from any factual differences there may be in the conduct giving rise to violations, it is also apparent that SOEs have a much closer *prima facie* nexus to the State by virtue of ownership. As discussed, ownership may involve State influence on the composition of the Board of Directors; influence on senior management; and the accountability of the ownership or coordinating State body to a State institution such as Parliament⁹³. It is therefore doubtful whether the ‘effective

⁸⁹ Ibid. The instances where there is no question that the State has instructed private persons to carry out certain acts the State will be directly responsible on account of its ‘instruction’ of the conduct.

⁹⁰ A large part of the ILC Commentary of article 8 is devoted to discussion of the *Nicaragua* case. See ‘Commentary to International Law Commission Articles on State Responsibility’. ILC Annual Report 2001, Ch. IV, commentary on article 8 p. 103-9. International Court of Justice. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). ICJ Rep. 1986, 14

Available at: <http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

⁹¹ To understand the high threshold which the ‘effective control’ test entails it must be viewed in light of the established facts; that the United States ‘largely financed, trained, equipped, armed and organized’ the contras and selected their leaders. Further, in at least one period, the contra force was so dependent that it ‘could not conduct its crucial or most significant paramilitary activities without the multi-faceted support of the United States’. Ibid. §108, 111 and 112

⁹² Ibid. §115. The International Court of Justice stated: ‘*For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State has effective control of the military or the paramilitary operations in the course of which the alleged violations were committed*’.

⁹³ See earlier discussion in beginning of Section V on the threefold potential for State involvement in SOEs.

control' test, which is arguably '*practically difficult*'⁹⁴ to satisfy, would be seen as an appropriate approach to a situation involving an SOE. While there is no authoritative determination of the question it is suggested that, due to the SOE's formal link of ownership to the State combined with the potential of the State exercising substantive control over the SOE, such a case would be more likely to prompt a consideration of whether the control is sufficient on the particular facts.

The ILC Commentaries indicate that factual differences will be significant to the determination of the requisite control: '*In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it*'⁹⁵. That weight must be given to factual circumstances of each case when considering attribution on the basis of 'control' is evidenced by the ICJ's decision in the *Namibia*⁹⁶ case and the European Court of Human Rights in the case of *Loizidou*⁹⁷, which both based attribution on the existence of the State's factual control over a territory⁹⁸. While a case involving a SOE is unlikely to involve a similar question of control over territory, it is noteworthy that the courts in these cases considered 'control' in light of the factual circumstances. By analogy, it might be contended that the factual aspect of the formal ownership by State of an SOE and, in particular, the degree of substantive control which the ownership in a given case entails, will form the foundation of considering control under article 8 with regard to cases involving SOEs.

⁹⁴ Chirwa, D. M.: 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights'. Melbourne Journal of International Law, Vol. 5 2004 p. 7

⁹⁵ 'Commentary to International Law Commission Articles on State Responsibility'. ILC Annual Report 2001, Ch. IV, commentary on article 8 p. 107
Available at: <http://www.lcil.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>
Further, while the *Tadic* decision may be thought discredited insofar as it disapproves the test in *Nicaragua* in preferring a lower test of 'overall control' for military and paramilitary groups, the International Tribunal for the Former Yugoslavia also stated that '*the degree of control may ... vary according to the factual circumstances of each case*' International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v. Tadic*, ICTY Appeals Chamber, 15 July 1999. Case No. IT-94A-A, see e.g. § 117, § 156

⁹⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, §118

⁹⁷ While the European Court of Human Rights referred to the test of 'effective overall control' significant weight was given to the factual circumstances of active troops in the territory and it was considered unnecessary to consider the '*detailed control over the policies and actions...*'. *Loizidou V. Turkey*, (Application no. 15318/89) Judgement, Strasbourg, 18 December 1996, §56

⁹⁸ Noted in Shaw, M. N.: 'International Law' 5th ed. Cambridge University Press, Cambridge: 2003. p. 705

Arguably, such an approach would signal that rather than considering whether a test of control is satisfied by the facts of a case, it is the factual circumstances which dictate the where the bar is set in terms of the required level of control.

The ILC Commentaries refer to a number of cases⁹⁹ where State responsibility can be seen to be founded on factual circumstances of State control arising from State ownership. In this respect the Commentaries refer to cases in which conduct of SOEs has been attributed to State where the corporation was exercising public powers (notwithstanding that this is not an explicit requirement under article 8) or, where the State was using its ownership to achieve a specific result¹⁰⁰. Thus in *Hertzberg v. Finland* the UN Human Rights Committee attributed the acts of the Finnish Broadcasting Company to the State based on Finland's high ownership share and control of the company. The Human Rights Committee stated: '*In considering the merits of the communication, the Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is*

⁹⁹ Not all cases involving SOEs are as explicit as to the grounds for determining attribution. In both the European cases referred to by the ILC Commentaries, the question of how State ownership affects the responsibility of State was largely avoided. European Commission of Human Rights. *X v. Ireland*, (App. 4125/69), (1971) 14 *Yearbook E.C.H.R.* p. 198; European Court of Human Rights. *Young, James and Webster v. United Kingdom*, *E.C.H.R.*, Series A, No. 44 (1981). The case of *X. v. Ireland* involved alleged violations of article 11 of the European Convention on Human Rights by a Board which had been established and financed by Government. The Commission avoided the question regarding '*to what extent acts of the Board or its officers could entail the responsibility of the respondent Government*' (p. 218) by maintaining that the Board policy was supervised by State in general, but that the violations had taken place in the course of '*day to day administration*' for which the State could not be responsible. Similarly in the case of *Young, James and Webster v the United Kingdom* the Court elected not to address the argument that the State was responsible for violations alleged by dismissed employees of the British Rail Board. Instead of dealing with the potential responsibility of State because it was the employer or because it was in control of British Rail, the Court deciding the case on other grounds. In *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, African Commission on Human and Peoples' Rights, Case No. ACHPR/COMM/A044.1, 27 May 2002, the Commission left some doubt as to whether acts of the State-owned oil company was directly attributable to State. In connection with the violation of the right to food it stated in §66: '*The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves*'.

¹⁰⁰ Commentary to International Law Commission Articles on State Responsibility'. ILC Annual Report 2001, Ch. IV, commentary on article 8 p. 107-108, see footnote 173, 174 and 175
Available at: <http://www.lcils.cam.ac.uk/Media/ILCSR/ILC2001chptIV.pdf>

*placed under specific government control*¹⁰¹. Another illustrative case is the decision of the Iran United States Claims Tribunal in the case of *Foremost Tehran*. In that case Iran was held responsible for the loss of United States investors in circumstances where government-owned and controlled entities held 52% of the shares in the corporation in question and where the Tribunal considered the corporation had been used to implement government policy¹⁰².

It is suggested that the capacity of State to exercise significant control over SOEs, and the indications in case law that State control may be exercised through ownership, renders article 8 a relevant ground to consider in regard to attribution to State of conduct of its SOEs. Cases may well arise where the implications of the State's formal and substantive involvement, as an owner, in the SOEs conduct create a relationship of control and dependency which engages the responsibility of State under article 8. State attribution of conduct of SOEs under article 8 will depend on the degree to which ownership is perceived as actually entailing control and direction in each case. The extent to which article 8 will be applied to cases involving SOEs will arguably depend on whether scope of article 8 is considered wide enough to encompass its application to the special situation of SOEs, and on the force of the momentum for increased regulation of SOEs.

VI. State Responsibility for SOE Activities: Duty to Protect

When the State has a closer relation to the dual-natured SOEs than it would typically have to purely non-state actors, it is likely that the State will have a heightened duty to protect against human rights violations by SOEs.

¹⁰¹ Human Rights Committee. *Hertzberg et al. v. Finland*, (Communication No. R.14/61), (1982), A/37/40, annex XIV, § 9.1. The case concerned the right to freedom of expression and was brought by the Finnish Organization for sex equality.

¹⁰² Iran- United States Claims Tribunal. *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10 Iran-U.S.C.T.R. 228. It was also a factor that government-controlled entities occupied the majority of the seats in the Board of Directors during the relevant period. Other cases decided by the Tribunal which are referred to by the ILC Commentaries (p. 107-108) are: *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989) 21 Iran-U.S.C.T.R. 79; *Petrolane, Inc. v. Government of the Islamic Republic of Iran* (1991) 27 Iran-U.S.C.T.R. 64; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 Iran-U.S.C.T.R. 170.

At the Copenhagen SRSG consultation held in November 2007 the participants were in general agreement that States are the primary duty bearers in relation to human rights and corporate regulation, but that fulfilment of that duty, especially under the duty to protect, is often hampered by various factors including lack of knowledge, ability and willingness¹⁰³. States, as the primary duty bearers under international law, are obliged '*to implement systems of "due diligence" to prevent, investigate, punish, and redress interference with rights by all types of corporations*'¹⁰⁴. Hence, even when acts or omissions of SOEs cannot be attributed to the State under the ILC Articles, in some circumstances the State will be obliged to exercise due diligence to protect against conduct by SOEs which violates human rights.

The duty to protect against human rights violations is a well-established principle of human rights both regionally and internationally¹⁰⁵ though its scope and application have yet to be clearly defined vis-à-vis business. According to one SRSG Report '*...the state duty to protect against non-state abuses is part of the human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuses by business enterprises or risk breaching their international obligations*'¹⁰⁶. The duty to protect places an obligation on the State in respect of violations by public and private corporations alike¹⁰⁷. However, the extent of that duty may be affected by the level of State involvement in SOEs, which would typically be greater than in private

¹⁰³ Expert Consultation, Copenhagen 7, 8 November 2007 on 'The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights'. Summary Report p. 2 Available at: <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>

¹⁰⁴ Ibid.

¹⁰⁵ For overview of the duty to protect and due diligence see Chirwa, D. M.: 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights'. Melbourne Journal of International Law, Vol. 5, 2004, p. 11-18

¹⁰⁶ General Assembly Document A/HCR/4/035 9 February 2007. Report of the Special Representative to the Secretary General 'Business and Human Rights: 'Mapping International Standards for Accountability and Responsibility for Corporate Acts.'' p. 7, § 18 Available at: <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>

¹⁰⁷ Ruggie, J. G.: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Kennedy School of Government and Harvard Law School. 12 February 2007, p. 7, § 7 Available at: <http://doc.politiquessociales.net/serv1/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf>

corporations. For reasons which will be elaborated in the following, the State involvement renders it possible that responsibility based on failure of the duty to protect may more readily be established in respect to acts or omissions of a SOE.

Before considering the State's duty to protect in relation to conduct of SOEs specifically, it is useful to first take a closer look at the duty itself. The Inter-American Court of Human Rights has described the duty to protect as follows: '*An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it...*'¹⁰⁸. It appears clearly from this statement that the responsibility of State under the duty to protect does not require attribution to State for the violating conduct itself, but hinges on establishing that the State failed to protect against the human rights violations of a third party (be it public or private) when it had a duty to do so. An example involving failure to protect against acts of an SOE is the African case brought on behalf of the Ogoni people. A number of human rights violations were found to have been caused by a consortium consisting of a Nigerian SOE and Shell¹⁰⁹. The violations related to health risks and environmental degradation and partly¹¹⁰ stemmed from the consortium's oil extraction activities. The African Commission on Human and People's Rights found that Nigeria had failed in its duty to protect on several counts, including failure to investigate human rights violations, to conduct environmental and social impact assessments, and to provide information to the affected people.

¹⁰⁸ Inter-American Court of Human Rights. *Velásquez-Rodríguez v. Honduras*. Judgement of July 29, 1988 (Merits) § 172

¹⁰⁹ *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*, African Commission on Human and Peoples' Rights, Case No. ACHPR/COMM/A044.1, 27 May 2002. Also discussed in Shelton, D. ['International Decisions: Decision regarding Communication 155/96'](#), American Journal of International Law Vol. 96, (2002) p. 937-942.

¹¹⁰ The case also involved violations committed by the Nigerian military for which Nigeria attracted direct responsibility and, in certain formulations of the Commission, it is unclear whether Nigeria was directly responsible for acts of its SOE.

In some case law there has been confusion surrounding the question of whether State responsibility is found by direct attribution or through failure of the obligation to protect. An illustration of this is found in the case of *Love v Australia*¹¹¹, which concerned a claim of discrimination against Qantas airline while it was still government owned. Australia argued that although it owned the airline it was not directly responsible for its violations because it did not interfere with the running of the company. The UN Human Rights Committee chose not to engage directly with Australia's argument and thus did not take the opportunity to clarify the distinction between direct attribution under the ILC articles and responsibility based on the duty to protect. The case perhaps illustrates that it is not yet clear how ownership affects determination of responsibility. In a SRSG report it is noted that ownership is less important than 'government control' in establishing responsibility. However, it is suggested here that there are aspects which may flow from ownership such as access to information and influence, which do not amount to 'control', but which may nonetheless engage the State's duty to protect. That ownership may have an effect, is seen in the case of *Hopu and Bessert v France*¹¹² which concerned both State and privately-owned corporations. While the Human Rights Committee did not spell out whether the responsibility of France was based on attribution or failure to protect, it implied that the State's duty to monitor and regulate the conduct was particularly clear because of the State-ownership of the corporation. Practically it may not matter in an individual case whether responsibility is based on attribution or failure to protect; the fall-back position remains that '*...regardless of the basis for responsibility, the Committee expects States Parties to act to prevent corporate abuse*'¹¹³.

However, in terms of seeking the widest possible scope for responsibility under international law,

¹¹¹ Communication 983/2001, UN Doc CCPR/C/983/2001, 28 April 2003. Discussed in SRSG Report: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Individual report on the International Covenant on Civil and Political Rights. Report No. III, June 2007. p. 44-5 and 141-2
Available at: <http://www.reports-and-materials.org/Ruggie-ICCP-Jun-2007.pdf>

¹¹² UN Human Rights Committee. *Hopu and Bessert v France*, 29 December 1997. Selected decisions under the Optional Protocol (ICCP), Vol. 6. Fifty-sixth to sixty-fifth sessions (March 1996 – March 1999) Communication No. 549/1993, see especially §10(3)
Available at: <http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf>
Also discussed in SRSG Report: 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties', Individual report on the International Covenant on Civil and Political Rights. Report No. III, June 2007, p. 41 and 45, §127-8 and 143

¹¹³ *Ibid.* p. 7 §5

it is significant that even where conduct of a SOE cannot be attributed to State (whether under ILC articles 4, 5, or 8), failing to meet the international obligations to protect against violations of human rights committed by SOEs could still lead to State responsibility.

The interesting question which arises in respect of SOEs is whether violations committed by this type of entity will more readily lead to State responsibility based on failure to protect. In order to assess this, it is necessary to look at how the duty of the State is determined and for this purpose regional case law offers some insights. The European Court of Human Rights has linked the State's duty with the level of information and control which the State had over the threat. In *Öneryildiz v Turkey*¹¹⁴ a methane gas explosion in a rubbish tip which was under the responsibility of local authorities caused loss of life of people living in the nearby slum area. The risk of an explosion had been known to the authorities for a considerable period of time and the Court accordingly found that: '*It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation ... to take such preventive operational measures as were necessary and sufficient to protect those individuals (...) especially as they themselves had set up the site and authorised its operation, which gave rise to the risk in question*'¹¹⁵. By analogy, in a case involving a SOE, the State may have created the SOE, it will typically have knowledge of the activities of the SOE and may also have influence on its practical operation.

Further guidance is provided by the Inter-American Court of Human Rights in the *Velasquez Rodríguez* case which concerned the detention, torture and 'disappearance' of a student in Honduras. In that case it was said that: '*The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to*

¹¹⁴ European Court of Human Rights. *Öneryildiz v. Turkey*, Grand Chamber Judgement of 30 November 2004 (application no. 48939/99)

¹¹⁵ *Öneryildiz v. Turkey*, Grand Chamber Judgement of 30 November 2004 (application no. 48939/99), §101. A similar test was used in *Osman v the United Kingdom* requiring that: '*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals from the criminal acts of a third party and that they failed to take measure within the scope of their powers which judged reasonably, might have been expected to avoid that risk*'. European Court of Human Rights. Case of *Osman v. United Kingdom*, Judgment of 28 October 1998 (87/1997/871/1083), § 116

*comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights*¹¹⁶. The Court further stated: ‘*What is decisive is whether a violation of the rights recognised by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or punish those responsible*’¹¹⁷. These cases indicate that the level of information, relative control and influence are all relevant factors to the duty of the State. This is significant because, arguably, the State’s knowledge of, or access to information about, the activity of its SOE would make it more likely for it to be seen to acquiesce to violating conduct. Moreover, the State may be in a position to exercise influence over, and thus support conduct of, some SOEs. It is suggested that insofar as SOEs do have a certain nexus to the State and States may have substantive influence over the conduct of SOEs, it is conceivable that generally, and subject to case by case treatment, States might more easily be found to have failed in their duty to protect when violations are caused by conduct of SOEs.

The regional and international cases discussed here highlight that there are circumstances arising from ownership by the State, such as access to information and influence over conduct, which engage and heighten the State’s duty to protect. It is therefore argued that because ownership places the State in a better position to protect against violations of by SOEs, the corresponding duty will be equally higher. State responsibility for conduct of SOEs will also under the duty to protect depend on a case by case assessment. As a general conclusion, however, it is suggested that just as the inherent interface in SOEs between the public and private has led to beginning tendencies at business, national and international levels to treat SOEs as a special category of corporate actor, so is this tendency arguably continued under the duty to protect.

VII. Conclusion

SOEs share the corporate duty to respect human rights but more may be expected of them than of other corporations in this regard. When the State seeks to engage as in the corporate world

¹¹⁶ Inter-American Court of Human Rights. *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July, 1988 (Merits) §167

¹¹⁷ Ibid. §173

through SOEs, depending on individual circumstances, its human obligations, to varying degrees, remain, and may result in responsibility whether by attribution or under the duty to protect.

Human rights are inherent in the natural person and can therefore be violated by a variety of actors including States, business and other natural persons. Traditionally respect for, and protection of, human rights has been developed in the context of State obligations. Because the natural person is the ultimate source of the power of States it makes sense that States are obliged not to turn their power against, and may in fact be obliged to protect, natural persons. As concluded by Locke towards the end of the 1600s of those leading the State that '*Their Power in the utmost Bounds of it, is limited to the Publick good of Society*',¹¹⁸ Today international human rights manifestly limit State power vis-à-vis natural persons. The regulation of corporations whose activity may violate human rights is, however, not as strong, though measures working to address this governance gap are developing at business, national and international levels. Development at these levels is interlinked and is, arguably, driven by both human rights and business interests. In this respect it has been argued that the existence of power obliges the holder to give due consideration to human rights observance. This has led to strong obligations on States and is increasingly doing so in respect of corporations, though the nature of the regulation may well differ. In regard to business interests, the idea that a healthy community makes for a healthy economy seems convincing¹¹⁹. Ensuring human rights in a community may well be a way of ensuring an environment in which business can thrive. These issues are relevant to both States and corporations and the relevance of SOEs to the current state of corporate regulation is that their public-private nature bridge corporate human rights duties and traditional, state-focussed human rights obligations.

¹¹⁸ Locke, J., 'Two Treaties of Government' (1960) edited by Laslett, P., Cambridge University Press, Cambridge: 1988. p. 357 (spelling as in original)

¹¹⁹ This was the gist of one argument made at the aforementioned Copenhagen Conference. Expert Consultation, Copenhagen 7, 8 November 2007 on 'The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights'. Summary Report p. 3-4
Available at: <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>

While development of corporate regulation continues it is important to consider how the category of SOEs may be regulated most effectively. As has been seen the wideness of the category engenders an equally wide range of possibilities for regulation, both under the corporate duty to respect and under State responsibility. What seems clear, however, is that that even when the SOE is not construed as forming part of the State its nexus to the State is recognised as having some effect on its position in relation to human rights observance. In support of this conclusion are, among other points, the 23 countries which signed up as candidates to the EITI initiative, Sweden's statement that SOEs must set an example, and a tendency in regional and international courts to find the State responsible for human rights violations committed by SOEs whether under the ILC Articles or the duty to protect. Consequently, while corporate regulation continues to develop, the link to the State of SOEs means that their acts may fall within the scope of international State responsibility. This arguably renders them subject to higher expectations of human rights observance than is the case for privately owned corporations. Therefore, it is suggested that there may be a basis for a stronger regulation of this category of corporate entities. This would also have a broader effect of linking the conceptually divided public and private spheres and accordingly bringing regulation closer to the reality in which human rights exist. Accountability and responsibility for human rights violation by SOEs at business, national and international levels, seem to rest on the understanding that the human rights obligations of the State, to a certain degree, still apply when SOEs act in the commercial sphere. To an extent, this can be seen as a continuation of the State-centred focus. However, at the same time the measures pertaining to SOEs are addressing the general situation of the corporate capacity for human rights violations. The significance of the special regulation of SOEs is that their nature enables some initial steps to be taken towards meeting the wider need for regulation, and in doing so constitutes a limited, but significant, precedent for corporate regulation in respect of human rights.