

BOOK REVIEW

Mihaela Maria Barnes, *State-Owned Entities and Human Rights. The Role of International Law* (Cambridge: Cambridge University Press, 2022)

The UN Guiding Principles on Business and Human Rights (UNGPs)¹ note that state-owned enterprises (SOEs) should play a leading role among all business enterprises in respecting human rights in light of the state's role as the primary guarantor of human rights, and signatory of international conventions. In her book *State-Owned Entities and Human Rights*.

The Role of International Law, Mihaela Maria Barnes convincingly puts forward additional reasons why we should pay attention to SOEs' impact on human rights: they play a key role in the economy of many states; sovereign wealth funds often are important to stabilize the financial system; and they are critical actors in situations of global emergencies, e.g., the COVID-19 pandemic. Interestingly, the book deviates from the classic business and human rights (BHR) literature in that it is not so much about state-owned entities and human rights as it is about the state *acting through* SOEs and human rights. Thus, the book is significant for the BHR field not just because of its varied, interesting and well-researched content, but also because of this particular prism, that of the state's personality in SOEs operations.

The book is composed of five chapters. Chapter 1 proposes an introduction to SOEs with a short history of the state as an economic actor. Chapter 2 considers SOEs through the lens of the concept of legal personality in international law. Chapter 3, 'State-Owned Entities and Norm Development in International Law: International, Regional and Domestic Approaches to Regulation', concentrates on the UNGPs, OECD instruments, ILO standards, the UN Global Compact and other soft law regulations focused on certain types of SOEs (e.g., the Sovereign Wealth Funds Generally Accepted Principles and Practices) or sectors (e.g., the Extractive Industries Transparency Initiative). At the regional level, the EU Public Procurement Directive is used as a case study. To illustrate domestic approaches, the author provides examples of countries with specific policies, regulations and guidance that expressly integrate human rights and/or the UNGPs throughout the operations of their SOEs. Chapter 4 addresses the challenge posed by the doctrine of sovereign immunity to the regulation of SOEs. It gives a short history of its evolution from absolute to restricted sovereign immunity. The author demonstrates how the increased participation of states in economic activities, through their SOEs, has fundamentally changed the fabric of international law leading to redefining state functions and ultimately the concept of sovereignty itself. Chapter 5 addresses the responsibility of states for the acts and omissions of SOEs.

The key focus of this book is about international law's potential to regulate state ownership and to provide safeguards against human rights abuses that SOEs commit. From a BHR perspective, it contributes significantly to the general debates on corporate

¹ United Nations, General Assembly Human Rights Council, 'Report of the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 21 March 2011, UN Doc. A/HRC/17/31.

accountability by considering SOEs as actors and ‘sui generis participants’ in international law (p. 101). As the author prognoses, soft law that demands that States take additional steps to ensure that the entities they own or control respect human rights could become customary international law. The close connection between a State and its SOEs raises questions about the scope of the state duty to respect, protect and fulfil (Pillar I of the UNGPs) regarding SOEs which is broader than when it applies to the regulation of private entities’ conduct. The State–SOEs connection also engages Pillar II which, as Barnes proposes, ‘should mean an obligation under international law to respect human rights, rather than a mere responsibility to do so’ (p. 266). The author argues that ultimately all SOEs are run in the public interest, and that is why the corporate responsibility *to protect* is expected of SOEs. In this part, the book contributes to one more important BHR debate – the debate about the ‘do no harm’ principle in the context of human rights obligations, negative and positive.

The author considers the role of the state in economic systems through the prism of capitalism (which is linked with ‘Western styles of democracy’) and socialism or communism. My review of this book is largely informed by my perspective as a law scholar from a region that is still impacted by its communist past. For post-communist countries, the relevance of SOEs is particularly evident due to the historical role that governments have played in the national economy. Private business has emerged in the territory of the former USSR only since 1991, with the beginning of privatization. Up to this moment, private business was completely prohibited (under the threat of criminal liability). All enterprises were state-owned. The economy was centralized and administered by command methods. The last three decades changed the situation significantly, but SOEs are still important players in post-communist economies. They are often dominant in critical sectors such as utilities, telecommunication, postal services, resources and finance, making their performance essential for economic growth.

The author comes close to examining the following conceptual question: whether, and if so how, capitalism should be rethought under the influence of the business and human rights concept, noting for example that ‘in Western styles democracy [...] the business agenda is first and foremost dictated by profit maximisation. In communist and socialist economies, the most important businesses are owned and controlled principally by the state for the benefit of the state’ (p. 13). In fact, neither model is capable of substantially (and not just formally) implementing the core idea of BHR.

The author covers the traditional concerns about SOEs – unfair competition, national security and resource security, and indicates human rights as a new concern (pp. 28–29). Ensuring national security and resource security are clear public functions, but so is providing essential services and goods. Private providers can provide those. However, in practice, especially in post-communist countries, SOEs remain the main providers of such services in the public interest. This means that SOEs are much more likely than private companies to face the possible conflict between national security needs (or any other public interest) and individual human rights, and have to find a way to balance them. The irony is that the likelihood of facing such challenges is much higher in post-communist countries due to political instability, the risk of armed conflicts in the region and other factors. I will give one example from the current situation in my home country, in Ukraine. Due to the war, state-owned providers of electricity continue to operate in high-risk environments, including regular shelling, to provide residents of frontline territories with access to electricity. In this case, the enterprise must find a balance between the public good, which is to provide access to essential services, and the individual rights of its workers to life and personal safety.

One of the central theses of the book is that ‘*conceptually* SOE cannot be a “private” entity, because the state owns it, and SOEs belong to the public domain, while private-owned entities

belong to the private domain' (pp. 68–69). The author means that SOEs cannot be regulated under the same legal regime as private entities. However, in my view, this statement can be debated. I would argue instead that the applicable legal regime should be determined not by the form of ownership of the company, but by the functions it performs. When a company is performing a public function, the company should be considered as a public actor with the relevant regulatory regime (regardless of the form of ownership of the company). It means in particular that the public nature of performing functions *enhances* corporate human rights responsibility. At the same time, some spheres could be privatized, which does not deprive them of an element of public function. In such cases, POEs should be considered as public actors (despite the private ownership of the company), and their conduct should be regulated accordingly. In particular, the functional approach is also the basis of the European Court for Human Rights (ECtHR) jurisprudence in cases where questions about human rights abuses by SOEs are raised.²

The title of this book might create anticipation that it is about human rights abuses by SOEs and international law instruments to prevent them. Many BHR publications start with considering the human rights risks inherent in the activities of companies. However, this book takes a different approach, one that pays little attention to human rights due diligence and remedies. It is not accidental but dictated by the core idea of the book, that of the state acting through SOEs. In this regard, this book is extremely valuable for BHR scholars as it is addressing BHR issues from a new angle: how applying human rights standards to SOEs, in particular those engaged in commercial activities at the international level, impacts State immunity and State responsibility rules, and makes our understanding of the state duty to protect much deeper.

Competing interest. The author declares none.

Olena Uvarova 

Yaroslav Mudryi National Law University (Ukraine),
Visiting Researcher, Wageningen University and Research,
The Netherlands

o.o.uvarova@nlu.edu.ua
[doi:10.1017/bhj.2023.18](https://doi.org/10.1017/bhj.2023.18)

² For example, see ECtHR, *Lisianskiy v Ukraine*, no. 17899/02, 4 April 2006, ECtHR, *Liseyeva and Maslov v. Russia*, nos. 9483/05 and 40527/10, § 187, 9 October 2014, ECtHR, *Jovičić and Others v. Serbia*, nos. 37270/11 and 7 others, § 36, 13 January 2015 and others.