Infrastructure for development: The use of human rights impact assessments in public-private partnerships

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Table of Contents

List of abbreviations

CDF	-	Comprehensive Development Framework
COBHRA	-	Community based human rights impact assessment
EIA	-	Environmental impact assessment
ESG	-	Environmental, social, and governance
GDP	-	Gross Domestic Product
GHRIAM	-	Guide to Human Rights Impact Assessment and Management
HRBAD	-	Human Rights Based Approach to Development
HRIA	-	Human rights impact assessment
IAIA	-	International Association for Impact Assessment
IBLF	-	International Business Leaders Forum
IFC	-	International Finance Corporation
IMF	-	International Monetary Fund
IO	-	International organisation
IPSIA	-	International Principles for Social Impact Assessment
LMICs	-	Low and Middle Income Countries
LMoH	-	Lesotho Ministry of Health
QE2	-	Queen Elizabeth II Hospital

QMMH	-	Queen Mamohato Memorial Hospital
RTD	-	Right to Development
SAP	-	Structural Adjustment Policy
SIA	-	Social impact assessment
UNECE	-	United Nations Economic Commission for Europe

Chapter 1: Proposal and overview of the study

> *The claim here is not so much that, say, legal development causally influences development tout court, but rather that development as a whole cannot be considered separately from legal development. Indeed, in this view, the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respectively in economic, political, social, legal and other spheres. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a whole.*[1]
>
> *Amartya Sen*

Background and problem statement

Most of what we consider public services today precedes the notion of human rights. Human rights, as a concept, is to some extent based on the notion that people should have rights to certain basic needs and services, and was formalised during the 1940's.[2] Nonetheless, people have acknowledged the importance of basic needs and services such as access to water and healthcare for centuries. Until the 1900's, private actors and religious groups met many of these basic needs. However, public services were gradually taken over by the state, after agreeing that certain services should be available to all – regardless of status and income, and consequently economic and

[1] Amartya Sen, 'What Is the Role of Legal and Judicial Reform in the Development Process?' (Legal Conference, World Bank, 5 June 2000); Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell International Law Journal 209, 232.

[2] The Geneva Conventions came into being between 1864 and 1949, and the Universal Declaration of Human Rights in 1948. The concept of 'basic needs' is closely linked to the concept of 'human dignity', which was incorporated in the Universal Declaration of Human Rights. For a discussion on the links between basic needs, human dignity, and human rights, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights.' (2008) 19 The European Journal of International Law 655.

physical access.[3] As the notion of humans rights, and socio-economic rights in particular, developed, the international community agreed that some public services were essential for human life and development, and that people had *rights* to these services.[4] Of course, all rights come with obligations, and the recognition of socio-economic rights would imply that those tasked with providing some of the public services may have human rights obligations to do so.

In many countries around the world, states fail to provide essential services, or fail to provide it adequately.[5] While many different reasons could be linked to states' failure to deliver public services, it is often a result of a lack of resources, a lack of capacity, but importantly also a lack of the necessary infrastructure. A lack of adequate infrastructure is recognised as a severe impediment to development,[6] which is why

[3] During the 1950's and 1960's many governments in former colonies also started nationalizing firms that previously belonged to the colonial masters, in an attempt to assert their own authority. State ownership was also thought to promote development in areas where the private sector was too risk-averse or myopic. See Chapter 6 of Robert Zagha and Gobind Nankani, *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank 2005) <https://openknowledge.worldbank.org/handle/10986/7370> accessed 1 June 2020.

[4] The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into effect in 1976, played an important role in this regard.

[5] The Water Project estimates that 1 in 9 people across the world do not have access to clean, safe water. See 'Poverty in Africa begins with Lack of Clean Water', https://thewaterproject.org/infographic-poverty-in-africa (accessed 11 November 2016); While access to education is hard to measure for a number of reasons, the World Bank found in 2012 that 8 out of the 10 countries with the lowest pre-primary net enrolment rates are from Sub-Saharan Africa, while the 10 countries with the lowest primary school enrolment rate are all from Sub-Saharan Africa. See http://datatopics.worldbank.org/education/wStateEdu/StateEducation.aspx (accessed 11 November 2016); A recent report jointly published by the World Bank and the World Health Organisation indicates that more than 400 million people world-wide lack at least one of the seven essential health services. See 'Tracking Universal Health Coverage', World Health Organisation and The World Bank.

[6] United Nations, 'Report of the Secretary-General on SDG Progress 2019: Special Edition' (2019) <https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf>.

infrastructure development is a key focus area for multi-lateral development banks, international organisations, states, and the private sector.

It is not uncommon for private actors to take on the roles and responsibilities of the state. While the context and circumstances may differ greatly, this phenomenon is seen in both developing and developed economies – with varying degrees of clarity, and different levels of formalised partnerships between the state and the private sector. Since the ways through which infrastructure is developed and essential services delivered is not prescribed under international law,[7] private involvement in infrastructure and public service delivery can take many shapes and forms. One example of a formalised partnership between the state and the private sector that is increasingly used for infrastructure development is known as Public-Private Partnerships (PPPs).

PPPs can take many shapes and forms, and has various definitions. It is essentially 'a contractual agreement of shared ownership between a public agency and a private company, whereby, as partners, they pool resources together and share risks and rewards, to create efficiency in the production and provision of public or private goods'.[8] Whereas PPPs share numerous characteristics of other forms of privatisation, it is quite clear that it is unique in the sense that it creates a *partnership* between the parties, with an explicit sharing of both risks and rewards. Throughout the course of this thesis, any reference to 'privatisation' refers to the involvement of the private sector

[7] States have certain human rights obligations in relation to the delivery of essential services and the fulfilment of socio-economic rights, that cannot be abdicated. However, states have different options to ensure how these services are delivered and rights fulfilled. This point is discussed in more detail in Chapter 4 below.

[8] Akintola Akintoye, 'PPPs for Physical Infrastructure in Developing Countries', *Policy, Finance & Management for Public-Private Partnerships* (Wiley-Blackwell 2009) 124 <http://doi.wiley.com/10.1002/9781444301427.ch7>.

in functions, or ownership of assets, that previously belonged to the state. Whereas both the state and a private or non-state actor may be involved in this scenario, one party (usually the state) would retain full responsibility. However, 'PPPs' refer to a formalised partnership between the state and a private partner where roles and responsibilities are shared between the partners.[9]

There are inextricable links between infrastructure, the delivery of basic services, and human rights. In some respects, it would be nearly impossible to fulfil human rights without the necessary infrastructure. Examples include the construction and operation of hospitals and clinics to provide access to healthcare, the construction and operation of schools to provide access to education, and the construction and operation of the necessary infrastructure to provide for basic services such as access to water and food. However, infrastructure, especially when developed through PPPs, can be problematic from a human rights perspective for three reasons.

Firstly, as will be explained in more detail in Chapter 2, it is possible for Infrastructure PPPs to not contribute to the fulfilment or realisation of human rights, even when it is intended to. While infrastructure planning may have strong development aspirations, sustainable development outcomes cannot be met without the consideration of non-economic factors, including human rights. When infrastructure is driven through PPPs, planning is complicated further by the procurement process, which can often change the scope and outcome of an infrastructure project significantly as a result of the private partner's scope, capacity or area of specialisation. In the case of unsolicited PPP proposals, it is also possible that projects are merely submitted to the relevant state authorities because of the economic prospects of the projects.

[9] The definition of PPPs is a topic of much debate, and is discussed in more detail under Chapter 3 below.

Secondly, when infrastructure is developed by the state, and the infrastructure fails to deliver basic services or realise socio-economic rights, it is relatively clear that the state would also be the one that could be held accountable for these failures. When other actors get involved, however, the situation often becomes much less clear. PPPs in particular have been described as 'molten mass[es] of public and private, domestic, foreign and international law, which can result in an accountability deficit when it comes to the violation of human rights'.[10] Because of the fact that risks and rewards are shared between the state and a private actors in a PPP, it necessarily means that roles and responsibilities are also shares between the parties. As a result, it is often unclear where the human rights obligations lie in the context of PPP-driven infrastructure.

Thirdly, large-scale infrastructure projects, whether developed through PPPs or not, often have very negative impacts on human rights.[11] These impacts may happen at different levels, across different stakeholder groups, and affect a wide spectrum of human rights.[12] Similarly to the problem described in the preceding paragraph, the matter is further complicated when a PPP is formed, and the roles and responsibilities shared between the different partners. As a result of the complex nature of PPPs, it may be hard to know which substantive human rights impacts are attributable to which project partners, which would in turn again result in an accountability deficit.

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[10] Michael Likosky, 'The Privatisation of Violence' in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford 2009) 16.

[11] An example is the Sardar Sarovar Dam project in India. See Michael Likosky, 'Adapting Human Rights to Privatised Infrastructure Projects' (2004) 4 Global Jurist Topics; Michael Likosky, 'Mitigating Human Rights Risks under State-Financed and Privatized Infrastructure Projects' (2003) 10 Indiana Journal of Global Legal Studies.

[12] The different levels of human rights impacts in large-scale infrastructure projects is discussed in more detail under Chapter 4 below.

Summarily, the overarching research problem is that human rights are not considered adequately in the design, development, and implementation of PPPs. As with most other large scale or projects,[13] there may be a focus on the general environmental and social impacts that the project may have, but no explicit human rights focus. Whereas Environmental and Social Impact Assessments (ESIAs) are mandatory in most jurisdictions,[14] there is no widely accepted equivalent in the context of human rights. While the application of Human Rights Impact Assessments (HRIAs) stands out as a logical potential solution to the problem, HRIAs are not legally required in the same way that ESIAs are.

Working hypothesis

The notion of development has changed significantly over the past 70 years. Initially, development was mainly considered from an economic perspective, and economic progress seen as synonymous with development. With this in mind, infrastructure planning and development was also done purely from an economic perspective. Towards the end of the 20th century, academics (and policy-makers) started acknowledging that development may be broader than only economic progress, and include social and environmental factors as well. Ultimately, with the dawn of the 21st century, the focus shifted to sustainable development, which consists of strong

[13] 'Megaprojects', as explained by eminent scholar Bent Flyvbjerg, is defined by the US Federal Highway Administration as 'major infrastructure projects that cost more than US$ 1 billion, or projects of a significant cost that attract a high level of public attention or political interest because of substantial direct and indirect impacts on the community, environment and budgets'. See http://flyvbjerg.plan.aau.dk/whatisamegaproject.php (accessed 9 November 2016).

[14] In a USAid sponsored paper in 2008, it was estimated that by 2005 more than 100 countries already had some form of Environmental Impact Assessment (EIA) regulation. See http://www.fess-global.org/workingpapers/eia.pdf (accessed 9 November 2016).

conservational elements, the eradication of poverty, and the progression of human rights.[15]

The notion of development changed throughout the years, but many of the drivers of development remained the same, and infrastructure is no exception. This does not mean, however, that the *way* in which infrastructure is considered has not changed. The focus shifted from economic infrastructure as the primary focus under traditional views of development, to the development of sustainable infrastructure, that meets the needs of the public, and have minimal adverse impacts. In the context of infrastructure, the shift to sustainable development requires the consideration of human rights in three ways – in the planning of infrastructure; to identify the different roles and responsibilities of project partners in infrastructure projects; and to identify and mitigate the potential adverse human rights impacts of project.

The focus of the thesis is on infrastructure PPPs, for two main reasons. Firstly, as will be explained in more detail in Chapters 1 and 2, PPPs are being touted by the World Bank and a number of other international organisations as a model that could help address the infrastructure gap in the developing world, by providing access to the private sector. It is thus realistic to expect an ever-increasing number of infrastructure PPPs in the coming years. Secondly, as discussed in Chapters 3 and 4, PPPs pose a number of challenges when it comes to the promotion and protection of human rights. With this in mind, the working hypothesis of this thesis is based on the premise that sustainable development cannot be achieved if human rights is not adequately considered in infrastructure PPPs, and that the best way to do this is through the use of HRIAs.

[15] For a more detailed discussion around the concepts of development *vis-à-vis* sustainable development, see 'The evolution of development as a concept' in Chapter 2.

Research questions

Against the backdrop of the working hypothesis outlined above, the overarching research question of the study is – how can infrastructure better contribute to sustainable development?

In answering the overarching research question, the thesis answers the following questions:

1. How is development understood in the global modern context?
2. Where does infrastructure development fit into the modern understanding of development?
3. With PPPs being touted as a solution to the global infrastructure deficit, what are the legal risks, and human rights risks in particular, involved in infrastructure PPPs?
4. By including human rights considerations, would Infrastructure PPPs better contribute to sustainable development?
5. What are the different human rights dimensions of Infrastructure PPPs, and what is required for infrastructure PPPs to comply with human rights standards?
6. How should human rights be considered in the context of Infrastructure PPPs?

Rationale of the study

Over the past 70 years, there has been an increasing recognition by scholars and other stakeholder groups that development is much broader than economic development, and should include environmental and social elements like human rights. There is also a recognition that infrastructure plays a key role in driving development. However, there is often a disconnect between development ideals,

and the projects designed to realise those ideals. In other words, it is not always clear how to ensure that the development projects actually lead to the intended development outcomes. This is indeed the case with infrastructure development, and is evident from the adverse human rights impacts of large scale infrastructure projects.

This thesis is focused on the operationalisation of human rights in the context of Infrastructure PPPs, and suggests that HRIAs may be utilised for this purpose. HRIAs draw from other forms of impact assessments such as ESIAs, while at the same time benefiting from continuous norm development by international organisations such as the United Nations, and regional bodies such as the European Union and African Union. The underlying rationale of the study is that, if HRIAs are applied appropriately in the context of Infrastructure PPPs, better development outcomes would be achieved by improving the planning, design, and implementation of the projects.

Literature review

For purposes of this thesis, the literature review focuses on four sub-thematic areas. These four areas include development, infrastructure and PPPs, human rights in the context of infrastructure and privatisation, and human rights impact assessments. The following paragraphs will touch on some of the main points highlighted in the relevant literature, as far as it relates to the focus of the thesis.

a) Development

For decades, development scholars have proposed different theories on what development is, and how to best achieve development outcomes.[16] The roles of the

[16] For a comprehensive overview of different development scholars and theories, and in particular how it relates to development in the context of developing countries, see John

state and the private sector have also been areas of particular importance and interest for a number of development scholars. The stark differences in opinions Is visible in the way the global economy was split in the post-World War II era between those that believed in state-centric approaches, and those that preferred free market approaches with a limited role for the state. With the creation of the International Monetary Fund (IMF) and the World Bank at the Bretton Woods conference in 1944, international organisations were also introduced as key role-players in the context of development, and has been ever since.

One of the key differences in how development is considered throughout different eras, is the scope and content of development. More specifically, a number of scholars believe that the primary focus of development should be economic progress, whereas others view development as a much broader concept. There are several theories on the matter, many of which only differs marginally. Bradlow proposes a much more pragmatic approach, and use two overarching categories of development[17] – the views that prioritise economic development, categorised as 'traditional views' of development, and the views that consider development as a much broader, holistic concept, which includes non-economic aspects as well. The latter could be categorised as 'modern views' of development.

One of the most well-known modern theories of development, is that of Amartya Sen, which focuses on freedoms and capabilities. In a nutshell, Sen proposes that development should be seen as the freedom to fulfil capabilities, and in turn obtain

Rapley, *Understanding Development: Theory and Practice in the Third World* (Lynne Rienner Publishers 2002).

[17] Daniel D Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (2005) 21 South African Journal on Human Rights 47.

valuable functions as a result of the exercised capabilities.[18] To enable development, is thus to enable the conditions required to fulfil capabilities – in other words, create an environment that allows people to maximise opportunities.[19] While Sen believes that there is an obligation to create an environment where capabilities can be realised, it is unclear whether he believes that the obligation extends to actually ensuring that the opportunities are used, and that capabilities lead to actual valuable functions or gains.[20]

There are various determinants of development. Particular focus has been given to the law, and its potential to influence and to some extent determine the outcome of development. A vast body of scholarship formed around the subject, and is known in some circles today as the 'law and development' movement.[21] Law and development consists of a body of multidisciplinary works that explores the nexus between the law, and social and economic development. While opinions differ on the extent to which the law can be used as an instrument to facilitate development (both economic and otherwise), it has been acknowledged for decades now that the law can play an important role in the pursuit of development, as well as the *way* in which development is considered and achieved.[22]

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[18] See Amartya Sen, *Development as Freedom* (Oxford University Press 1999). For further elaboration on the 'development as freedom' theory, also see Amartya Sen, *The Idea of Justice* (Penguin Books 2009).
[19] Amartya Sen, 'How Does Development Happen' (2005) 25 Cato Journal 455.
[20] Serena Olsaretti, 'Freedom's Value: Some Persisting Questions for Amartya Sen's Capability Approach' (2014) 5 Jurisprudence 369.
[21] For an overview of the emergence and evolution of the law and development, see Liliana Lizarazo-Rodriguez, 'Mapping Law and Development' (2017) 4 Indonesian Journal of International and Comparative Law 761; Gabriel Garcia, 'The Rise of the Global South, the IMF and the Future of Law and Development' (2016) 37 Third World Quarterly 191.
[22] Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4 Law and Society Review 29.

A number of leading scholars, however, are quite cautious and sceptical about law and development, and its efficacy in achieving development outcomes. Tamanaha, for example, claims that the law and development movement is a reincarnation of the modernization theory, which has been widely criticised and discarded by most as a serious path to development.[23] He further notes that distinctions should be drawn between law and development on the one hand, and legal development on the other.[24] Whereas the former, in his view, consists of a series of failed development efforts that were focused on legal reform and the rule of law, the latter is a consequence of any developing society. Tamanaha draws attention to the inextricable links between law and other aspects of society such as the history of the country, tradition, culture, the political and economic systems in place, distribution of wealth and power, levels of industrialization, ethnicity, language, and religion.[25] Because these aspects are different in each society, it is impossible to merely transplant law from one state to another.

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[23] Modernization theory, which was built on the ideas of Max Weber, suggests that developing states (or in his view 'traditional' or 'pre-modern' states) can be 'modernized' in the same ways that more advanced or 'modern' states have achieved their levels of development. This theory is heavily criticised for its oversimplification of development, and the ways in which it ignores the unique characteristics of each state and society.

[24] On a separate but related note, Pistor warns that there is no single law and development tradition. Nonetheless, according to Pistor an important element of law and development is legal reform, which is not necessarily inherently a good thing. She highlights that it is good to have indicators to determine whether legal reform heads in the right direction. See Katharina Pistor, 'There Is No Single Field of Law and Development' (2009) 104 Northwestern University Law Review Colloquy 168.

[25] Tamanaha calls this the 'connectedness of law' principle, which conveys the notion that the law is connected to every aspect of society. See Tamanaha (n 1) 214; Brian Z Tamanaha, 'A Holistic Vision of the Socio-Legal Terrain' (2008) 71 Law and Contemporary Problems 89. Pistor agrees with Tamanaha in this regard, and argues that legal reform, especially reform that contains a normative agenda, is very challenging when there are societal differences between states. See Katharina Pistor, 'The Law and the Non-Law' (2006) 27 Michigan Journal of International Law 973.

Along the same line, Pistor warns against the effects that the standardisation of law can have on developing economies.[26] It is perhaps worth highlighting that an important element of law and development work revolves around legal reform, and the standardization of law according to international standards and best practice. In reality, however, the standards and 'best practices' are more often than not based on Western of Anglo-Saxon experiences. Pistor is therefore concerned, not unlike Tamanaha, that law and development projects and in particular those focused on the rule of law and legal reform is merely a revival of modernization attempts, where Western legal frameworks are imposed on developing states.

As global development agendas continue to focus on poverty eradication[27] and sustainability[28], it is increasingly clear that sustainable development is grounded in human rights. Various scholars have drawn, and continues to draw, links between human rights and sustainable development.[29] And while a number of scholars have explored these links, it remains notoriously difficult to operationalise human rights, or integrate it fully into development plans, even in the context of sustainable development. These challenges, amongst other factors, have led scholars to explore

[26] Katharina Pistor, 'Standardization of Law and Its Effect on Developing Economies' (2002) 50 American Journal of Comparative Law 97.
[27] Sakiko Fukuda-Parr and David Hulme, 'International Norm Dynamics and the End of Poverty: Understanding the Millennium Development Goals' (2011) 17 Global Governance 17.
[28] Annelie de Man, 'The Sustainable Development Goals and the Rights-Based Approach to Development: Compatible or Missing the Point?' (2019) 19 African Human Rights Law Journal 445.
[29] Wekgari Dulume, 'Linking the SDGs with Human Rights: Oportunities and Challenges of Promoting Goal 17' (2019) 10 Journal of Sustainable Development Law and Policy 56; de Man (n 28).

more integrated approaches to development, such as human rights based approaches to development.[30]

b) Infrastructure and public-private partnerships

Infrastructure has always been considered a key driver of development.[31] However, as pointed out in the background to the study, there remains a massive infrastructure deficit in the developing world, with no apparent way to bridge this gap through public financing.[32] As such, the utilisation of private resources to develop infrastructure has been touted as a possible solution. The involvement of the private sector in infrastructure development or public service delivery can take many shapes and forms, but PPPs have emerged as a model that could be suited particularly well for infrastructure development in particular.[33]

The involvement of the private party in a PPP may take place in various ways. The private partner may be involved in the development, construction, and operation

[30] Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development - an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 The International Journal of Human Rights 664.
[31] Pierre-Richard Agénor, 'A Theory of Infrastructure-Led Development' <http://www.ses.man.ac.uk/cgbcr/discussi.htm>.
[32] Anita George, Rashad-Rudolf Kaldany and Joseph Losavio, 'The World Is Facing a $15 Trillion Infrastructure Gap by 2040. Here's How to Bridge It.' (*World Economic Forum*, 11 April 2019) <The world is facing a $15 trillion infrastructure gap by 2040. Here's how to bridge it> accessed 21 March 2020; United Nations Inter-agency Task Force on Financing for Development, 'Closing the Infrastructure Gap' <https://developmentfinance.un.org/closing-the-infrastructure-gap> accessed 24 March 2020; McKinsey Global Institute, 'Bridging Global Infrastructure Gaps' (McKinsey&Co 2016) <https://www.mckinsey.com/~/media/McKinsey/Industries/Capital%20Projects%20and%20Infrastructure/Our%20Insights/Bridging%20global%20infrastructure%20gaps/Bridging-Global-Infrastructure-Gaps-Full-report-June-2016.ashx> accessed 24 March 2020.
[33] Akintoye (n 8); ER Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (Elsevier 2007) <https://www-sciencedirect-com.uplib.idm.oclc.org/science/book/9780750680547>.

phases of the project, but also be involved from a financing perspective. The utilisation of private resources, financial and otherwise, is after all one of the key motivations for Infrastructure PPPs development in the first place. Project finance is a form of financing that is often use in infrastructure projects. However, compared to other forms of finance, it has received relatively little attention from legal scholars.[34] One of the key things to bear in mind in the context of project finance, argues Bjerre, is the fact that there are undoubtedly negative externalities[35] associated with project finance, especially at a large-scale or international level.[36] These negative externalities may very well impact on human rights.

When it comes to the planning of infrastructure, there are also numerous challenges. For example, finding consensus on the type of infrastructure that should be prioritised, as well as the way in which it should be development, remains very challenging. It is argued that projects may perhaps not be considered consensual if those that are not direct parties to the agreement (such as the project originator, special purpose vehicle, investors, sponsors, project company, and lenders) do not also provide consent to the project.[37] It is proposed that 'consent' could be considered a spectrum, and not necessarily a binary concept with simple 'yes' and 'no' options.[38] For example, if there are numerous stakeholders in an infrastructure project, and

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[34] Carl S Bjerre, 'Project Finance and Consent', in *Privatising Development: Transnational Law, Infrastructure and Human Rights*, ed. by Michael B Likosky (Bedfordshire: Martinus Nijhoff Publishers, 2005), I, 221-53.

[35] An 'externality' is defined as 'a cost or benefit arising from any activity which does not accrue to the person or organisation carrying out the activity. Negative externalities cause damage to other people or the environment, for example by radiation, river or air-pollution, or noise, which does not have to be paid for by those carrying out the activity', John Black, Nigar Hashimzade and Gareth Myles, *Oxford Dictionary of Economics* (Oxford: Oxford, 2013), IV.

[36] Oxford dictionary of Economics (n 26 above).

[37] Bjerre (n 24 above).

[38] Bjerre (n 24 above).

consent is obtained from the majority of them, is it accurate to say that there are consent around the project?

There are several overviews of PPPs, though it should be pointed out that most studies focus on the financial and economic aspects of PPPs.[39] There are of course a few exceptions. The most comprehensive study on the links between privatisation and human rights is done by Antenor Hallo de Wolf.[40] In his book, Hallo De Wolf broadly looks at whether the notion of privatization is reconcilable with the international human rights obligations of states. While Hallo de Wolf look at privatisation in the context of sectors like private security and water provision, relatively little in the study is dedicated to PPPs as a specific form of privatisation.

Scholars like Michael Likosky and Maria Romero have considered the non-economic aspects, and human rights in particular, of PPPs.[41] Both Likosky and Romero point out the potential adverse impacts that PPPs may have on human rights, and use cases like the Sardar Sarovar Dam in India, the Malaysian North-South Expressway in Malaysia, and the Pueblo-Panaman Plan in Mexico to illustrate how these impacts may occur, and different approaches used to try and address these impacts.[42]

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[39] Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (n 33); Akintoye (n 8); Eduardo Engel, Ronald D. Fischer and Alexander Galetovic, *The Economics of Public-Private Partnerships: A Basic Guide* (Cambridge University Press 2014).

[40] Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights*, vol 49 (Intersentia 2012).

[41] Michael Likosky, 'Human Rights Risk, Infrastructure Projects and Developing Countries' (2002) 2 Global Jurist Advances; Likosky, 'Mitigating Human Rights Risks under State-Financed and Privatized Infrastructure Projects' (n 11); Likosky, 'Adapting Human Rights to Privatised Infrastructure Projects' (n 11); María José Romero, 'What Lies beneath? A Critical Assessment of PPPs and Their Impact on Sustainable Development' <http://www.eurodad.org/files/pdf/1546450-what-lies-beneath-a-critical-assessment-of-ppps-and-their-impact-on-sustainable-development-1450105297.pdf>.

[42] Likosky, 'Mitigating Human Rights Risks under State-Financed and Privatized Infrastructure Projects' (n 11).

Ultimately, Likosky argues that human rights is a key issue in the provision of infrastructure through PPPs, and that these issues are currently not being addressed in a uniform manner. He proposes the establishment of a 'PPP Unit' under the auspices of the United Nations.[43]

c) Human rights in the context of infrastructure and privatisation

The amount of literature on human rights, including human rights that could be considered relevant in the context of infrastructure is enormous. PPPs aside, large infrastructure projects have a contentious track record when it comes to human rights. Large-scale dam projects, for example, have been recorded to have adverse impacts on the livelihoods of surrounding communities, forcing widespread displacement and resettlement schemes, disrupting access to services and socio-economic rights such as water, education and healthcare, and often all of the above with impunity for the transgressors.[44] Similarly, waterway and hydro-electric projects may have adverse environmental impacts, as well as impacts on the rights to health, indigenous peoples' rights, and the right to property.[45]

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[43] Michael Likosky (ed), 'Beyond Naming and Shaming: Towards a Human Rights Unit for Infrastructure Projects', *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Publishers 2005).

[44] Examples include the Bujagali Dam in Uganda, the Merowe Dam in Sudan, and the Ilisu Hydropower project in Turkey. For more information, see Anna Irvin, 'The Human Rights Impact of Mass Displacement Caused by the Construction of the Ilisu Dam' (Water and Sustainability, Zaragoza Expo, 4 July 2008); Swizeen Ndyabawe, 'Human Rights Lessons from the Bujagali Dam in Uganda' (*FIVAS*) <https://fivas.org/en/frontsak-en/human-rights-lessons-from-the-bujagali-dam-in-uganda/> accessed 5 September 2020; Adrian Kriesch, 'Controversial Sudanese Dam Sparks Human Rights Complaint' *Deutche Welle* (19 May 2010) <https://www.dw.com/en/controversial-sudanese-dam-sparks-human-rights-complaint/a-5589801> accessed 6 September 2020.

[45] Abby Rubinson, 'Regional Projects Require Regional Planning: Human Rights Impacts Arising from Infrastructure Projects' (2006) 28 Michigan Journal of International Law 175, 201.

While links could quite easily be drawn between human rights and infrastructure, a relatively small number of scholars have explicitly done this from an academic perspective. For purposes of this thesis, the most relevant academic study is arguably a quite recent one done by Motoko Aizawa for the United Nations.[46] One of the key achievements of Aizawa's study, is the useful distinction she draws between the different levels at which human rights impacts may take place in the context of infrastructure, and uses micro-, meso-, and macro-impacts to highlight the nuances between these levels.[47] Aizawa also considers the potential human rights implications of several regional infrastructure plans, and proposes that further research be done on regional infrastructure plans form a human rights perspective.

While the focus is not on PPPs per se, an important body of literature for purposes of this thesis is also the work done around the human rights obligations of private and other non-state actors. Clapham has done valuable work in this regard, having published a comprehensive study on non-state actors that include private actors, international organisations, and financial institutions.[48] Others studies have focused specifically on the nature of the human rights obligations of private actors,[49] and the

[46] Motoko Aizawa, 'Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment' (2017) July.
[47] Also see Antonio Estache, Andres Gomez-Lobo and Danny Leipziger, 'Utilities Privatization and the Poor: Lessons and Evidence from Latin America' (The World Bank 2000).
[48] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (1st edn, Oxford University Press 2006).
[49] David Bilchitz, 'A Chasm between "is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles', *Human Rights Obligations of Business* (2013); Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) <http://ebooks.cambridge.org/ref/id/CBO9781139568333>; Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?', *Human Rights Obligations of Business* (Cambridge University Press 2013).

nature of the human rights obligations of international organisations such as the United Nations, the World Bank, or the International Monetary Fund.[50]

There is a decent body of literature around the impacts that privatisation of infrastructure and related services have on human rights, broadly speaking.[51] Services and infrastructure categories that are often highlighted in this context include the privatisation of water and water provision, healthcare, education, and prisons. Each of these categories have their own specific problems, but there are also a few recurring concerns across all of them. Generally, these concerns are focused on the impacts of privatization on access to services, the quality of services, difficulties around monitoring and regulating services, and accountability (or the lack thereof).[52]

Since much of the existing human rights focused literature could be interpreted in the context of infrastructure and privatisation, it should come as no surprise that international bodies touched on these aspects as well, to give guidance to states and non-state actors. The UN Committee on Economic, Social and Cultural Rights in particular have considered the human rights obligations of states under international

[50] Sigrun I Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing Limited 2001); Daniel D Bradlow, 'The World Bank, the IMF, and Human Rights' (1996) 6 Transnational Law & Contemporary Problems 48.
[51] While some of the literature refer to PPPs, the majority considers privatization in general, and not one specific privatization model.
[52] Martha Minow, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 Harvard Law Review <https://dash.harvard.edu/bitstream/handle/1/3138655/Minow - Public and Private Partnerships.pdf?sequence=2>; Danwood Mzikenge Chirwa, 'Privatisation of Water in Southern Africa: A Human Rights Perspective' [2004] African Human Rights Law Journal 218; Khulekani Moyo and Sandra Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37 Human Rights Quarterly 691; Melina Williams, 'Privatization and the Human Right to Water: Challenges for the New Century' (2007) 28 Michigan Journal of International Law 469; Alfred C Aman Jr., 'Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law' (2005) 12 Indiana Journal of Global Legal Studies 511; Right to Education Project, 'Privatisation of Education: Global Trends of Human Rights Impacts' (ActionAid International 2014).

human rights law, and particular the International Covenant on Economic, Social and Cultural Rights, in the context of business activities.[53]

d) Human rights impact assessments

The hypothesis suggests that HRIAs could be used as a tool to potentially address the problems highlighted in the problem statement. Compared to other forms of impact assessments such as environmental impact assessments (EIAs) and even social impact assessments (SIAs), HRIAs is a relatively new concept, and very much still under development and refinement. Numerous authors have written about HRIAs from a general and conceptual perspective,[54] while others have looked at specific aspects of HRIAs such as the links (and differences) between HRIAs and other forms of impact assessments.[55] There is significant overlap between HRIAs and the underlying

[53] Committee on Economic, Social and Cultural Rights, 'General Comment 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (United Nations Economic and Social Council 2017) E/C.12/GC/24 <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> accessed 9 January 2019.

[54] Gauthier De Beco, 'Human Rights Impact Assessments' (2009) 27 Netherlands Quarterly of Human Rights 139; Deanna; Kemp and Frank; Vanclay, 'Human Rights and Impact Assessment: Clarifying the Connections in Practice' (2013) 31 Impact Assessment and Project Appraisal 86; John Ruggie, 'Human Rights Impact Assessments - Resolving Key Methodological Questions' (Human Rights Council 2007) A/HRC/4/74.

[55] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (2013) <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf>; Nora Götzmann, Frank Vanclay and Frank Seier, 'Social and Human Rights Impact Assessments: What Can They Learn from Each Other?' (2016) 34 Impact Assessment and Project Appraisal 14; Ana Maria Esteves and others, 'Adapting Social Impact Assessment to Address a Project's Human Rights Impacts and Risks' [2017] Environmental Impact Assessment Review 73; The Danish Institute for Human Rights and IPIECA, 'Integrating Human Rights into Environmental, Social and Health Impact Assessments - A Practical Guide for the Oil and Gas Industry' (2013).

principles of social impact assessments (SIAs), which is why a number of scholars have considered SIAs from a human rights perspective.[56]

A recent publication by Götzmann is arguably one of the most comprehensive studies on HRIAs, and contains a series of contributions from scholars and practitioners in the field.[57] Götzmann addresses some of the principles behind HRIAs, and highlights a number of methods and approached used in the field – many of which are discussed under Chapter 5 in this thesis.[58] Other notable contributions focus on the participation of affected stakeholders in HRIAs, including potentially vulnerable groups like women[59] and children.[60] The author of this thesis also contributed a chapter on infrastructure and PPPs to the publication, with a focus that is very similar to that of this thesis.[61]

Methodology

The study is primarily based on desktop research, making use of databases from the University of Pretoria Law Library, and a number of other available databases online. While academic scholarship is widely consulted throughout the thesis, a wide variety of reports and other publications from international organisations an non-

[56] Götzmann, Vanclay and Seier (n 55); Esteves and others (n 55); Frank Vanclay, 'International Principles for Social Impact Assessment' (2003) 21 Impact Assessment and Project Appraisal 5.
[57] Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Edward Elgar Publishing 2019).
[58] Nora Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, Methods and Approaches', *Handbook on Human Rights Impact Assessment* (2019).
[59] Bonita Meyersfeld, 'The Rights of Women and Girls in HRIA: The Importance of Gendered Impact Assessment', *Handbook on Human Rights Impact Assessment* (2019).
[60] Tara M Collins, 'Children's Rights in HRIA: Marginalized or Mainstreamed?', *Handbook on Human Rights Impact Assessment* (2019).
[61] Josua Loots, 'Infrastructure Development in Africa: Making Use of HRIA in Public-Private Parternships', *Handbook on Human Rights Impact Assessment* (2019).

governmental organisations are also used. Some of the chapters also refer to court cases, both at the domestic and international levels, as far as it pertains to the interpretation and elaboration of key concepts in the thesis. This is for example particularly apparent in Chapter 4, which deals with the human rights dimensions of infrastructure and PPPs.

The thesis does not necessarily have a specific geographical or jurisdictional focus. It rather considers the matters from a theoretical perspective, and only draws from specific examples and case studies where appropriate. The main reason for this approach, it to allow the study to look at the hypothesis from a theoretical perspective, while at the same time looking at a general approach that can be applied in different contexts. The specific recommendations, however, are made in the context of specific focus areas of the hypothesis, and specifically made to relevant stakeholders that include private actors, states, international financial institutions, and international organisations.

Since the topic of the thesis is multi-disciplinary in nature, the study looks at different academic disciplines that include law, development, economics, engineering, sociology, and of course, impact studies. While most of these areas are considered qualitatively, the study also draws on quantitative measurements where needed. The methodology changes slightly in Chapters 5 and 6, and builds on the qualitative assessments from the previous chapters to suggest a new impact assessment model that could potentially be used in the context of PPPs, in a way that addresses the problems highlighted in the problem statement.

In Chapter 3, that specifically looks at PPPs in more depth, a case study is used to give the reader an idea of what a PPP could look like in practice, and to be used as a reference to illustrate some of the points that are discussed in Chapter 3. This is

particularly useful, since Chapter 3 deals with a lot of theoretical aspects around PPPs, and claims that have been made about the positive and negative impacts of PPPs, as well as the advantages and disadvantages to using PPPs. The case that is used revolves around a healthcare PPP in Lesotho that have enjoyed much attention from the media and scholars around the world. The reason for using this particular case, is because of the amount of information that is publicly available on the case, as well as its ability to illustrate the impacts of PPPs on different levels, the intricate relationship between different partners in a PPP, and the involvement of a number of different domestic and international role players.

Limitations and scope of the study

The study in this thesis has several methodological and substantive limitations. As alluded to in the literature review, whereas there is an abundant amount of literature on some aspects of the study, such as human rights for example, other areas have received relatively little academic attention, with only a handful of studies to draw from.[62] The multidisciplinary nature of the study is one of its biggest strengths, but it also presents several challenges. It is inherently difficult to draw from research findings across different disciplines, as the research problems are often looked at from very different perspectives, with findings aimed at achieving different objectives.

The scope of the study is also limited, in various respects. It is undeniable that all infrastructure projects have social and environmental impacts, both positive and negative. However, the scope of this thesis is limited to infrastructure projects developed through PPPs, for two main reasons. Firstly, PPPs is a unique organisational

[62] As mentioned above, the consideration of the non-economic dimensions of PPPs is an area that has not been explored in much detail by academics.

model that lies somewhere between public provision and complete privatisation, which raises several interesting questions in the context of human rights, mostly related to the different duties and obligations of each of the different partners in a PPP, and the key human rights concerns during a typical PPP project life cycle. And secondly, as explored in more detail in Chapters 2 and 3, PPPs are increasingly used for infrastructure development, and is promoted by a number of influential international organisations and financial institutions as a potential solution to the infrastructure deficit.

While the study looks at infrastructure generally driven through PPPs, many of the issues will most likely be mainly applicable to those infrastructure projects, and associated services, with a strong human rights component. For example, whereas the links between the human rights obligations of the state (and any other actor for that matter) may be clear in the context of education, it may be less so in the context of information and technology infrastructure. Nonetheless, it is worth reiterating that the study considers human rights mainly from three different perspectives, and whereas some of the considerations around obligations may be more relevant to some forms of infrastructure than others, the other focus areas like infrastructure planning and the mitigation of adverse human rights impacts are relevant to all infrastructure projects.

Human rights are looked at from a theoretical perspective. Nonetheless, the human rights under focus in this thesis is primarily limited to those that are recognised in the international legal instruments, many of which are recognised in domestic human rights frameworks as well. The human rights frameworks are especially relevant in the final chapters of the thesis, and mainly includes international conventions under global international and intergovernmental organisations such as the United Nations, International Labour Organisation, and World Trade Organisation, as well as others

under regional systems such as the African Union, European Union, Council of Europe, Organisation of American States, and the Association of Southeast Asian Nations.

Whereas the thesis looks at the potential of HRIAs to include a broad range of human rights considerations, and potentially improve the full spectrum of human rights outcomes of infrastructure PPPs, many of the examples and references in the study refer to socio-economic rights in particular. This does not mean, however, that the underlying principles should not be applied to civil and political rights. As mentioned in the methodology section above, the study mainly draws on existing literature and case studies, and the existing literature and case studies on infrastructure PPPs are most often directly linked to the fulfilment of socio-economic rights. For this reason, the thesis looks at socio-economic rights as a particular area of interest, but posits that the underlying principles should be applied to the full spectrum of human rights. Civil and political rights are also implicated in infrastructure PPPs through the need for consultation, transparency, and accountability – all of which are discussed in detail in the thesis.

Significance of the study

The significance of the study is best explained from the perspective of the problem statements, since it the problem statements highlight the areas that would benefit most from this thesis. As highlighted earlier, the overarching problem statement can be divided into three underlying problems. Firstly, human rights does not play an adequate role in the planning of infrastructure projects. Secondly, and especially when other parties get involved (as with PPPs), the human rights obligations of the parties may be unclear. And thirdly, infrastructure projects may potentially have devastating adverse human rights impacts, which should be identified and mitigated.

As it currently stands, most infrastructure planning is done from the top down, where governments or inter-governmental organisations identify specific domestic or regional development needs, and plan infrastructure accordingly. Economic considerations are still paramount in this process, but non-economic considerations are also increasingly playing a role in the infrastructure development process.[63] While the non-economic considerations are mostly principles based, it often remains intangible and hard to operationalise. This thesis proposes that basic needs assessments could be done best from a human rights perspective, and infrastructure planned accordingly. This approach would assist states in fulfilling their human rights obligations, while at the same time ensuring that basic needs are met.

Several countries, especially in the developing world, are gearing up and developing capacity for the utilisation and implementation of infrastructure PPPs.[64] This is apparent by the number of PPP units being established in national governments, but also by the guidance provided on PPPs by international financial institutions (IFIs) and other inter-governmental and development organisations.[65] As will be highlighted in more detail under Chapters 3 and 4, the existing guidelines on PPPs do not adequately include human rights as a focus area, which leads to two ways in which infrastructure PPPs have shortcomings from a human rights perspective – the different human rights

[63] Geoffrey Read, 'General Considerations for Infrastructure Planning' (World Bank 2012) <https://openknowledge.worldbank.org/bitstream/handle/10986/10129/529390BRI0REVI10BOX353820B01PUBLIC1.pdf?sequence=1&isAllowed=y> accessed 1 June 2020.
[64] The Economist Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Africa: The 2015 Infrascope' (2015) <http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Africa-Infrascope-2015.pdf&mode=wp&campaignid=AfricaInfrascope2015>.
[65] See for example Motoko Aizawa, 'A Scoping Study of PPP Guidelines' (UN Department of Economic and Social Affairs 2018) <https://www.un.org/development/desa/en/>.

roles and responsibilities of all parties are not adequately considered and clarified, and projects also often have adverse substantive human rights impacts.[66]

This thesis proposes that the human rights roles and responsibilities, or rather obligations, should be an explicit consideration in the PPP process. In particular, when the risks and responsibilities are identified and allocated to different partners in a PPP, the human rights risks and responsibilities should be included in the exercise. Subsequently, the human rights risks and obligations should be included in PPP contracts, to ensure that it is adequately covered, and that parties are held accountable in the event of failure. While legal risks are currently considered in risk-allocation exercises,[67] human rights does not play a significant role in the process, and is also not identified as a key consideration in PPP contracts.[68]

In general, the thesis contributes to existing literature by suggesting that the wheel does not need to be reinvented, but instead that existing tools be adapted to ensure that human rights are adequately considered in the scenarios described above. In particular, the thesis suggests that HRIAs are used for these purposes. In addition, the thesis suggests that HRIAs should be used to address the final problem described

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[66] Aizawa (n 46).
[67] Li Bing and others, 'The Allocation of Risk in PPP/PFI Construction Projects in the UK' (2005) 23 International Journal of Project Management 25; Christopher H Bovis, 'Risk in Public-Private Partnerships and Critical Infrastructure' (2015) 6 European Journal of Risk Regulation 200.
[68] The World Bank, 'Guidance on PPP Contractual Provisions' (2017) <http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Guidance_PPP_Contractual_Provisions_EN_2017.pdf>; Erik Hans Klijn and Joop Koppenjan, 'The Impact of Contract Characteristics on the Performance of Public–Private Partnerships (PPPs)' (2016) 36 Public Money & Management 455; 'An Overview of the PPP Process Cycle: How to Prepare, Structure and Manage a PPP Contract | The APMG Public-Private Partnerships Certification Program' <https://ppp-certification.com/ppp-certification-guide/10-overview-ppp-process-cycle-how-prepare-structure-and-manage-ppp-contract> accessed 16 August 2018.

above, which is adverse substantive human rights impacts. This is arguably what HRIAs are most well-known for – the identification of potential adverse human rights impacts, and ensuring that mitigation measures are put in place and implemented.

Definition of terms

Throughout this thesis, terms are used that may have a particular meaning in the context of the study, and not necessarily the meaning or connotation that it would have in other discourses. In addition, some terms may be used with a specific definition in mind that may be broader, or narrower, than commonly understood.

'Private actors' is used to refer to actors that are not public, in other words not connected to the state or government structures in any official way. In the context of this thesis, private actors refer to for-profit entities, such as companies, unless indicated otherwise. This may, however, also include domestic financial institutions like banks and other financiers.

'Non-state actors' include private actors as described above, but is broader in its scope. Non-state also includes not-for profit entities such as non-governmental organisations, inter-governmental organisations, and international organisations.

While the definition is discussed in detail under Chapter 3, 'PPPs' refer to a specific type of arrangement, which falls on the privatisation spectrum. 'Privatisation', however, generally refers to 'the transfer of a business, industry, or service from public to private ownership and control'.[69]

[69] Definition of 'privatization' as contained in the Oxford Dictionary of English.

In the context of this thesis, 'human rights' refers to legally recognised international human rights, as contained in the different sources of public international law discussed in Chapter 4.

For purposes of this thesis, 'development drivers' or 'development projects' refer to projects and activities that are aimed at achieving development outcomes. The use of these terms are not dependent on the definition of development that is used. In other words, a project may still be referred to as a 'development driver' or 'development project', even if the aim was to achieve economic development only. Where different conceptions of development are used, it will be indicated and explained as such.

There are several references to 'economic infrastructure' and 'social infrastructure' throughout the thesis. For purposes of the study, 'economic infrastructure' refers to infrastructure that would typically promote economic activity, such as roads, highways, railroads, airports, sea ports, electricity, telecommunications, water supply and sanitation.[70] 'Social infrastructure' refers to infrastructure that promotes health, education, or other social services, and is often linked to the direct or indirect impacts on the quality of life of its users.[71] Of course, the distinction is not always very clear, and infrastructure may serve as both economic and social infrastructure at the same time.

[70] Johan Fourie, 'Economic Infrastructure: A Review of Definitions, Theory and Empirics' (2006) 74 South African Journal of Economics 530, 531.
[71] ibid.

Overview of chapters

This thesis is presented in six chapters. This Chapter serves to introduce the study, and amongst other things sets out the background, problem statement, and hypothesis of the study. The subsequent chapters focus on different elements of the study, each answering one or more sub-research question, and collectively answering the overarching research question. Ultimately, when read together, the chapters prove the hypothesis, as laid out above.

Chapter 1 – Proposal and overview of the study

The first chapter contains the this research proposal, which sets out the background to the research problem, working hypothesis, research questions and methodology that will be used to address the research problem, and the significance of the study. The chapter also contains a general literature review, which highlights some of the most pertinent scholars and bodies of literature in fields that are relevant to the thesis.

Chapter 2 – Exploring the nexus between development, infrastructure, and human rights

The second chapter provides an overview of the history and evolution of the notion of development from traditional views that primarily focused on economic development, to modern views that are more holistic in nature and includes non-economic aspects as well, such as sustainable development. The chapter highlights the important role that infrastructure plays in development, and the fact that PPPs are touted as a potential solution to the global infrastructure deficit. Finally, the chapter proposes that sustainable development could only be achieved if human rights are considered adequately, including in the context of PPPs.

Chapter 3 – An overview of Public-Private Partnerships

The third chapter focuses primarily on PPPs, and provides an overview of the definitions and characteristics of PPPs, as well as the arguments in favour and against the utilisation of PPPs. The chapter briefly discusses different PPP models, and the legal structuring of PPPs. It also provides an overview of existing guidelines on PPPs, and point out some of the shortcomings from a human rights perspective. Finally, the chapter looks at the different phases of PPP projects, which provides some insight into the different challenges associated with each of the different stages of the project cycle. A case study is used to illustrate some of the points that are discussed in Chapter 3.

Chapter 4 – The human rights dimensions of infrastructure PPPs

The fourth chapter explores the different human rights dimensions of infrastructure PPPs by highlighting the different human rights obligations of all the different role-players in a PPP, and the sources of these obligations. The discussion on obligations takes place in four different contexts – the obligations of the state, the obligations of international financial institutions, the obligations of the private sector, and human rights obligations in the context of privatisation. The chapter concludes by drawing links between infrastructure and human rights, and human rights and PPPs in particular.

Chapter 5 – Human Rights Impact Assessments

The fifth chapter provides an overview of the history and background to HRIAs, and in particular its evolution from other kinds of impact assessments such as EIAs and SIAs. The chapter explores the similarities and differences between different types of impact assessments, and highlights the value that is added by HRIAs in particular.

Different approaches to HRIA is explored, as well as the different tools and methodologies that are most commonly used in practice.

Chapter 6 – Conclusion and recommendations

The final chapter provides a summary of the thesis, and uses the findings to propose a specific HRIA approach for PPPs that would potentially address the problem statement as described earlier. The chapter also contains specific recommendations, targeted to different stakeholder groups that include governments, international organisations and international financial institutions, private actors, civil society, and researchers.

Chapter 2: Exploring the nexus between development, infrastructure, and human rights

> *'Infrastructure, if well-conceived and implemented, is vital for the realisation of many human rights, including health, water and sanitation, and for economic growth. Growth, in turn, generates resources which can be harnessed for investments in people and the environment… Regrettably, human rights are rarely given more than lip service in this context. In the macho world of mega-infrastructure, success is measured by size and speed, breeding the denial of human rights rather than due diligence. The unspoken, or, sometimes, spoken narrative seems to be that you need to break a few eggs to make an omelette.'*[72]
>
> *Zeid Ra'ad Al Hussein*

Introduction

Imagine for a moment a world that is designed, and constructed, to fulfil basic human needs. Where roads and railways are built to provide the easiest possible access to hospitals and schools, and these roads and railways are filled with means of transportation that give access to everyone, and not just a select few. A world that allows people the freedom to develop their own capabilities and potentials fully. Infrastructure dictates, to a large extent, how people live their lives. It is an aspect of life that can either enable access to different services, places, and opportunities, or restrict access to those same services, places, and opportunities. Designing and constructing a world that is centred around the fulfilment of basic human needs does not happen by accident; it needs to be intentional.

[72] Zeid Ra'ad Al Hussein, *Human Rights Trampled in Push to Build Infrastructure | Miami Herald* (2017) <http://www.miamiherald.com/opinion/op-ed/article136884218.html>.

The international human rights framework serves as a framework for the fulfilment of basic human needs. The development of the International Bill of Rights,[73] in particular, ushered in an era where human rights not only promotes civil and political rights, but also socio-economic rights, and access to services. Human rights have been explored in the context of development,[74] infrastructure,[75] as well as the different roles and responsibilities of the state, financial institutions,[76] and the private sector.[77] As such, it could potentially be a useful framework when designing and constructing infrastructure that is aimed at fulfilling basic human needs.

In this chapter we will be looking at two overarching justifications for the consideration and use of human rights in the context of infrastructure. The first justification is closely tied to the notion of development, and what it entails. As will be explained in more detail, the concept of development has changed significantly over the last 50 years – moving from a position where economic growth was considered synonymous with development, to an era where it is acknowledged that development entails much more than mere economic growth, and includes aspects that focus on environmental, social and human rights impacts, and the alleviation of poverty. Since

[73] The International Bill of Rights consists of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.
[74] See amongst others Philip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005). For further discussion, see the section that deals with 'The evolution of development as a concept' in Chapter 2.
[75] Aizawa (n 46). Also see Chapter 4 of this thesis for a detailed exploration of human rights and infrastructure.
[76] Leonardo A Crippa, 'Multilateral Development Banks and Human Rights Responsibility' (2010) 25 American University International Law Review 532. See also Chapter 4 for a discussion of the human rights obligations of non-state actors.
[77] Commission on Human Rights, 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' (2003) E/CN.4/Sub.2/2003/12/Rev.2; John Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (Human Rights Council 2007) A/HRC/4/035; Nolan (n 49).

infrastructure is widely recognised as a driver or even prerequisite of development, it follows that infrastructure should be developed in a manner that aims to promote all aspects of development, or achieve holistic development outcomes.

The second justification for the inclusion of a human rights lens in infrastructure development, focuses on the legal frameworks within which states (and increasingly other actors) operate. In particular, this conversation will focus on international development law, and how the content of international development law has changed in parallel with the notion of development. Under traditional views of development, the content of international development law focused almost exclusively on international economic law, since the goal was economic growth. In a more modern view of development, it includes areas such as international environmental and human rights law, as the goal is to achieve more holistic development outcomes. Bearing in mind the idea that infrastructure is closely tied to development outcomes, this chapter argues that infrastructure should be developed within an international legal framework that includes international human rights law.

The focus of this thesis is on infrastructure that is developed through PPPs, for a number of reasons. Firstly, PPPs are increasingly being used as a method for infrastructure development.[78] Ideological views on privatisation aside, there is a recognition that the infrastructure funding gap currently faced by governments, estimated to be around US $90 trillion in total and US $1,5 trillion annually,[79] is nearly impossible to bridge

[78] See amongst others The Economist Intelligence Unit (n 64); Jomo KS and others, 'Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose?' (UN Department of Economic and Social Affairs 2016) DESA Working Paper nr. 148.
[79] United Nations High Commissioner for Human Rights and Heinrich Böll Stiftung, 'The Other Infrastructure Gap: Sustainability - Human Rights and Environmental Perspectives' (2018) <https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap_FullLength.pdf > accessed 19 June 2020. Institutional investors such as pension funds, insurance companies,

by using public funds only,[80] and international organisations such as the World Bank and the United Nations are pushing governments to look into collaborative efforts with the private sector. As a result, PPPs is a very relevant topic in development at the moment, and will likely remain relevant for the next few years. Secondly, from a legal standpoint, PPPs can be very complicated. PPPs involve a number of different legal frameworks, both internationally and domestically. It necessarily requires that responsibilities are shared between the state and the private sector, and if not careful, it could result in legal obligations falling by the wayside.

One of the goals of this thesis is to show how international human rights law can be used to identify the different roles and responsibilities of the actors involved in a PPP, as well as potential substantive human rights impacts. And finally, over the past 10 years there has been significant developments in clarifying the human rights roles and responsibilities of private actors, with developments such as the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs, and other related works, shine some light on the implications of privatisation on human rights, which is particularly useful in the context of PPPs. In other words, the political context within which to consider the human right obligations of private actors has never been more advanced than now.

The chapter will start by reviewing the concept of development, and how this changed over time. This changing notion of development influenced public international law, and more specifically, international development law. As the ideas around what constitute development outcomes changed, the content of

and sovereign wealth funds, are currently at the centre of attention when it comes to private investment, with up to US $70 trillion in assets.

[80] George, Kaldany and Losavio (n 32).

international development law changed as well to include frameworks such as international environmental law and international human rights law. The chapter will then look at what a human rights based approach to development would entail, and how the law can facilitate the achievement of the desired outcomes under this approach. Since the focus of the thesis is on PPP-driven infrastructure, we will explore how infrastructure is linked to development, and why it is important to use a HRBA in infrastructure planning, especially when it comes to PPPs. And finally, the chapter will end by suggesting ways in which human rights could be best incorporated into different stages of infrastructure PPPs.

The evolution of development as a concept

For some time, there was consensus that development consisted mainly of economic growth,[81] and that it could in principle be separated from social, cultural and political issues. Today, however, development is seen by many as a much broader concept that involves economic, social, cultural, political and environmental aspects. There are a number of different development theories, some with great variances, and others with only slight differences. For purposes of this chapter, two overarching categories of development[82] will be used – traditional views of development, and modern views of development.[83] Traditional and modern views of development are divided by a few key issues that include the roles of the state in the development process, questions around the importance of economic growth in development, the

[81] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 52.
[82] See for example Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17).
[83] ibid. One of the first recorded distinctions made between 'traditional' and 'modern' views of development, was made by Jameson and Weaver in 1981, in Kenneth P Jameson and James H Weaver, *Economic Development: Competing Paradigms* (1981).

relationship between national and international regulation,[84] and the responsibilities of different actors in the development process.[85]

The key stakeholder groups involved in or affected by the development process could broadly be described as the state, project sponsors, project contractors, and the individuals or communities indirectly and directly affected.[86] It is important to consider how development affect these different stakeholder groups, and how these are linked to the human rights, and corresponding obligations, of each group. As will be explained in more detail below, international organisations are also playing increasingly important roles in the development process, as these IOs often serve as the catalysts and driving forces behind large-scale projects. To explain the evolution of the notion of development over the years, the traditional and modern views of development will be discussed, with references to some of the main influential theories, events, and role-players that helped shape how we understand development today.

Traditional views of development

The traditional views of development largely revolves around economic growth, and development is seen as economic processes, and the policies that drive these

[84] The relationship between international and domestic law is a topic of much consideration, and numerous different views. For a detailed discussion on some of the complexities that exist in this relationship, see Daniel D Bradlow, 'The Times They Are A-Changin: Some Preliminary Thoughts on Developing Countries' (2001) 33 George Washington International Law Review 503; Daniel D Bradlow, 'Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law' (2002) 50 University of Kansas Law Review 695; Daniel D Bradlow and Claudio Grossman, 'Are We Being Propelled towards a People-Centered Transnational Legal Order' (1993) 9 American University Journal of International Law and Policy 1.
[85] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 52.
[86] ibid 53.

processes.[87] It is also associated with concrete projects aimed at development outcomes, such as infrastructure projects, for example. While some proponents of traditional views of development would recognise that development has social, environmental, and political implications, it is argued that all these issues could be dealt with separately from the economic aspects of development.[88] In other words, a project is seen to consist of two overarching sets of policy decision-making – one set dealing with broad policy issues such as social and environmental policies, and another that deals with policies that specifically or closely related to the project. The viability of a project is measured in terms of economic and financial benefits, and it is argued that if these benefits outweigh the costs, or could be overcome, the project is developmentally beneficial.[89] In other words, social and environmental issues, ie. the first set of policies described above, are seen as externalities by project sponsors and contractors, and is left to governments or society at large to deal with.

Accountability is relatively limited under traditional views of development.[90] Project sponsors and contractors tend to consider themselves accountable to only three groups. Firstly, they are accountable to government regulators under the relevant laws and regulations. Secondly, they are accountable to those who hired them in accordance with any contractual obligations. And thirdly, they are responsible to their own shareholders for the management of their enterprise. As such, these groups

[87] Rapley (n 16); Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17).
[88] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 53.
[89] ibid 54; Warren C Baum and Stokes M Tolbert, *Investing in Development: Lessons of World Bank Experience* (Oxford University Press 1985) 418–468 <http://documents1.worldbank.org/curated/en/316461468141895022/pdf/multi0page.pdf> accessed 21 September 2020.
[90] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 55.

will only deem themselves accountable to those that are adversely affected by their projects under two sets of circumstances – when there is a direct contractual relationship, and those contractual obligations are not met, or when the project sponsors or those that have been trusted with the implementation of the project commit a tort or an unlawful act under the law of delict.[91]

Because traditional views of development sees social, environmental and human rights impacts as externalities, the state would be accountable if adverse impacts occur in these areas. The state, in turn, is in principle held accountable through the political system and other administrative and judicial procedures that may exist within a specific jurisdiction.[92] Consequently, decisions around these issues are considered the prerogative of the state, and are not negotiated between project sponsors and contractors.[93] It is quite clear that, under traditional views of development, the state has disproportionate discretion and power to decide on the importance of social, environmental and human rights matters. If the state does not consider these issues important in the context of the project, and the administrative and judicial mechanisms are lacking, it could lead to serious adverse impacts with little or no accountability.

Traditional views of development are still widely supported in the 21st century. While governments don't always state this explicitly, it is evident in the way economic growth and large scale infrastructure projects are pursued at the expense of environmental and human rights protection. Examples include the construction of

[91] ibid.
[92] Daniel D Bradlow, 'Development Decision-Making and the Content of International Development Law' (2004) 27 Boston College International and Comparative Law Review 195, 202.
[93] See later reference where the notion to include these issues in contractual negotiations is highly recommended.

large scale dams, which have been controversial in this regard over a period of many years. From the Sardar Sarovar dam project in India, which dominated discussions around large-scale infrastructure projects in the latter half of the 20th century, to the more recent Inga dam projects[94] in the Democratic Republic of Congo (DRC), we have seen human rights impacts that include the widespread displacement of people,[95] as well as environmental impacts such as air and water pollution.[96] When large scale infrastructure projects like the construction of dams have severe negative social and environmental impacts, it is hard not to wonder what the real development gains are.

Of particular interest in this context, is the Chinese development model. Driven by a strong state-led model, or 'developmental state' model, China unashamedly prioritised economic development over individual liberties and freedoms since the late 1970s.[97] This has led to significant economic growth for China from the 1980s to late 2000s. More recently, however, notions like 'good governance' have increasingly enjoyed more attention from Chinese policymakers and academics, and includes

[94] In the wake of the Inga I and Inga II dams, the Congolese and South African governments are set to develop the Grand Inga dam. The dam will be the largest hydroelectricity project in Africa, and cost in excess of R2014 billion. Thousands of people will likely be displaced by the Grand Inga project, many of whom have already been displaced by Inga I or II. See Jason Stearns, 'Inga Dam Deal Is a Grand Delusion' *Mail & Guardian* (12 April 2019) <https://mg.co.za/article/2019-04-12-00-inga-dam-deal-is-a-grand-delusion/> accessed 22 March 2020.

[95] For example the Three Gorges Dam in China, which is the world's largest hydropower development project, displaced approximately 1,2 million people. See Ali Van Cleef, 'Hydropower Development and Involuntary Displacement: Toward a Global Solution' (2016) 23 Indiana Journal of Global Legal Studies 349, 351. See also Daniel D Bradlow, 'The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making' (2001) 16 American University International Law Review 1531, 1557.

[96] See 'WWF Infrastructure Overview' <https://www.worldwildlife.org/threats/infrastructure> accessed 22 March 2020.

[97] He Li, 'The Chinese Model of Development and Its Implications' (2015) 2 World Journal of Social Science Research 128, 130.

special consideration for norms and practices that include public participation, the rule of law, transparency, equity, effectiveness, and accountability. It could be argued that China therefore potentially regards development as a sequential process, which may need to prioritise traditional views of development for a period of time, until the state has enough resources to transition to a more modern view of development.

Modern views of development

The main difference between traditional and modern views of development, relates to the dynamic between economic development and any potential social, environmental and human rights aspects. According to modern views of development, economic development cannot be separated from these aspects, and development should be seen as a holistic and integrated process.[98] With this in mind, it is not only the economic factors that are taken into account when assessing the development potential of a project, but the social, environmental and human rights impacts and gains as well. Modern views of development has in part evolved as a result of a number of projects that were aimed at having economic development outcomes, but had harmful effects on communities and the environment in the process. In general, there seems to be an underestimation of the financial, environmental and social costs of projects, and an overestimation of the benefits.[99]

As modern views of development gained more support, there was an increasing recognition of the importance that should be attached to the assessment of non-

[98] Bradlow, 'Development Decision-Making and the Content of International Development Law' (n 92) 207.
[99] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 67.; Also see Bradlow, 'The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making' (n 95) 1541.

economic impacts of projects.[100] This includes the environmental impacts, as well as the social and human rights impacts. Additionally, modern views seek to assign the responsibilities of assessing and addressing potential impacts to those most likely to cause the impacts, and who are arguably also in the best position to address those potential impacts. This is an important departure from traditional views, which argues that the state should be responsible for any impacts on society at large, and that all other project actors should defer to the decisions of the state in this regard.[101] In practice, modern views of development would suggest that project sponsors and contractors cannot treat environmental and social costs as externalities.[102]

Modern views of development have its own set of challenges.[103] For one, the responsibilities of different project actors are much more complex under modern views than traditional views of development. The lines between the different roles and responsibilities of sponsors and contractors can be very blurry, and the same geographical and temporal limitations do not apply as in traditional views. Under traditional views, the responsibilities of project sponsors and contractors are limited to the specific location of the project, and the period during which they are involved in the project, such as the construction phase for example. Under modern views, impacts are looked at in a much more holistic manner, as well as how these impacts could evolve during the life cycle of the project. As such, it is crucial to identify the roles and responsibilities of each of the different stakeholders in advance.

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[100] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 68.; This evolution is also discussed in more detail under chapter 5 of this thesis, which deals specifically with impact assessments.
[101] ibid.
[102] ibid 70.
[103] ibid 72.

Sustainable development

Whereas traditional views of development were greatly influenced by early economic development theories, modern views of development have been greatly influenced by notions such as sustainable development. Sustainable development is widely understood to refer to development models that meet the needs of the present, without compromising the ability of future generations to meet their own needs.[104] It has a strong conservationist element to it, whereby it is acknowledged that natural resources and the natural environment need to be protected in order to provide future generations with safe and healthy living conditions.[105] The push for the recognition of sustainable development was perhaps led by the environmental movement, but it also enjoyed strong support from the human rights community, as the links between environmental and social protection became increasingly clear towards the end of the 20th century.[106]

Under international organisations such as the United Nations, states have committed themselves individually and collectively to specific sustainable development outcomes. Two prime examples are the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs). Both the MDGs and the SDGs are focused

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[104] World Commission on Environment and Development, 'Our Common Future' (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 21 September 2020.

[105] For notes on the inextricable links between conservation, the environment, and human rights, see Jenny Springer, Jessica Campese and Michael Painter, 'Conservation and Human Rights: Key Issues and Contexts: Scoping Paper for the Conservation on Human Rights' (International Union for Conservation of Nature 2011) <https://www.iucn.org/sites/dev/files/content/documents/conservation_and_human_rights_key_issues_and_contexts.pdf> accessed 7 May 2020.

[106] The World Conservation Strategy of 1991, for example, highlighted the need to include elements of human rights in a holistic conservation strategy that is focused on human rights. See Nicholas A Robinson, 'Caring for the Earth: A Legal Blueprint for Sustainable Development' (1992) 22 Environmental Policy and Law 22, 24.

on development issues that are much broader than economic growth, and enjoyed great support from the international community.[107] The widespread support is an indication of the relative successes of international organisations in harnessing support for collaborative development efforts, and could be seen as a recognition by the international community of the links between development initiatives and broader socio-economic outcomes.[108]

The development of the MDGs and SDGs were also strong recognitions of the potential role that development projects can play in the elimination of poverty. At the start of the new millennium world leaders gathered at the UN to come up with a comprehensive strategy to end poverty, which is how the MDGs were born.[109] The focus of the MDGs was mainly on developing states, with financial support for the MDGs mainly coming from developed states. The MDGs remained the overarching development framework of the UN and most UN states for fifteen years, from 2000 to 2015. The MDGs consisted of eight overarching development goals that included the eradication of extreme hunger and poverty, achieving universal primary education, the promotion of gender equality and women empowerment, reducing child mortality, improving maternal health, combating diseases, ensuring environmental sustainability, and developing a global partnership for development.[110]

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[107] Upon adopting the development agenda titles 'Transforming our world: The 2030 Agenda for Sustainable Development', the SDGs are officially supported by at least 193 countries. See United Nations, 'Sustainable Development Goals Officially Adopted by 193 Countries' (25 September 2015) <http://www.un.org.cn/info/6/620.html> accessed 22 March 2020.

[108] It is worth noting here that this does not necessarily indicate a complete transition from traditional views of development to modern views of development. As explained earlier, proponents of traditional views of development have for a long time acknowledged the links between development and social factors. However, these issues are seen to be separate from one another.

[109] See Fukuda-Parr and Hulme (n 27).

[110] United Nations, *UN Millennium Project | About the MDGs* <http://www.unmillenniumproject.org/goals/> accessed 4 September 2017.

At the end of the MDG timeline in 2015, significant achievement was made on a number of these goals, though progress was uneven across regions and countries, and many gaps remained. Inequality and extreme poverty, in particular, remained major challenges in some regions.[111] As such, states gathered at the UN in 2015 to discuss the way forward, and adopted the 2030 Agenda for Sustainable Development (ASD), which served as the basis for the SDGs. The ASD and SDGs are described as a 'comprehensive, far-reaching and people-centred set of universal and transformative Goals and targets.'[112] It consists of 17 goals,[113] with 169 associated targets, and will guide development related decision-making at a global level from 2015 until 2030. A few important differences between the SDGs and the MDGs include that the SDGs focus on all states (as opposed to developing states only), the SDG explicitly incorporates focus areas such as human rights and equity, a specific focus on and role for civil society, and an explicit goal to partner with the private sector in

[111] United Nations, 'The Millennium Development Goals Report' (2015) 14 <https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf>.
[112] 'Resolution 70/1: Transforming Our World: The 2030 Agenda for Sustainable Development' (United Nations General Assembly 2015) A/RES/70/1 3 <https://www.unfpa.org/sites/default/files/resource-pdf/Resolution_A_RES_70_1_EN.pdf> accessed 23 March 2020.
[113] ibid 14.

achieving its objectives.[114] The ASD was officially tabled through UN Resolution 70/1,[115] which was adopted by the General Assembly.

Infrastructure and development

Infrastructure plays a key role on the path to development, and most development strategies include infrastructure as a key component.[116] It is therefore no surprise that the SDGs have strong links with infrastructure development. Some of the SDGs that are directly linked to infrastructure development include the goals to achieve good health and wellbeing,[117] quality education,[118] clean water and sanitation,[119] and affordable and clean energy.[120] It is clear that certain infrastructure such as transport infrastructure, hospitals and clinics, schools, and water related infrastructure would need to be in place in order to achieve these goals. The link between these goals and infrastructure thus goes two ways – good infrastructure is necessary to achieve the

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[114] Sanjiv Kumar, Neeta Kumar and Saxena Vivekadish, 'Millenium Development Goals (MDGs) to Sustainable Development Goals (SDGs): Addressing Unifinished Agenda and Strengthening Sustainable Development and Partnership' (*Indian Journal of Community Medicine*, January 2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4746946/#:~:text=Difference%20Between%20SDGs%20and%20MDGs,-SDGs%20benefit%20from&text=They%20reflect%20continuity%20and%20consolidation,sustainable%20by%20strengthening%20environmental%20goals.&text=While%20MDGs%20were%20focused%20with,17%20goals%20with%20169%20targets.> accessed 19 September 2020.

[115] 'Resolution 70/1: Transforming Our World: The 2030 Agenda for Sustainable Development' (n 112).

[116] Infrastructure is either explicitly or implicitly included in most development strategies. See for example both the MDGs and SDGs, as well as the World Bank development strategy at The World Bank Group, 'A Stronger, Connected, Solutions World Bank Group: An Overview of the World Bank Group Strategy' (2014) <https://openknowledge.worldbank.org/bitstream/handle/10986/16093/32813_ebook.pdf;jsessionid=E1143FC8E22CE481D929BE89CC14FAA4?sequence=5>.

[117] United Nations, 'Report of the Secretary-General on SDG Progress 2019: Special Edition' (n 6) 9.

[118] ibid 11.

[119] ibid 14.

[120] ibid 15.

goals, and the acknowledgement of the goals as key priority areas potentially drive the infrastructure needs of the states in question. As such, it comes as no surprise that the goal to build resilient infrastructure and promote inclusive and sustainable industrialization is recognised as a goal in and of itself.[121] The most recent progress report of the SDGs confirms this view by citing lacking infrastructure as one of the key impediments to achieving the SDGs, and the expansion and improvement of infrastructure as a key method to accelerate implementation of the SDGs.[122]

The infrastructure planning process is crucial in ensuring that infrastructure is developed in a manner that facilitates sustainable development. The planning involves a needs assessment, where policy makers identify gaps and needs that should be met by infrastructure. Of course, public participation requirements are instrumental in this regard, and are necessary to ensure that the correct needs are identified and addressed.[123] Furthermore, the administrative processes that back up these requirements are equally important in achieving the intended outcomes.[124] Infrastructure projects are often planned regionally, or transnationally, which highlights the need for regional institutions to be aligned in terms of sustainable development objectives.[125]

Under the SDGs, financial support for economic infrastructure in developing countries reached $59 billion in 2017, which was an increase of 32,5% from 2010.[126] While the

[121] ibid 18.
[122] ibid 37.
[123] Suharto Teriman, Tan Yigitcanlar and Severine Mayere, 'Social Infrastructure Planning and Sustainable Community: Example from South East Queensland, Australia' (2011).
[124] Luis Arroyo Jiménez, 'Infrastructure Planning in Spain - Public Participation and Legal Protection' (2014) 11 Journal for European Environmental & Planning Law 232.
[125] Rubinson (n 45).
[126] United Nations, 'Report of the Secretary-General on SDG Progress 2019: Special Edition' (n 6) 19.

progress is significant, it still does not bridge the infrastructure funding gap that persists in the developing world,[127] with states struggling to meet this need. The 2019 SDG progress report notes that urgent funding is needed for infrastructure in relation to water, sanitation, transportation, energy, irrigation and flood protection.[128] Furthermore, it is noted that development progress in today's rapidly changing world will be 'contingent on the ability to anticipate, prepare for and accommodate sudden changes', since '[s]hocks in one area spill over into impacts in others – weather related hazards are believed to be the biggest cause of direct disaster-induced economic loss'.[129] It is clear that development goals have limited value without the means to implement or achieve them. As such, parallel to the negotiations around the SDGs, the UN coordinated negotiations on financing for development, which resulted in the Addis Ababa Action Agenda (AAAA).[130]

The AAAA enjoyed support from inter-governmental organisations such as the IMF, the World Bank, and the World Trade Organization (WTO). There was much debate at the time around whether or not there should be formal links between the AAAA and the SDGs, as there were no formal links between previous similar initiatives.[131]

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[127] The Inter-Agency Taskforce on Financing for Development estimates that developed countries will still need approximately USD $20 trillion between 2015 and 2030. See United Nations Inter-agency Task Force on Financing for Development (n 32); Inter-Agency Task Force on Financing for Development, 'Report of the Inter-Agency Task Force on Financing for Development' (2018) <https://developmentfinance.un.org/sites/developmentfinance.un.org/files/Report_IATF_2018.pdf>; McKinsey Global Institute (n 32).

[128] United Nations, 'Report of the Secretary-General on SDG Progress 2019: Special Edition' (n 6) 35.

[129] ibid 37.

[130] United Nations, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (United Nations 2015) <https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf>.

[131] For example, there were no links between the MDGs and the Monterrey Consensus, which was a similar financing-for-development conference led by the United Nations in 2002.

Ultimately it was decided that the two initiatives will be linked, albeit to a limited extent.[132] A key priority of the AAAA, is to close the infrastructure funding gap, through investments in sustainable and resilient infrastructure that include transport, energy, water and sanitation.[133] To do this, the AAAA suggests that all financing sources should be considered – public, private, domestic, and international sources.[134]

The AAAA specifically calls on private investment in infrastructure. In paragraph 48 of the AAAA outcomes document it is stated that:[135]

> *We recognize that both public and private investment have key roles to play in infrastructure financing, including through development banks, development finance institutions and tools and mechanisms such as public-private partnerships, blended finance, which combines concessional public finance with non-concessional private finance and expertise from the public and private sector, special purpose vehicles, non-recourse project financing, risk mitigation instruments and pooled funding structures.'*

The message that private and blended financing, and perhaps PPPs in particular, could potentially be the answer to the financing shortfall reverberated across the development financing world. The World Bank and a number of other DFIs strongly

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[132] The AAAA was adopted three months ahead of the 2030 agenda, and is aimed 'to further strengthen the framework to finance sustainable development and the means of implementation for the universal post-15 development agenda'. The 2030 ASD in turn states that 'the AAAA supports, complements, and helps contextualize the [ASD]'s means of implementation targets'. Inter-Agency Task Force on Financing for Development, 'Addis Ababa Action Agenda: Monitoring Commitments and Actions - Inaugural Report' (United Nations 2016) 4.
[133] ibid 13.
[134] ibid.
[135] United Nations, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (n 130) 48.

promote the use of PPPs for infrastructure by providing guidance and resources on PPPs, helping governments set up PPP units and make decisions around PPPs, assisting governments in drafting PPP focused legislation and regulations, and of course, by providing funding for PPPs.[136] Summarily, the message from DFIs has been clear in recent years – the use of PPPs is a policy decision that would not only unlock private sector funds, but attract support from DFIs as well. Developing countries responded by preparing themselves for PPP investments. This includes amongst other things the adoption of PPP legislative and regulatory frameworks, that would make it easy for the private sector to invest in infrastructure, with relaxed regulatory frameworks and favourable economic environments.[137]

It is important to remember that infrastructure, and infrastructure aimed at development outcomes in particular, should serve the public. With this in mind, there are two important reasons why the state is ultimately responsible for the delivery of public services, such as infrastructure development. Firstly, many public services are tied to basic human rights, such as access to healthcare, education, and potable water. While others have roles and responsibilities in this regard, the state is still considered to be primarily responsible for the provision of these rights. This aspect will be discussed in more details in chapter 4. Secondly, since public services are closely

[136] The PPP Knowledge Lab, for example, was launched in 2015 by the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the Islamic Development Bank, and the World Bank Group. See World Bank Group, 'PPP Knowledge Lab' (2015) <https://pppknowledgelab.org/> accessed 25 March 2020; World Bank Group, 'Public-Private Partnership Legal Resource Centre: World Bank Group's Role in PPPs' (25 November 2019) <https://ppp.worldbank.org/public-private-partnership/overview/world-bank-group> accessed 25 March 2020. See also different materials and guidelines offered such as World Bank Group, 'Public-Private Partnerships in Infrastructure Toolkit: Informed Decision-Making' (World Bank Group 2016) <http://pubdocs.worldbank.org/en/982261479317855835/InfrastructureToolkit-Booklet-FINALWEB.pdf>. and The World Bank, 'Guidance on PPP Contractual Provisions' (n 68).
[137] See for example The Economist Intelligence Unit (n 64).

linked with essential services, it is highly problematic for the delivery of these services to be determined or driven by profit motives. Since the state is not necessarily driven by profit motives, it is well placed to deliver services or fulfil functions that may not yield financial profits. This notion, however, is strongly challenged when the private sector gets involved.

A central theme to this thesis, is the notion that decision-making around infrastructure development and service delivery should be informed by basic human needs, and that it is only through fulfilling these needs that true development outcomes are achieved. The private sector is largely focused on profit maximisation, and its involvement in PPPs is driven by similar motives. It is uncertain, at this point, to what extent the drive to maximise profits, and the need to deliver basic services, are reconcilable. As will be explored in more detail in the following chapter, the current data on PPPs show that the drive to make infrastructure development or service delivery financially viable (or profitable) to the private partner, often results in a disproportionate amount of risk being placed on the public partner.[138] This also leads to PPP projects that are much more expensive than the public alternative, lacking in quality because of the drive to cut costs, and potentially exclude those that cannot afford to use the facility or service.

As PPPs are touted as a means to accelerate infrastructure development, and development more broadly, it is important to ensure that these projects are undertaken in a manner that will lead to real development outcomes.[139] In other

[138] Bing and others (n 67).
[139] For example, if it is acknowledged that one of the primary development goals of developing healthcare infrastructure is to improve access to healthcare, it is important to ensure that healthcare infrastructure PPPs achieve this outcome, and do not in fact restrict access to healthcare by adding additional economic barriers. This example is elaborated on in Chapter 3, in the case study around the Queen Mamohato Memorial Hospital in Lesotho.

words, while additional financial considerations may be involved, at the core it is important to ensure that both public and private driven infrastructure serve the public, and contributes to development. It is clear from the SDGs that the development outcomes infrastructure investment seeks to achieve are much broader than economic growth, and thus much more in line with modern views of development than with traditional views of development. It is for this reason that PPP driven infrastructure projects should be approached using frameworks that include environmental and human rights aspects as well. This brings us to the question – to what extent can human rights and environmental law be used as frameworks to change the outcome of development activities, and in this case PPP driven infrastructure activities in particular?

The law and development movement

For decades, academics have explored the interaction between the law and development, and the ability of the law to improve development outcomes. This ultimately led to a body of knowledge that became known as 'law and development'.[140] The law and development movement is defined as a field that 'focuses on the socio-economic role of law in supporting development',[141] and is influenced by disciplines that include economic theory, development theory, politics, and the policies and practices of development organisations and IFIs.

Like development theory itself, and perhaps in parallel to it, the law and development movement has also evolved over the course of the past 60 years, and could be broadly categorised into three phases. The first phase of law and development was

[140] Garcia (n 21) 3.
[141] ibid.

strongly influenced by the work of Max Weber, and modernisation theory. According to modernisation theory, a modern economy requires a predictable legal system to facilitate political and economic development. This theory and its implications, however, controversially proposed that the only models to serve as bases for modern legal systems were found in the West.[142] This overemphasis on the role of Western legal systems, and the challenges to transposition it in the developing world, led to the first phase of the law and development fizzling out in the early 1970s.[143]

The second phase of the law and development was inspired by neo-liberal economic theories, and had a strong focus on economic growth and economic development. Similar to traditional views of development, it proposed that economic growth would automatically spread to other aspects of development. As a result, IFIs such as the World Bank and the IMF convinced states to implement a series of legislative and regulatory reforms that would supposedly lead to economic growth, and development more broadly.[144] These reforms are also known as structural adjustment policies (SAPs).

In addition, the IFIs promised to provide financial aid in exchange for the SAPs. Some of the areas that were included in the SAPs included trade and foreign investment, banks regulations, the liberalisation of financial markets, protection of intellectual property, improvement of courts systems, and the creation of alternative dispute resolution schemes.[145] The second phase of law and development was criticised for

[142] ibid.
[143] ibid 4; David M Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] Wisconsin Law Review 720; David M Trubek, 'Law and Development: Forty Years after Scholars in Self-Estrangement' (2016) 66 University of Toronto Law Journal 301.
[144] Muna Ndulo, 'The Democratization Process and Structural Adjustment in Africa' (2003) 10 Indiana Journal of Global Legal Studies 315, 364.
[145] Garcia (n 21) 5.

its excessive focus on market fundamentalism.[146] The movement was also mainly conceptualised and led by states from industrialised economies, which presented a number of challenges to the developing world.[147]

The third phase in the law and development movement is not so much a complete break from the second phase, but rather an expansion of it. Whereas some ideas around neo-liberal economic theory were preserved,[148] important role-players in the development space started pushing for more comprehensive understandings of development. In particular, the environmental movement played a key role in forming concepts such as sustainable development in anticipation of the UN Conference on Environment and Development, held in Rio de Janeiro in 1992.[149] A few years later the World Bank proposed the adoption of a Comprehensive Development Framework (CDF), which not only emphasised economic development, but also the promotion of the rule of law, democracy, and human rights.[150]

As such, the law and development movement acknowledged that, if there is a realistic chance for development to be influenced by the law, it would require legal reform in areas that include economic law, environmental law, and human rights law. It became clear that development is a multi-disciplinary concept, that permeates

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[146] ibid.
[147] ibid 6.
[148] Such as, for example, the strengthening of private law. See ibid.
[149] The Brundtland Commission, in many ways, paved the way with its 'Our Common Future' report that was published in 1987. See World Commission on Environment and Development (n 104).
[150] For an early analysis of the CDF, see Richard Cameron Blake, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development' (2000) 3 Yale Human Rights & Development Law Journal 158; James D Wolfensohn, 'The Comprehensive Development Framework' (The World Bank 2000) <http://documents1.worldbank.org/curated/en/208631583185352783/pdf/The-comprehensive-development-framework.pdf> accessed 21 September 2020.

several areas of law. At the international level, the areas of law related to development are often collectively referred to as international development law (IDL). The content of IDL, is therefore crucial in determining the extent to which the law will have an impact on development outcomes.

International development law

There are strong links between development policies and international development law (IDL), and these links are reflected in the way that different groups view IDL as a sub-category of public international law. For example, since economic growth is seen as the main objective under traditional views of development, the same proponents would argue that IDL should focus on international economic law issues. This includes international trade, finance, and investment, and in particular how these issues could be addressed from a legal perspective to stimulate economic growth, and consequently lead to development outcomes. Under traditional views of IDL, a lot of importance is attached to the sovereignty of the state as the primary subject of public international law. Consequently, under the traditional view, the state also has the final say over non-economic factors such as social, environmental and human rights considerations, and the way these factors are coordinated under domestic legal frameworks.

Modern views of IDL have different understandings from traditional views around the substantive content of IDL, the sovereignty of states, the relationship between international and domestic law, and the role that international human rights should play.[151] Regarding the substantive content, there are two key differences. Firstly,

[151] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 73.

modern views of IDL consider the state as one of many role-players in the context of development, while traditional views treat the state as the primary role-player. The significance in the modern view's approach lies in the fact that it challenges the very basis on which international law developed, which is to acknowledge states and international organisations as the only subjects of public international law. The modern view, however, acknowledges that private and non-state actors can also be subjects of public international law.[152] Secondly, as alluded to earlier, modern views of IDL are much broader than economic issues only, and therefore includes international environmental and human rights law as well.[153] It is important to note that, simply because modern views of IDL have a wider scope that includes international environmental and human rights law, it does not diminish the importance it attaches to economic law or economic issues.[154] It merely acknowledges the importance of environmental and social issues in addition to economic issues, and the need to internalise these issues.

Both traditional and modern views of IDL recognise the state as an important role-player in the context of development. Modern views, however, would hardly ever consider any issues as being exclusively within the state's domestic jurisdiction. Keeping with the broader, more holistic view of development, modern IDL would recognise and rely on the international community to play a role in the protection of those that stand to be adversely impacted by development activities. Traditional views of IDL also clearly distinguish between domestic and international law, and primarily focus on the state's sovereign right to regulate matters at the domestic level

[152] This notion is discussed in more detail in Chapter 4.
[153] Bradlow, 'Differing Conceptions of Development and the Content of International Development Law' (n 17) 74.
[154] ibid 76.

as it sees fit. Modern views of IDL, however, is premised on a form of transnational law in which the boundaries are often blurred between the two.[155]

Human rights based approaches to development

Let us assume for the moment there is agreement on the fact that infrastructure, including infrastructure developed through PPPs, need to be developed with human rights and other non-economic impacts in mind to ensure real positive development outcomes. Let us also assume, that the law can serve as a mechanism to ensure these outcomes. The question that remains, however, is how international human rights law can be operationalised in a manner that would ensure these outcomes? For a number of years, development agencies and MDBs have been asking this question, in the context of poverty reduction, but also in the context of development more broadly.[156]

Poverty has played an important role in linking human rights and development. While poverty is commonly understood to refer to a lack of means, it is also both the cause and consequence of the non-fulfilment of all categories of human rights.[157] Poverty reduction has been a major theme for discussion in the context of development in recent decades, and an important focus for development efforts since the early 2000s.[158] Summarily, the idea is that poverty cannot be addressed without addressing

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[155] ibid 81.
[156] UNDP, 'Operationalizing Human Rights-Based Approaches to Poverty Reduction: Interim Pilot Project Report' (2007).
[157] ibid 7.
[158] Around the dawn of the new millennium, poverty reduction became the main goal of development efforts, and served as the basis of the MDGs, as well as the World Bank's Comprehensive Development Framework. It also served as the main element in the Poverty Reduction Strategy Papers (PRSPs) required by the World Bank and IMF in order to be considered for debt relief. See in this regard United Nations, *UN Millennium Project | About the MDGs* (n 110); The World Bank, 'World Development Report 2000/1: Attacking Poverty

development, and *vice versa*. Against this backdrop, it makes sense to focus development efforts on the fulfilment of human rights, if the goal is poverty reduction. Human rights based approaches to development (HRBAD), represents a crucial step in the that direction.

HRBAD can be defined as 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.'[159] In other words, under a HRBAD, human rights is considered both a means and an end – it is through the fulfilment of human rights that true development outcomes are achieved, and thus the end goal of development should be to promote, protect, respect and fulfil human rights. As pointed out by Broberg and Sano, while it is possible to find a general definition for HRBAD, it is important to recognise that no common approach exists in implementation. Rather, there are many, which is why we refer to 'human rights based *approaches* to development' above.[160] HRBAD generally prioritise human rights principles that include universality and inalienability, indivisibility, inter-dependence and inter-relatedness, accountability and the rule of law, participation and inclusion, and equality or non-discrimination.[161]

The demand for linking human rights and development policy was put forward at the World Conference on Human Rights in 1993.[162] It is important to note that, while HRBAD

Approach and Outline' <https://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/approutl.pdf>; World Bank Group, 'Comprehensive Development Framework Country Experience: March 2019 - July 2000'; Fukuda-Parr and Hulme (n 27); Sen, *Development as Freedom* (n 18); Olsaretti (n 20).

[159] Broberg and Sano (n 30) 669.

[160] ibid.

[161] ibid; UNDP (n 156) 2.

[162] Brigitte I Hamm, 'A Human Rights Approach to Development' [2001] Human Rights Quarterly 1005, 1007.

refer to all human rights, and refers to the interrelation and interdependence between different human rights, special attention is paid to economic and social rights in the context of development policy.[163] The formulation of HRBAD was in part fuelled by debates around a right to development (RTD), which should not be confused with HRBAD. The RTD was discussed for many years, and was finally adopted in The Declaration on the Right to Development at the UN General Assembly in 1986.[164]

The RTD is described as an individual right, but also as a collective right, with the collective aspect referring broadly to peoples.[165] Essentially, the RTD is seen as an inalienable right by virtue of which everyone are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all rights and freedoms can be realized. The content of the RTD has been debated amongst governments, scholars and human rights activists, not least because of the relatively unclear nature of the RTD, and the apparent problems around its justiciability.[166] Criticisms against the RTD include that it does not add anything substantive to the international human rights framework, that there are no identifiable duty-bearers, and that it is not enforceable.[167] Proponents of the RTD, however, argue that the RTD

[163] ibid 1006.
[164] UN General Assembly, 'UN Declaration on the Right to Development A/RES/41/128.' (1986) A/RES/41/128 <http://www.un.org/documents/ga/res/41/a41r128.htm> accessed 30 January 2018.
[165] Leon E Irish, 'The Right to Development versus a Rights-Based Approach to Development' (2005) 3 International Journal of Civil Society Law 6.
[166] The main concerns with the justiciability of the RTD, is around the apparent lack of clarity of duty bearers, or obligations. See in this regard ibid; ES Nwauche and JC Nwobike, 'Implementing the Right to Development' (2005) 2 Sur - International Journal on Human Rights 23.
[167] Irish (n 165) 6.

involves all of the rights under the international bill of rights, and that the mere fact that it is hard to identify a duty-bearer, does not mean that it is not a right.[168]

There are a number of important characteristics in the operationalisation of the RTD, an in particular through HRBAD. Firstly, HRBAD are rights based, and therefore do not consider development efforts as charity or voluntary actions, but rather as the fulfilling of obligations. This leads to the second characteristic of HRBAD, which is that rights can only be asserted if there are corresponding obligations, and HRBAD recognise that there are certain duty bearers when it comes to development. These rights are primarily exercised against the state, though we will also later consider situations where rights are exercisable against non-state actors.[169] Thirdly, there is a recognition in HRBAD that discrimination and inequality are amongst the most important causes and consequences of poverty, and as a result, non-discrimination and access to services and facilities are very important elements of HRBAD.[170]

IFIs, DFIs, and other international organisations have been grappling with HRBAD, and questions around how to institutionalise and operationalise HRBAD within their organisations, for some time now.[171] Some of the DFIs that have committed themselves to adopting HRBAD include the African Development Bank, the Asian Development Bank, the European Investment Bank, the European Bank for

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[168] ibid.

[169] For more on the human rights obligations, see Chapter 4 of this thesis, or as general reference Clapham (n 48); Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights' (2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

[170] Broberg and Sano goes on to highlight three other characteristics of HRBAD that they deem important. However, while these are undoubtedly important aspects, the author of this thesis does not agree that these should be highlighted in the same context as those raised above. See Broberg and Sano (n 30) 668.

[171] Erich Vogt, 'Establishing a Rights-Based Approach to International Development' (2015) 45 Environmental Policy and Law 180, 181.

Reconstruction and Development, and the UN Development Group.[172] The UN Development Group comprises of 32 UN funds, programmes, agencies, departments and offices that play a role in development.[173] In 2003, the UN Development Group committed to a common understanding of HRBAD, under which all development programmes, policies and technical assistance should further the realisation of human rights as laid down in the International Bill of Rights.[174]

Some of the methods put forward for the implementation of HRBAD include the development of action oriented human rights policies, human rights due diligence, human rights impact assessments, and the tracking of and reporting on the implementation of these policies. For purposes of this thesis, the focus will be on the use of human rights impact assessments (HRIAs) as a way of operationalising HRBAD in the context of infrastructure PPPs. As will be illustrated in the following chapters, the main reason for the use of HRIAs, is that it potentially offers solutions to some of the most pressing challenges in relation to infrastructure PPPs, and more specifically, the challenges associated with achieving real development outcomes . The next section will give a brief introduction to HRIAs, and explain why it could be a useful tool in operationalising human rights in the development context, and even more so in the context of infrastructure.

Human rights impact assessments in infrastructure development

The use of HRIAs can be useful in improving broader development, for a number of reasons. Three broad areas in which it can be particularly useful, are compliance,

[172] ibid.
[173] ibid.
[174] ibid.

policy making, and accountability. While each of these areas will be discussed in more detail below, it is important to remember that HRIAs is proposed as a tool in the context of this thesis to ensure that PPP driven infrastructure also consider non-economic aspects, and therefore achieve sustainable development outcomes.[175] As stated earlier, applying a human rights framework to infrastructure development could be useful in ensuring that infrastructure meet the basic needs of people, in identifying potential adverse human rights impacts, and also to identify the relevant duty bearers that are responsible for infrastructure development and basic service delivery.

HRIAs can play an important role in pointing out real and potential adverse human rights impacts, and encourage decision-makers to mitigate these adverse impacts. All states have international human rights obligations. As will be discussed more in Chapter 4, these obligations could emanate from a number of international sources, and manifest in domestic constitutions and legislative frameworks. By identifying policies that potentially infringe on human rights, HRIAs have the capacity to prevent states from breaching their human rights obligations.[176] Alternatively, HRIAs can also be used to ensure that states meet their human rights obligations. This could be particularly useful in the context of policy-making, thought that will be discussed below. HRIAs have been used successfully in the context of legislation drafting,[177] where the purpose is to examine the likely consequence of legislation that is yet to be adopted. Since multiple laws and regulations play a role in the development of infrastructure, it would be useful to apply HRIAs to the laws and policies to ensure that

[175] For a detailed discussion on the different types of impact assessment, and how they relate to HRIAs, see Chapter 5.
[176] De Beco (n 54) 145.
[177] Also often referred to as 'regulatory impact analysis assessment'. See ibid.

they don't breach any human rights obligations, and are enforced in a manner that obligations are met.

HRIAs can also be used to integrate human rights into policy making.[178] By applying HRIAs to the policy-making process, it is possible to avoid policies that could potentially have adverse impacts on human rights, and ensure policies that fulfil or realise human rights. HRIAs provide two advantages in particular. Firstly, HRIAs improve the quality of policies, as it forces an in-depth analysis of the policy at hand. It requires policy makers to carefully consider the objectives of the policy, as well as alternative means for achieving those objectives. Secondly, HRIAs serve to mainstream human rights in a certain policy area. The purpose of mainstreaming, is to integrate a specific goal into the policy-making process. This is also potentially a powerful educational tool, through which legal and non-legal policymakers are forced to consider human rights in the course of their work. A cumulative advantage of course, is that this could in turn foster a common understanding of human rights and corresponding obligations within the public administration.

Another area in which HRIAs can add tremendous value, is accountability.[179] As will be discussed in more detail in the next chapter, accountability is particularly problematic in the context of privatisation, and PPPs. This is mainly because, whereas there is a certain expectation that the state is responsible for the provision of infrastructure and delivery of basic services, privatisation potentially muddies the water significantly in terms of duties and obligations, and consequently who to hold

[178] ibid 146.
[179] ibid 147.

accountable. By applying HRIAs to a project,[180] it is possible to identify relevant duty bearers, and ensure that the human rights obligations of the state is met, even when transferred to a private entity. Chapter 4 deals with this aspect in more detail.

Conclusion

At this point, it is perhaps worth bringing all the discussion points together, and reiterate what the objectives of this chapter are, bearing in mind the rest of the thesis that follows. The chapter started off by discussing development as a broad concept, and how it evolved over time. While traditional notions of development prioritised economic growth, modern understandings of development tend to take a much broader view of development, and include social and environmental aspects as well. One of the most relevant modern views of development at the moment, is encapsulated in sustainable development, as it enjoys great support from the international community and international organisations. Sustainable development served as the basis for the SDGs, which is poised to drive the global development agenda for the next decade at least.

Against this backdrop of sustainable development, two other important factors were discussed that are separate, but related. The first, is development funding, which has often been cited as a big impediment to development progress.[181] The second factor, is infrastructure, which is also considered an important development driver, but an impediment if not addresses adequately. Infrastructure projects tend to be very expensive financial undertakings, often not within the financial reach of developing

[180] Important to use HRIAs at each stage of the project, to ensure that obligations are highlighted and met in various different contexts. For more on this, see Chapter 5 of this thesis.
[181] United Nations, 'Report of the Secretary-General on SDG Progress 2019: Special Edition' (n 6).

countries. This gives rise to a cycle where a lack of funding leads to a lack of infrastructure development, which results in slow development and economic growth, which again does not help the public budget. To try and break this cycle, international organisations and states have refocused their attention on the potential use of private funding in driving infrastructure development in particular, and development more broadly.

It is problematic, however, that privatised infrastructure schemes such as PPPs necessarily focus on economic gains and financial returns – at the very least for the private partners. And while economic growth is an important aspect of development, there is a real risk that the sole prioritisation of economic growth will return the focus to traditional views of development, which is not conducive to achieving the SDGs. A potential solution to this problem, is the application of the international human rights framework, in an attempt to bring social impacts to the fore in a manner that is clear, enforceable, and with proven results in other spheres. The chapter briefly explored the notion that the law can be used to ensure better development outcomes, and how human rights in particular can be used as a basis for development. Finally, the chapter suggests that human rights impact assessments can be used as a tool to operationalise human rights, and used to achieve better development outcomes in PPP driven infrastructure projects.

The involvement of the private sector in infrastructure projects through PPPs is a complicated legal process. Amongst other things, complications arise from the sharing of risks and responsibilities between partners, which is a core characteristic of PPPs. The definition of PPPs is also differently understood in different regions, or even different contexts. The next chapter will give a broad overview of PPPs and its complexities, and explain why these complexities could lead to outcomes that are

not conducive to sustainable development, and why a stronger focus on human rights could potentially help.

Chapter 3: An overview of Public Private Partnerships

> *'[We are seeing] the establishment of a third sector, a [p]ublic sector, which we hope to distinguish from, on the one hand, the state sector and, on the other hand, the wholly private sector…For purposes of our argument, then, we offer the following working definition of the third, public-service sector. It is the sector of the economy in which services or activities, recognized as public in the sense that the State is seen ultimately responsible for the provision of them, are nevertheless not provided by the State itself but by institutions which are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctively associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy.'*[182]
>
> *Mark Robert Freedland & Silvana Sciarra*

Introduction

The involvement of the private sector in large-scale development projects, including infrastructure, is not a new concept. For decades, the private sector has been involved in different ways - from acting as a service provider to the state or other public developers, in relation to very specific aspects of infrastructure projects, to being the sole driver, developer and implementer of infrastructure projects. The involvement of the private sector in infrastructure development or public service delivery is often considered or referred to as 'privatisation'. However, privatisation is a complex concept, and may have many different interpretations, depending on the circumstances and application. The term implies that something, either an asset or

[182] Mark Robert Freedland and Silvana Sciarra (eds), 'Law, Public Services and Citizenship: New Domains, New Regimes?', *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Oxford 1998) 1 <http://cadmus.eui.eu/handle/1814/23565>.

service, that used to be in the control of a public entity is transferred to the private sector, either wholly or partially. It is perhaps more appropriate to think of privatisation as a spectrum of different options and arrangements, and acknowledge that each of the different privatisation arrangements will have different implications, especially in relation to risk and accountability.

The involvement of both the state and the private sector in the economy, and functions such as service delivery and infrastructure development, is a debate deeply rooted in political ideology. For decades there have different ideas around the structuring of the global economy, where some states decided to create an environment that would allow for the market to operate freely[183] to the greatest extent possible, while other states decided to take a much more state-centric approach to economic models. Since then, a number of other political economic theories have developed, with different views on the extent to which the state and the private sector should be involved in economic activities. Since both free market and state-centric approaches have been criticised greatly for apparent shortcomings and failures, the focus has shifted to what is known in some circles as the 'third way' - an attempt to focus on and harness the positive aspects of the free market capitalism, and state involvement for the benefit of society at large.[184]

It is against this backdrop that PPPs have gained popularity in recent years.[185] It is promoted by multi-lateral development banks and international organisations as a model that could potentially deliver the benefits of free market approaches and the capital investment of the private sector, but also the involvement of the state as

[183] In this context 'freely' means without any restrictions, including state regulation.
[184] Raymond J Friel, 'Blair's Third Way - Thatcher's Enduring Legacy' (2000) 48 University of Kansas Law Review 861, 861.
[185] ibid 884.

regulator, ensurer, and the primary protector of the public interest. To understand why PPPs would be any different from previous economic models that feature privatisation, it is important to understand the differences between PPPs and other forms of privatisation. Since many of the ideas discussed in this chapter may be perceived as quite abstract, the chapter will start by briefly explaining the resurgence of PPPs, and then provide an example of what an infrastructure PPP looks like. Following the case study, the chapter will give a brief overview of the history and definitions of PPPs. It will then look at the arguments in favour of, and against, the use of PPPs for infrastructure development and service delivery. The chapter will also explore the legal structuring of PPPs, different models of PPPs, existing guidelines on PPPs, as well as take a look at the different PPP project phases and the levels at which projects may present environmental and social impacts during each of those phases. Throughout the course of the discussions, references are made to the case study, in an attempt to provide additional context and understanding.

The resurgence of PPPs

The involvement of the private sector in infrastructure development dates back hundreds of years. In the USA, for example, private sector involvement in road development stretches back to the 1790s, with the development of the Philadelphia and Lancaster Turnpike in Pennsylvania.[186] Other non-state actors, such as the Catholic Church, have also played an important role in the development of social infrastructure and service delivery.[187] However, the private sector's involvement in

[186] Engineering National Academies of Sciences, *Public-Sector Decision Making for Public-Private Partnerships* (2009) <https://www.nap.edu/catalog/13901/public-sector-decision-making-for-public-private-partnerships> accessed 3 July 2018.
[187] The earliest Catholic schools can be traced back to the 1600s, and the Catholic Church still operates the largest non-government education network in the world.

infrastructure projects fluctuated over the years, as the provision of public infrastructure and services increasingly considered to be a function of the state, with an overarching goal to serve the public.

Immediately after World War II, with the dawn of multilateralism and the regulation of the international monetary and financial order through the Bretton Woods institutions, development was very state-driven. Western and other capitalist states involved themselves much more in the economy through nationalisation and regulation than ever before.[188] It was only in the 1980s under the leadership of Margaret Thatcher in the United Kingdom (UK) and Ronald Reagan in the USA that a more explicit emphasis on and involvement of the private sector in service delivery and infrastructure once again became the preferred official economic policy.[189] Thatcher's successor, John Major, carried forward the legacy of privatisation and adopted the Private Finance Initiative (PFI) in 1992, thus paving the way for PPPs. From there PPPs spread to most corners of the world, in part as a result of its promotion and support by multilateral financial institutions.

Over the past twenty years, the World Bank has played a significant role in promoting and supporting work around PPPs. The Banks's involvement is both upstream, in terms of policy making and institutional issues, as well as downstream in terms of the financing and execution of projects, and it engages and works with both the public and private sectors.[190] From 2002 to 2013 the Bank's financial support to PPPs increased threefold, from US$ 0.9 billion to US$ 2.9 billion, and its support is expected

[188] Rapley (n 16).
[189] Robert Poole, *Ronald Reagan and the Privatization Revolution* (2004) <https://reason.org/commentary/ronald-reagan-and-the-privatiz/> accessed 17 May 2018.
[190] Romero (n 41); Independent Evaluation Group, 'World Bank Group Support to Public-Private Partnerships: Lessons from Experiences in Client Countries, FY02-12' (2014) 93629.

to increase more in coming years.[191] This trajectory is also reflected in other financial institutions, such as the African Development Bank (AfDB). Together with the African Union Commission (AUC) and the New Partnership for Africa's Development (NEPAD), they have launched initiatives such as the Programme for Infrastructure Development in Africa (PIDA), and the African Strategic Infrastructure Initiative (ASII), all in support of the use of PPPs in infrastructure development.

The World Bank, often through the its private sector lending arm, the International Finance Corporation (IFC), directly offers support to PPPs across the globe. Since infrastructure is often most lacking in low- and middle-income countries (LMICs), the IFC has been involved in a number of PPPs in LMICs such as India, South Africa, Brazil, and Lesotho. Whereas involvement by and support from the IFC is aimed at improving the infrastructure in these countries, LMICs often lack the capacity and resources to design, develop, and implement successful PPPs. One such case, is that of the Queen Mamohato Memorial Hospital (QMMH) in Lesotho - a well-publicised PPP that has received attention from all over the world. The QMMH case illustrates the impacts of PPPs on different levels (economic, social, and political), and provides insight into the intricate relationship between the different partners in a PPP. It also highlights some of the complexities around the involvement of different domestic and international role players. The following section provides an overview of the QMMH project, and sets the backdrop for the rest of the chapter.

[191] Romero (n 41); Independent Evaluation Group (n 190).

The Queen Mamohato Memorial Hospital

Lesotho is a small country, completely surrounded by South Africa, with a population of just more than 2 million people.[192] The Lesotho healthcare system is mainly funded by the state, with around 11% to 13% of the national budget going towards healthcare.[193] In 2000 the government of Lesotho decided to look at ways to replace the Queen Elizabeth II hospital (QE2), which was the main referral hospital based in the capital of Lesotho, Maseru. According to reports, the reasons to replace QE2 included that the QE2 was dilapidated, poorly managed with staff shortages, and an overall lack of quality service delivery.[194] As such, the government conducted feasibility studies, and after exploring different models, decided to proceed with a PPP-driven project as a replacement solution.

The Government of Lesotho initiated a tender process in January 2007, aimed at finding the right partners to take the PPP forward, which was followed by a second request for tenders in October 2007.[195] Only two consortia, anchored by South African private hospital groups Netcare and Life Healthcare, participated in the procurement process. The project was finally awarded to the Tšepong consortium led by the Netcare group to design, build, part-finance and operate the hospital. The project also included the refurbishment and re-equipment of three 'filter' clinics, aimed at

[192] PWC and UCSF Global Health Sciences: The Global Health Group, 'Health System Innovation in Lesotho: Design and Early Operations of the Maseru Public-Private Integrated Partnership' (2013) 1 <https://globalhealthsciences.ucsf.edu/sites/globalhealthsciences.ucsf.edu/files/pub/pshi-lesotho-ppip-report.pdf> accessed 7 September 2020.
[193] Mark Hellowell, 'Are Public-Private Partnerships the Future of Healthcare Delivery in Sub-Saharan Africa? Lessons from Lesotho' (2019) 4 BMJ Global Health 4; UNICEF, 'Lesotho Health Budget Brief - Fiscal Year 2018/ 19' (2019) <https://lesotho.un.org/sites/default/files/2019-10/Lesotho%20Health%20Budget%20Brief%202018-19.pdf> accessed 20 September 2020.
[194] PWC and UCSF Global Health Sciences: The Global Health Group (n 192).
[195] Hellowell (n 193) 4.

managing referrals to the new hospital. The new hospital would be free for patients, with a small co-payment for some services, 90% of which would transfer to the Lesotho Ministry of Health. The contract further specified a minimum and maximum treatment of 16 500 – 20 000 inpatients and 258 000 – 310 000 outpatients per year,[196] with an additional payment from the Government of Lesotho of approximately $1 140 USD per patient if these numbers are exceeded.

It should be noted that the project proposed at the start of the procurement process differed greatly from the project that was eventually agreed to, in a number of important ways.[197] Firstly, whereas the initial capital expenditure was estimated at approximately $60 million USD, the capital expenditure was eventually estimated around $140 million USD at financial close. Secondly, the initial plan was for the project to be 80% publicly funded, and only 20% privately funded. At financial close in March 2009, with the increased estimated capital expenditure, the project was only 34,3% publicly funded, and 65,7% privately funded. And thirdly, while the Government of Lesotho indicated in the October 2007 request for bids that it could afford a maximum unitary fee of $21,65 million USD per year, this amount rose to $30,67 million per year during the course of the negotiations.

The contract required both the government and Tšepong to contribute the capital costs upfront. The government provided $48 million USD, with the remaining $92 million USD coming from private financing. The bulk of the private finance was made up of a loan by the Development Bank of Southern Africa (DBSA), at an annual interest rate of 11,65%, with Netcare and other local investors providing the rest. Netcare was the

[196] The main difference between inpatients and outpatients, is that inpatients are patients that have been formally admitted to a hospital, whereas outpatients are typically not formally admitted to hospital.
[197] Hellowell (n 193) 4.

largest individual shareholder. At the time of signing the contract, the forecasted internal rate of return on shareholder capital was estimated at 25,2%, with the bulk of the money coming from the government. To put this into perspective, the average interest on government debt in 2011/ 2012 was around 0,6%. As such, the weighted rate of return was far higher than the interest would have been if Lesotho relied on conventional public funding methods.[198]

The three filter clinics opened in May 2010, and the new QMMH opened in October 2011. According to the contract, the Lesotho Ministry of Health (LMoH) was allowed to monitor the performance of the QMMH, as well as the number of inpatients and outpatients treated. In practice, however, the LMoH did not have the capacity to monitor the performance, with only two full-time staff having to oversee activities that amounted to 52% of the entire health budget expenditure for 2015.[199] As a result, many of the payment mechanisms in the contract were made redundant, including the ability of the government to impose penalties in the event of underperformance. Nonetheless, while the redundancy of the payment mechanisms may have resulted in severe financial losses for the government, QMMH still managed to deliver high quality healthcare, mainly due to the requirement to comply with the criteria set out by the Council for Health Service Accreditation of Southern Africa.

In addition to the fact that the Government of Lesotho decided to proceed with the project despite the substantial increases in capital expenditure and annual unitary fees, the costs to the government continued to increase even beyond the costs forecasted at financial close, for a number of reasons. Firstly, the unitary fee was linked

[198] PWC and UCSF Global Health Sciences: The Global Health Group (n 192); Hellowell (n 193).
[199] PWC and UCSF Global Health Sciences: The Global Health Group (n 192); Hellowell (n 193) 4.

to inflation, and increased by 68% due to indexation, from $30.67 million USD to $52,73 million USD. Secondly, the treatment of inpatients and outpatients far exceeded expectations,[200] resulting in large additional payments. Thirdly, the Government of Lesotho has not been able to pay the unitary fees on time, which resulted in additional interest and penalty payments. Before long, the Government of Lesotho found itself in dire financial straits when it came to honouring the contract.

Nonetheless, the experience of the QMMH PPP is mixed. As referred to above, despite the challenges, the QMMH managed to deliver relatively high quality healthcare services, especially in comparison with its predecessor, the QE2. According to the UN Economic Centre for Europe (UNECE) International PPP Centre of Excellence, the QMMH also impacted and progressed the SDGs in several positive ways:[201]

a) It promoted SDG 3, which is focused on good health and wellbeing, by improving preventative services in primary care, promoting good health, and wellbeing;
b) It promoted SDG 5, which is focused on gender equality, by involving women in the design of the project, which improved maternal healthcare in particular;
c) It promoted SDG 9, which is focused on industry, innovation and infrastructure, by putting innovative and improved healthcare infrastructure in place;
d) It promoted SDG 10, which is focused on reducing inequality, by 'boosting' primary care, and establishing clinics in previously under-served communities;[202]

[200] In 2013, for example, the patient numbers exceeded the forecasted numbers by 25%.
[201] UNECE, 'PPP Hospital in Lesotho' (*UNECE International PPP Centre of Excellence*) <https://www.uneceppp-icoe.org/people-first-ppps-case-studies/ppps-in-health/ppp-hospital-in-lesotho/> accessed 19 September 2020.
[202] It is unclear, however, how the QMMH managed to achieve this, since the hospital was built in Maseru, and the filter clinics remained where they were. Also, all indications are that

e) It promoted SDG 16, which is focused on peace, justice, and strong institutions, by improving and strengthening healthcare services, and improving infant mortality rates; and
f) It improved SDG 17, which is focused on partnerships, by modernising the facilities and improving access to healthcare in Lesotho.

UNECE further claims that the QMMH PPP followed a 'people-first' approach by linking economic effectiveness with positive impacts on people, by increasing access to essential services, and being a project that is easily scalable or replicable in other locations.[203] Doctors at the QMMH are also quite vocal about the improved working conditions, compared to the working conditions experienced at the QE2.[204]

While the QMMH managed to deliver relatively high-quality healthcare services, it is not clear whether these are a direct result of the PPP model that was followed, and the challenges associated with the QMMH PPP are numerous. The effect of the exorbitant costs of the project is that the Government of Lesotho has had to channel resources towards the project away from other healthcare services, especially primary services in other parts of the country that serve an estimated 75% of the population.[205] In 2019 the doctors at the Tšepong hospital accounted for almost half of the medical doctors in Lesotho.

The financial predicament that the Government of Lesotho found itself in as a result of the QMMH PPP became clear soon after the hospital opened its doors. In 2014 a

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the QMMH did not improve primary care, and in in fact diverted resources away from the bulk of the primary care system. See Hellowell (n 193) 6.

[203] UNECE (n 201).

[204] Paul C Webster, 'Lesotho's Controversial Public-Private Partnership Project' (*The Lancet*, 14 November 2015) <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)00959-9/fulltext> accessed 7 September 2020.

[205] Hellowell (n 193) 5.

report was written by Oxfam that highlighted a number of key concerns with the project.[206] Amongst other things, the Oxfam report highlighted the fact that the QMMH hospital, which was supposed to replace the QE2 and cost roughly the same to operate, already costed the government three times what the QE2 costed, which in turn led to a projected 64% increase in government health spending. Of the increased spending, 83% was projected to go towards the QMMH PPP. The report further noted that the cost of additional patients were so high, that the Government of Lesotho felt the need to consider alternative solutions, such as building another hospital.[207]

The World Bank responded to the Oxfam report by defending the QMMH PPP.[208] Amongst other things, the World Bank pointed out that the QMMH is the only national tertiary hospital in Lesotho, and could therefore be expected to consume a significant portion of the national healthcare budget. In fact, in 2017 the World Bank argued that the data suggested that 'the cost trajectory was within the norm and on par with the share of the services provided by the hospital'.[209] Despite the challenges associated with the QMMH PPP, the World Bank is currently promoting this model for healthcare provision in countries like Myanmar, Nigeria, and Tunisia.[210] Other IFC-assisted

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[206] Oxfam, 'A Dangerous Diversion: Will the IFC's Flagship Health PPP Bankrupt Lesotho's Ministry of Health?' (2014) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/bn-dangerous-diversion-lesotho-health-ppp-070414-en_0.pdf> accessed 7 September 2020.
[207] The Government of Lesotho announced in its 2014 budget speech that it considered building another hospital, although it doesn't seem to have followed through with the plan.
[208] The Post, 'World Bank Defends Tšepong' (*The Post*, 20 April 2018) <https://www.thepost.co.ls/news/world-bank-defends-tsepong/> accessed 20 September 2020. The World Banka also commissioned a study of the QMMH, which was done by Boston University. The study supports the views of the World Bank stated above. For more information, see Nathalie McIntosh and others, 'A Public-Private Partnership Improves Clinical Performance In A Hospital Network In Lesotho' (2015) 34 Health Affairs 954.
[209] The Post (n 208).
[210] Webster (n 204).

healthcare PPPs in low- and middle-income countries that are used as success stories include a diagnostic imaging clinic in Andhra Pradesh, India, and the Hospital do Subúrbio in the Brazilian state of Bahia.[211]

Some important takeaways from the QMMH are that LMICs often do not have the capacity to negotiate PPPs that share risks and rewards equally, that is financially feasible, to monitor PPPs adequately, and ensure that there is accountability where needed.[212] In 2020, the QMMH takes up an estimated 30% of the national healthcare budget, and is plagued by infighting between the PPP partners.[213] Netcare applied to the Lesotho High Court in early 2020 to try and save what is described as a 'floundering public-private partnership', by asking the Court to intervene in the hospital consortium's finances.[214] According to Netcare, the Government of Lesotho owes Netcare 'hundreds of millions' for services provided at the QMMH.[215]

The QMMH PPP case study illustrates a number of points that are discussed in more detail in this chapter. Over the course of the following sub-sections, the QMMH is used to explain different conceptual issues, as well as challenges and potential benefits associated with infrastructure PPPs. In instances where the QMMH is not relevant to the discussion, the points are hypothetically discussed against the backdrop of the QMMH PPP.

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211 ibid.
212 Oxfam (n 206); Webster (n 204).
213 Pascalinha Kabi, 'Why One Hospital Takes up Almost 30% of This Country's Entire Health Budget' *Bhekisisa: Centre for Health Journalism* (6 February 2020) <https://bhekisisa.org/health-news-south-africa/2020-02-06-netcare-looks-to-lesotho-high-court-to-intervene-in-floundering-public-private-hospital/> accessed 7 September 2020.
214 ibid.
215 ibid.

Defining PPPs

The PPP Reference Guide, which aims to bring together the most relevant and authoritative resources on PPPs, defines PPPs as:[216]

> *'A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance'*

The United States Department of Transportation defines PPPs as:[217]

> *'...a contractual agreement formed between public and private sector partners, which allow more private sector participation than is traditional. The agreement usually involves a government agency contracting with a private company to renovate, construct, operate, maintain, and/ or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional rights in determining how the project or task will be completed.'*

Akintoya defines PPPs as:[218]

> *'...contractual agreement of shared ownership between a public agency and a private company, whereby, as partners, they pool resources together and share risks and rewards, to create efficiency in the production and provision of public or private goods'*

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[216] The World Bank and others, 'PPP Reference Guide Version 3' (2017) <https://library.pppknowledgelab.org/documents/4699/download>.
[217] US Department of Transportation, 'Report to Congress on Public-Private Partnerships' (2004).
[218] Akintoye (n 8).

There are many different definitions and interpretations of PPPs, and what exactly a PPP entails. It is often raised in the context of privatisation, since the private sector is essentially involved in something that is perhaps understood to traditionally belong in the realm of the state, or some would argue, supposed to be provided by the state. Privatisation, however, should be viewed as a spectrum, with government provision of products and services at the one end, and a complete divestment of all responsibilities to the private sector at the other end.[219] Some argue that PPPs is not a form of privatisation, mainly due to the fact that government still has a direct role in operations and ultimately retains responsibility in the context of PPPs, which is arguably not the case with privatisation.[220] Others see PPPs as a mix of public and private, that fall somewhere in the middle of the privatisation spectrum, and could thus indeed be described as a form of privatisation.[221]

A number of PPP guidelines have emerged in recent years, developed by international organisations and multi-lateral development banks.[222] While many of the existing guidelines on PPPs acknowledge that PPPs exist somewhere in the middle of the privatisation spectrum, the guidelines differ on what exactly constitutes a PPP. The OECD guidelines, for example, offers a relatively narrow conception of PPPs, and proposes that concessions should not be included. Other guidelines, such as those

[219] National Academies of Sciences (n 186); Geert Dewulf, Anneloes Blanken and Mirjam Bult-Spiering, *Strategic Issues in Public-Private Partnerships.* (John Wiley & Sons 2011).
[220] Darrin Grimsey and Mervyn K Lewis, 'Are Public Private Partnerships Value for Money?: Evaluating Alternative Approaches and Comparing Academic and Practitioner Views' (2005) 29 Accounting Forum 345.
[221] Leavitt, W and Morris, J.C., 'Public Works Service Arrangements in the 21st Century: The Multiple-Sector Partnership as an Alternative to Privatization' (2007) 12 Public Works Management and Policy 325.
[222] See the 'PPP Tools' section in the PPP Knowledge Lab website at https://pppknowledgelab.org/tools/ppp-tools-0?ref_site=kl (accessed 10 May 2020).

developed by the European Commission and others, use a broader definition of PPPs focusing on the partnership element between public and private entities.[223] Some of the guides[224] exclude information sharing mechanisms, voluntary initiatives, joint research and innovation projects, and financial leases, as they reportedly do not transfer or share enough risks between the different partners.

Nonetheless, the definitions listed above are useful at illustrating what the defining characteristics of a PPP are. Some of these defining characteristics include the sharing of authority and responsibility, an investment from both or all parties involved, the sharing of risk and liability, and the fact that all parties stand to benefit from the partnership.[225] Current guidelines on PPPs describe the defining features to include a long term contract between a public contracting authority and a private sector company, the transfer of risks to the private sector, specification of project outputs rather than inputs, the application of private financing, and payment to the private sector for services delivered.[226] Another prominent feature of PPPs, albeit not necessarily a defining one, is that a PPP often involves a number of different entities or organisations, and consequently one or more special purpose vehicles[227] (SPVs) are formed in the process of setting up a PPP.

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[223] Aizawa (n 65); European Commission, 'Guidelines for Successful Public-Private Partnerships' (2003) <http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf> accessed 14 August 2018.

[224] Aizawa (n 65); The World Bank Group, 'PPP Reference Guide' (*PPP Knowledge Lab*) <https://pppknowledgelab.org/guide/sections/1> accessed 14 August 2018; Asian Development Bank, 'Pubic-Private Partnership Handbook' (2008) <https://www.adb.org/sites/default/files/institutional-document/31484/public-private-partnership.pdf>.

[225] Grant, T, 'Keys to Successful Public Private Partnerships' 23 Canadian Business Review 27.

[226] Aizawa (n 65).

[227] PWC defines SPVs as 'an off-balance sheet vehicle comprised of a legal entity created by the sponsor or originator, typically a major investment bank or insurance company, to fulfil a

Even with different definitions and defining characteristics, there is often still great confusion between PPPs and other forms of traditional privatisation, such as outsourcing for example. To try and clarify this, the National Academy of Sciences documented a number of alternative approaches to PPPs, listing them from the least amount of private sector involvement, to the most involvement.[228] Traditional non-PPP approaches would mean that the design and construction responsibilities in a project are awarded separately, and sequentially, to private firms. In other words, the public authority and private entity/ ies do not partner for the duration of the project, and the risks and rewards are not shared between them. The private entities would serve as contractors, for very specific parts or phases of the project. Full privatisation would entail that the facility be owned by the private partner, with no apparent intention to transfer it to a public entity.

PPP approaches include most of the project arrangements outside these descriptions that involve both a private and public entity, with one of the most important features being that ownership will remain with, or at some point be transferred to, the public entity. The transfer of ownership back to the public entity or authority is an essential element of a PPP. As a practical example, in the QMMH project in Lesotho, the Governmetn of Lesotho entered into an 18-year contract with the Tšepong

temporary objective of the sponsoring firm', PWC, 'The next Chapter: Creating an Understanding of Special Purpose Vehicles' (2011) <https://www.pwc.com/gx/en/banking-capital-markets/publications/assets/pdf/next-chapter-creating-understanding-of-spvs.pdf>.

[228] National Academies of Sciences (n 186); US Department of Transportation (n 217); AECOM, 'User Guidebook on Implementing Public-Private Partnerships for Transportation Infrastructure Projects in the United States' (US Department of Transportation 2007) Report prepared for the Office of Policy and Governmental Affairs 05–002; Pakkala, P.A., de Jong, W.M., and Aijo, J., 'International Overview of Innovative Contracting Practices for Roads' (Finnish Road Administration 2007); Federal Highway Administration, 'Design-Build Contracting' Vol. 72, No. 156 <http://www.fhwa.dot.gov/programadmin/contracts/fedreg071408.cfm>.

consortium.[229] The PPP was quite ambitious, in terms of the range of responsibilities transferred to the private partner, which summarily involved the provision of primary, secondary, and tertiary healthcare services.[230] Assuming the project will run its full course, and the partnership is not renewed, the partnership will terminate in December 2026, upon which the QMMH and all the corresponding responsibilities will transfer back to the Government of Lesotho.[231]

Arguments in favour of, and against, PPPs

Since PPPs are usually long-term arrangements, involving projects with renewable periods of up to 25 years, much of the evidence we need to understand PPPs better is still being development. Nonetheless, research on PPPs is emerging at a rapid rate, and the following few paragraphs will briefly explore the different arguments in favour of and against PPPs. It is worth pointing out that research on PPPs tend to be quite diverse in terms of its analysis, and conclusion, on whether or not PPPs offer more benefits than costs. This is of course a common phenomenon in policy focused research, as there are vested interests in both the arguments for and against PPPs. For example, as highlighted by a paper on the social impacts of PPPs in the Global South:[232]

> *'On the one hand, PPP enthusiasts including many UN agencies, bilateral donors and multinational companies may not be interested in the impact assessment findings that conclude that PPPs cause more harm than good. On*

[229] PWC and UCSF Global Health Sciences: The Global Health Group (n 192); Hellowell (n 193) 2.
[230] Hellowell (n 193) 1.
[231] PWC and UCSF Global Health Sciences: The Global Health Group (n 192).
[232] Peter Lund-Thomsen, 'Assessing the Impact of Public-Private Partnerships in the Global South' (2007).

> *the other hand, PPP sceptics might not welcome impact assessments that demonstrate that PPPs bring about win-win outcomes where poverty is reduced and all stakeholders benefit.*'

One way to try and get around this bias to some extent, is by looking at different perspectives on each of the arguments for and against PPPs, from actors that would typically want PPPs to succeed such as development banks and international organisations, to actors that tend to be sceptic about PPPs such as civil society organisations, as well as actors that purport to offer more objective analyses such as scholars.

Cost savings and access to capital

Two benefits of PPPs that are often cited, is that it could bring cost savings to projects, and provide easy access to (non-public) capital.[233] This was after all one of the main motivations behind the renewed push for PPPs as a model to drive infrastructure development - an attempt to bridge the current financing gap. However, there is very little evidence to support the claim that PPPs, and the harnessing of private funds, save costs when compared to public provision.[234] Some research indicates that private sector financing for a PPP would typically cost around 2 - 3% higher per annum than public sector borrowing, even when the PPP relies on a payment stream that is derived from the public sector.[235] Other research shows that it could cost the

[233] National Academies of Sciences (n 186); Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (n 33); Akintoye (n 8).
[234] National Academies of Sciences (n 186).
[235] ER Yescombe, 'Chapter 2 – PPPs—For and Against', *Public-Private Partnerships* (2007).

government up to twice as much to pursue a PPP over public provision, and would put significant strain on the public purse in the process.[236]

One of the reasons why public borrowing is more affordable than private sector borrowing, is because the government is not necessarily taking any significant risk (at least, more than usual) with public funds, whereas risk would be a main consideration in the context of private borrowing.[237] In other words, public borrowing rates tend to be relatively low, whereas the amounts of capital expenditure and interest rates of private borrowing in a PPP are often driven up, since private partners tend to build risk factors into the financial planning in a lot of detail. The alleged higher cost of PPPs has been referred to as the 'PPP premium', and some have argued that it is a premium that you pay for the supposed efficiency gains.[238] Others have argued that there is no PPP premium, as it is unfair to compare private project financing to public financing.[239] This is because government default risk subsumes bondholder risk under public provision, and that public debt is cheaper because the public implicitly absorbs the risk through potentially higher taxes or lower public expenditures in case of imminent default.[240]

As illustrated earlier, in the case of the QMMH in Lesotho, the PPP ended up being significantly more expensive than it most likely would have been if financed by the government. This is evident from the massive increases in capital expenditure compared to initial forecasts, the rising unitary fees, large payments made as a result

[236] Romero (n 41).
[237] Yescombe, 'Chapter 2 – PPPs—For and Against' (n 235).
[238] Engel, Ronald D. Fischer and Galetovic (n 39).
[239] John Kay, 'Efficiency and Private Capital in the Provision of Infrastructure', *Infrastructure Plicies for the 1990s* (1993).
[240] *ibid.*

of additional patients, and perhaps most telling of all, the increases in healthcare spending.[241] Furthermore, payments to the Tšepong consortium by the Government of Lesotho has allegedly increased by 80% between 2011 and 2017.[242] Since the QMMH does not appear to offer any financial benefits to the Government of Lesotho, the question is whether the gains in efficiency are worth the additional expenses.

Efficiency gains

Against the backdrop of the cost-saving debate, it has been argued that, even if PPPs cost higher than public provision, it is still worth considering because of the efficiency gains.[243] Some would even argue that the greatest and most apparent benefit to PPPs, is its ability to deliver services or facilities more efficiently than the government.[244] There are three main overarching reasons why PPPs are often cited as being potentially more efficient than public provision.[245] The first reason is organisational. Public authorities tend to have multiple objectives, are accountable to multiple principals, and have goals that are political in nature. Also, because of the fact that public authorities manage a large number of projects, the scale and scope of a particular project is likely to be beyond what is considered efficient. PPPs, however, tend to be managed by SPVs that have narrower focus areas, that are unconstrained by public sector rigidities, and not linked to the uncertainties of annual public budgets.

241 Hellowell (n 193).
242 apolitical, 'New Public-Private Hospital Saves Lives but Sinks Budget' (27 March 2017) <https://apolitical.co/en/solution_article/public-private-hospital-lesotho-saves-lives-sinks-budget> accessed 20 September 2020.
243 Yescombe, *Public-Private Partnerships: Principles of Policy and Finance* (n 33).
244 Engel, Ronald D. Fischer and Galetovic (n 39).
245 *ibid.*

The second reason is the financing method. It is argued that if PPPs are financed through user fees, it will contribute further to efficiency, as it is easier to charge the public than receiving money from the government. Subsidies are also more expensive than user fees, because of the rigidities in public expenditure. The third reason is that long term PPP contracts can improve maintenance, which tends to be a huge challenge in public provision. This is mainly because, while government can theoretically set aside enough funds to ensure proper upkeep and maintenance, the reality is that governments would most likely use that money for more projects, and only turn to maintenance once a facility has deteriorated significantly. Under a PPP, an SPV is more often than not contractually obligated to maintain a facility.

For all its financial faults, the QMMH in Lesotho did improve the quality of healthcare. As stated by a former vice-president of the World Bank, who also presided over the QMMH while serving as Lesotho's finance minister until 2012: "The government [of Lesotho] could have built the new hospital, but we didn't have the capacity in government for efficient management…We could not retain doctors due to the poor quality of the work environment". Clearly, efficiency was a key consideration in the Government of Lesotho's decision to drive the project through a PPP model. The question remains, however, whether short-term efficiency gains in very localised areas are worth the higher price, or even ultimately beneficial to the society in question. As illustrated earlier, the exorbitant expenses associated with the QMMH had several knock-on effects for the people of Lesotho.

Critics of the efficiency gains argument notes the potential efficiency gains of a PPP would very much depend on the sector, the type and size of the project, the size of the private sector investment, and the country context in terms of regulatory

environment and governance.[246] In other words, PPPs do not necessarily offer efficiency gains in all sectors, and the lack of efficiency gain is greatly exacerbated by a poor regulatory environment and poor governance.

Increased innovation

A key feature of PPPs, is that the public authority responsible for the procurement of the project usually specifies outputs, rather than inputs when calling for private sector bids. In other words, the public authority will specify what it needs or what is required, but not necessarily how those needs or requirements should be met. Under traditional public procurement, a project will usually be specified in more detail, and include design aspects since it needs to make a determination on which service provider will be able to deliver the service exactly according to their needs and design. The benefit of the public authority focusing on outputs in the bid, as opposed to inputs, is that it allows the private sector to come up with innovative ways to address those needs or requirements.

The counter-argument, is that that the private sector is not necessarily more innovative than the government. In fact, especially in the context of infrastructure and other public service or facility provision, chances are that the government would have a lot of experience in dealing with those kinds of projects, and consequently there would be no reason why those working in government is not able to come up with the most innovative or cutting-edge ideas on service delivery and infrastructure provision.

It is not clear whether the PPP in the case of the QMMH in Lesotho led to any specific innovative solutions that would not have existed under traditional public provision.

[246] Romero (n 41).

However, perhaps with healthcare infrastructure PPPs in particular, equipment and resources play a key role in quality service delivery, which definitely seemed to be the case with the QMMH. But, as mentioned above, innovation and new technology do come with a price.

Risk transfer and sharing

One of the defining characteristics of a PPP, which is also widely regarded as an argument in favour of PPPs, is the transfer of risks from the public sector to the private sector.[247] The risk transfer element is also explicitly considered in the value for money exercise (VFM), which essentially aims to determine whether a project should make use of public provision, or an alternative model like a PPP. The rationale behind the value in risk transfer, is that project risks could be transferred to the partner that is best able to deal with those risks, at the lowest cost. This implies that the party bearing the risk should have the freedom to deal with that risk as they think best. In this context, risk relates to uncertain outcomes which may have an effect on either the provision of the services or facility, or the financial viability of the project.[248] In each of these cases the result would be a loss or cost that needs to be borne by someone. The parties that would typically share the risks in a PPP project are the public authority, the private sector partner(s), and the end-user or public.[249]

Arguments against the risk-sharing element in PPPs, is the assertion that risk is almost always shared disproportionately, and is either disproportionately carried by the state, or the end-user. As mentioned earlier, private sector investors will very closely analyse

[247] Akintoye (n 8); National Academies of Sciences (n 186); ER Yescombe, 'Chapter 14 – Risk Evaluation and Transfer', *Public-Private Partnerships* (2007).
[248] Yescombe, 'Chapter 14 – Risk Evaluation and Transfer' (n 247).
[249] Engel, Ronald D. Fischer and Galetovic (n 39).

the risk involved in any project, and will either financially invest in projects that are not too risky, or demand that the risk is taken on by the public partner or insured against. However, some argue that it is impossible for all infrastructure and service delivery projects to be financially viable in that regard, as any attempt to ensure a profit or viable subsidization scheme (from the perspective of the private partner) will force great risks onto the state or the public/ end-user.

In the QMMH case in Lesotho, the private partners took on significant amounts of risk and responsibilities. As mentioned earlier, the project essentially meant that primary, secondary, and tertiary healthcare would be taken over by the Tšepong consortium. In this specific case, however, it appear that the private partner did factor in the risks,[250] which translated into higher costs.

Complexity of PPPs

As highlighted by numerous institutions, the need to bridge the infrastructure gap in regions like Africa is immediate,[251] and while PPPs could be useful in this regard, the complexity around PPP projects make it very hard to deliver a project outcome quickly.[252] Some of the factors that add to the complexity around PPPs include the long-term nature of the concessions, the large scale of the projects, the multiple

[250] A concrete example would be the limitation that was placed on the number of inpatients and outpatients treated by the QMMH. The Tšepong consortium arguably recognized from the outset that there was a realistic underestimation of the number of people in Maseru that required healthcare services, and factored this into the PPP agreement. However, whether the financial cost is in line with the associated risks is debatable.
[251] The Economist Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Africa The 2015 Infrascope' <http://infrascope.eiu.com/wp-content/uploads/2017/02/Africa_Infrascope_Report_2015_English-1.pdf>.
[252] National Academies of Sciences (n 186).

stakeholders involved, and the changing environment (both natural and legal).[253] There are also some factors in a PPP contract that may add to the complexity of the project, such as whether or not the contract allows sanctions to be imposed in the event of non-performance, the flexibility of the terms in the contract, and whether renegotiation of the terms is possible.[254] As discussed in more detail below, the legal structure of PPPs can also be extremely complex, and involve a web of different special purpose vehicles and entities. All of these factors that add to the complexity of the project, also have direct performance implications.[255]

One reason why the added complexity might be overstated, is in relation to efficiency gains. It was highlighted earlier that PPPs tend to focus more on efficiency than public provision, which might be the reason why PPPs appear to be more complex than public projects. One could argue that a PPP is perhaps not inherently more complex, but due to the close scrutiny of the project, details are considered that would not necessarily be placed under the microscope in a public project, hence the added perceived complexity. The QMMH was delivered relatively quickly, with only 4 years passing from the bidding phase in 2007 to opening its doors in 2011. This does not mean, however, that the project was not full of complexities. In fact, the increased costs associated with the project suggest otherwise.

Public interest concerns

In some instances, there are fundamental ideological concerns attached to issues like privatisation. This is particularly relevant where PPPs are used to deliver what many

[253] Swapnil Garg and Kanika Rajput, 'Performance Consequences on Complexity in Public-Private Partnerships: Evidence from Indian Highway Projects' (2017) 4 International Journal of Engineering Technology Science and Research 10.
[254] Klijn and Koppenjan (n 68).
[255] *ibid.*

consider public and social goods, such as infrastructure. For example, can a PPP that is structured to make a profit, still be conducted in the interest of the public? Similarly, when fee collection and tariff structure setting is transferred to a private partner, would the private partner have the required motivations to protect the public interest?[256] Public interest issues include the appropriate use of revenues, keeping to environmental and social standards, and maintaining fair labour practices.[257] There is also evidence that the level of interest in PPPs, or at the very least the level of state involvement *vis-a-vis* private sector involvement, often depends on the ideological positioning of the country in question, with social or politically driven states having a stronger public sector dominance, and profit driven or private economies having a stronger private involvement.[258]

The private partners in the QMMH project allegedly made (or continue to make) a 25% return on their investment. If this is indeed the case, and given the fact that the Government of Lesotho is stretching its financial means to honour the PPP contract, one cannot help but wonder whether such high profit margins, especially in relation to infrastructure development and service delivery, are reconcilable with acting in the public interest. Perhaps, if the Government of Lesotho had stronger capacity around PPPs to begin with, the costing of the project coupled with better sharing of roles and responsibilities would have led to a more equitable outcome. As alluded to before, it appears that the potential for a PPP to be implemented and executed in the public interest is strongly linked to the capacity and ability of the government to negotiate, implement, and monitor PPPs.

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[256] National Academies of Sciences (n 186).
[257] *ibid.*
[258] Akintoye (n 8).

Accessibility of services and infrastructure

Concerns around the commercialisation of public goods or services have been raised many times in the context of privatisation, and in relation to its potential impact on accessibility in particular.[259] This is of course especially relevant to instances where there is a user fee attached to a service or facility, such as for example expecting the public to pay for the use of water. The logic is that, since the state could provide these services at a lower cost than the private sector, or through a PPP, the fees that the public would have to pay for these services would be lower than they would under private or PPP provision. It is also a great topic of debate in the context of services that are closely linked to socio-economic rights in particular, such as healthcare or education, where there is a legal duty on the state under international human rights law to ensure that these services and facilities are accessible to the public.

To address the issue of accessibility, PPPs can make use of a number of techniques related to subsidisation, or tariff structuring.[260] For example, the state can subsidise a service to ensure that the user fee does not impact accessibility in a substantial manner. Innovative tariff structuring could also ensure that certain end-users pay more for a service or facility than others. This may be relevant in instances where certain users can afford to pay more, or use the service or facility more than others.

However, even subsidisation and tariff structuring is not straightforward in practice. In the QMMH case in Lesotho, the end users of the healthcare facilities were not

[259] Kishore Singh, 'Report of the Special Rapporteur on the Right to Education' (United Nations General Assembly 2014) <http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Report_to_UNGA_Privatisation_2014.pdf>; Minow (n 52).
[260] Engel, Ronald D. Fischer and Galetovic (n 39).

expected to pay for the service,[261] with the government essentially providing full subsidisation. As such, one would expect the project to improve accessibility to healthcare in Lesotho. And while this may be the case in and around the location of the QMMH, the project also had negative impacts on accessibility outside Maseru. As mentioned before, the high costs associated with the project meant that the government had to direct more resources to the QMMH, and away from other primary healthcare services in other parts of the country, which allegedly serves 75% of the population.

Transparency and public participation

PPPs are often very complicated arrangements, with many different actors involved and different interests represented. PPPs have been criticised in instances where big deals are rushed through, without proper consultation of and participation by the public, or even elected officials.[262] The lack of transparency in PPP processes has been voiced by many as an important concern around PPPs, and is acknowledged as a challenge by both sides - those in favour of PPPs, as well as those against PPPs.[263] A lack of transparency in projects is often tied to poor public participation, as access to information is an important pre-requisite for effective participation in decision-making.

[261] As mentioned above, however, there are small co-payments attached to the use of some services in the QMMH hospital, although the co-payments are also 90% covered by the government. See Hellowell (n 193) 3.
[262] National Academies of Sciences (n 186).
[263] *ibid; Romero (n 41).*

Decision-making and procurement processes

The challenge in deciding whether a service should be delivered or developed by the public or private sector has been referred to as the 'assignment problem'.[264] The need for a framework to address the assignment problem is widely recognised.[265] To try and address the assignment problem, academics like Randy Ross have come up with methodologies and frameworks for measuring government and free market performance in the delivery of economic or social activities and services.[266] In the case of Ross in particular, the method of measuring performance looks at four activity dimensions or functions, which are funding, production, utilization or consumption, and control or regulation.[267] To make an effective comparison, he then also looks at efficiency, equity, participation and accountability as the criteria. Ross tested and applied this framework to electric power provision, school bus transportation, and mental healthcare. The results showed that the assignment problem needs to be considered on a case by case basis, as there was no result proving that public or private provision was better or worse than the other in all instances.[268]

While Ross' methodology was largely an academic exercise, the way the assignment problem is addressed in practice, is through the use of a VFM exercise. The VFM exercise is aimed at determining the added value of a PPP, as well as who the appropriate risk-bearer is for each of the risks involved.

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[264] Randy L Ross, *Government and the Private Sector - Who Should Do What?* (The Rand Corporation 1988).
[265] *National Academies of Sciences (n 186)*.
[266] Ross (n 264).
[267] *ibid.*
[268] *ibid.*

Risk identification and allocation

As briefly alluded to earlier, risk in a PPP relates to uncertain outcomes and the need for the cost implications of those uncertainties to be borne by one of the project partners. The risk transfer exercise lies at the heart of the VFM debate, drawing from the argument that the private sector is better able to deal with some of the risks associated with the project, and thus improve the VFM. PPPs encourage the public sector to identify risks and think about the nature of those risks, and who is best equipped to deal with them, in a way that is not common to public procurement or provision.[269] While the term 'risk sharing' is often used in the context of PPPs, it is important to note that risk sharing does not generally involve the sharing of the same identified risk in different percentages between project partners. Different risks are generally transferred fully to either one or the other project partner.

A common approach to risk identification and allocation is to make use of risk matrixes. A risk matrix would typically set out:[270]

- The nature of the risk in question;
- The effect, should the risk occur/ realise;
- Allocation of the risk under the PPP contract;
- Possible mitigation of the risks;[271] and
- The financial impact of a risk should it remain with the project SPV.

Some of the risk categories at each of the project phases of a PPP include general political risks, site-related risks, construction risks, completion risks, and operation-phase

[269] Yescombe, 'Chapter 2 – PPPs—For and Against' (n 235).
[270] Yescombe, 'Chapter 14 – Risk Evaluation and Transfer' (n 247).
[271] It should be noted that this does not necessarily mitigate the risk, but rather mitigates the risk for a particular party, as it is in fact only carried over from one party to another.

risks.[272] Bearing in mind the broader purpose of this thesis, the focus will be on social and human rights related risks. However, since there are also links between social, economic and human rights risks, each of the different risk categories will briefly be explained.

There are a number of political risks in a PPP project. Because of the nature of the project, and the involvement of the public sector, the project needs political support to get off the ground in the first place. A project facing political opposition is also likely to face more challenges than a project that has political support. While not too different from any non-PPP commercial enterprise taking place in an environment that is likely to undergo legal reform, it can happen that a PPP is threatened by the public partner deciding to change the laws in such a way that negatively impacts on the PPP, or even end or terminate the PPP. Currently, political risks mainly relate to the potential change in the legislative and regulatory environment, as well as political opposition.[273]

Site risks are closely linked to social risks, and could include risks around the acquisition of land, the condition of the ground, having environmental and social permits in place, accessibility to and usage of the site, social unrest, and the disposal of surplus land.[274] In most instances, site risks remain with the public authority, including land ownership. This is especially convenient when large areas of land are required for the project, since the public authority can exercise its eminent domain powers to acquire the land.

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[272] Yescombe, 'Chapter 2 – PPPs—For and Against' (n 235); Yescombe, 'Chapter 14 – Risk Evaluation and Transfer' (n 247).
[273] Yescombe, 'Chapter 14 – Risk Evaluation and Transfer' (n 247).
[274] *ibid.*

Most PPPs would require an environmental impact assessment (EIA) as part of the permitting process.[275] While EIAs focus largely on the impact of a project on the natural environment (fauna and flora, for example), depending on the project it may also assess the impacts of the project on local communities, emissions into the atmosphere caused by the project, effects on water supply and discharge, as well as any other long-term effects on surrounding communities and the environment. Increasingly, social factors are taken into account in the EIA process, including the expansion of impact assessment tools to specifically include social impact assessments (SIA). However, Chapter 5 will deal with impact assessment tools in more detail, and explain why SIAs and other related tools do not always adequately cover the human rights aspects of social impacts in PPPs.

Construction risks relate to the potential overrun of construction costs.[276] As a result, there may be insufficient funding available, or the financial viability of the project may be called into question. Construction risks are usually shared between the partners, with the public authority shouldering some of the risks and the private partner also typically taking on some of the risks. Construction risks can also relate to the risks associated with contractors and sub-contractors' relationships during construction, price adjustments due to changes in the project schedule, unforeseen events or latent defects, as well as risks associated with revenue during construction.

Completion risks in a PPP generally refer to a delay in the completion of a project. Completion risks carry a high financial cost with them, since it significantly impacts the cost of debt (due to longer debt periods) and operation revenues are also delayed. Operation-phase risks include those risks associated with usage, network, revenue

[275] *ibid.*
[276] *ibid.*

payment, availability and service quality, operating costs, and maintenance.[277] Operation-phase risks also include risks that may by 'unforeseeable', such as changes in the project specification by the public authority, changes in legal and regulatory frameworks, and *force majeure* that may occur.

It is often the case, especially in new PPP programmes, that the parties do not identify the different risks in adequate detail, which leaves a number of risks unidentified, and unaccounted for.[278] As a consequence, the parties then tend to renegotiate the terms of the partnership, and more specifically the allocation of risks, as the risks become visible or materialise. The QMMH case discussed earlier is a good example of this, and the renegotiations following the bidding phase is what ultimately led to the massive increased projections in capital expenditure. A few guiding principles in the identification and allocation of risks include:[279]

1. Allocating risks to the party that is best placed to influence the risk factor;
2. Allocating risks to the party that is best able to anticipate or respond to the risk factor;
3. Allocating risks to the party that is best able to absorb the risk;
4. Matching risks and rights to make decisions related to that risk;

It is also important to leave enough room for the public authority, since it is the partner that typically makes the decision to go the PPP route, to withdraw from the project if it is no longer viable in light of the renegotiations that may have taken place.

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[277] *ibid.*
[278] ibid; Bing and others (n 67); Bovis (n 67).
[279] Timothy Irwin, 'Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects' (2007) The World Bank 56–65. It should be notes that the risks identified by Irwin are mainly done in the context of economic risks. However, these guidelines can potentially add value in a non-economic sense as well, and is revisited in Chapter 6.

Legal structuring of PPPs

PPPs can take many different forms and shapes, largely depending on the extent to which different parties or entities are involved, and the risk allocation. The structuring and risk allocation in a PPP is usually set out contractually. Institutions like the World Bank and the European Commission, as well as multilateral groupings like the G20, have dedicated significant time and resources in recent years to develop toolkits, guidelines, checklists, and model contracts on PPPs.[280] These resources are mostly divided according to the different sectors or phases of each project, and would cover issues like dispute resolution, remedies, risks allocation, insurance, and operation and maintenance.

A typical PPP structure involves contractual arrangements between a number of different parties that would include the government, project sponsors, project operators, financiers, suppliers, contractors, engineers, customers or end-users, and other third parties such as escrow agents.[281] 'Financiers' could include the various parties that invest in a PPP and could comprise equity and debt financiers, which may include domestic and foreign banks and financial institutions, bilateral and multilateral donor agencies, development banks, or even private investors.[282] As alluded to earlier, the creation of SPVs is a key feature in most PPPs. All the contractual

[280] See for example the materials available on the World Bank Public-Private Partnership Legal Resources Center (PPPIRC) at https://ppp.worldbank.org/public-private-partnership/agreements (accesses 5 July 2018). Also see the Global Infrastructure Hub of the G20 at https://www.gihub.org (accessed 5 July 2018).
[281] As defined on Investopedia, '[a]n escrow agent is a person or entity that holds property in trust for third parties while a transaction is finalized'. United Nations ESCAP, 'A Primer to Public-Private Partnerships in Infrastructure Development' <https://www.unescap.org/ttdw/ppp/ppp_primer/21_ppp_structure.html> accessed 6 July 2018.
[282] *ibid.*

arrangements between the different parties involved in a PPP are negotiated between themselves and the SPVs.

An SPV, also known as a Special Purpose Entity (SPE), is a[283]:

> [L]egal entity that has been set up for a specific, limited purpose by another entity, the sponsoring firm. An SPV can take the form of a corporation, trust, partnership, or a limited liability company. The SPV may be a subsidiary of the sponsoring firm, or it may be an orphan SPV, one that is not consolidated with the sponsoring firm for tax, accounting, or legal purposes...'

The idea behind setting up SPVs for purposes of a PPP, is to allow for improved financing since SPVs can raise capital without carrying the debt or other liabilities of the parent organisations or sponsoring firms. As stated above, the SPV's role is usually quite unique to the PPP, and though it may have actual employees carrying out tangible business operations, SPVs are traditionally used first and foremost as an off-balance-sheet capital tool.[284] Since most PPPs rely on support from commercial banks or other financial institutions, the SPV is almost always used to represent the financing wing of the project, to attract funds from investors. This allows the SPV to be protected from balance sheet issues with the parent company or government agency.

In practice, more than one SPV is usually created to drive a PPP. One SPV would usually consist of the commercial shareholders, and in particular those that have a role to play in the operational aspects of the PPP. In other words, not necessarily the

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[283] Gary B Gorton and Nicholas S Souleles, 'Special Purpose Vehicles and Securitization', *The Risks of Financial Institutions* (2007) <http://www.nber.org/books/care06-1>.
[284] Investopedia, 'What Role Do SPVs/ SPEs Play in Public-Private Partnerships?' (2018) <https://www.investopedia.com/ask/answers/030915/what-role-do-spvs-spes-play-publicprivate-partnerships.asp>.

public authority or authorities that are involved in the project. Parallel to this SPV, the public authorities may decide to set up another SPV, which is essentially an entity through which all the involved public authorities work together on the project. The public authorities will engage collectively through the use of one SPV, while another SPV is in charge of the operations of the project. The SPV involving government authorities will also specify outputs and progress indicators for the operational SPV, and monitor the activities and outputs. There are benefits to each of these approaches. The benefit if the government agencies engage with the project separately, in other words not through one SPV, is that it is relatively clear where deficiencies may lie, or which agency should be held accountable in the event of something going wrong. The benefit of engaging through an SPV, however, is that government agencies are forced to be aligned and coordinate their engagement internally.

Different PPP models

Since the structure of PPPs greatly depend on factors such as the ownership of capital assets, the responsibility for investment, the assumption of risks, and the duration of the contract, a number of different PPP models have emerged over the past few decades.[285] Particular kinds of PPP models have also become more popular to use in particular sectors. For example, concession agreements[286] are more common in transport and telecommunication sectors, whereas management contracts are common for existing assets in water and transport sectors. These are of course not set in stone, and in practice a combination or a number of different variations of different

[285] United Nations ESCAP (n 281).
[286] For more detail on concession agreements, see the section titled 'Concessions' further down.

models may be used. According to UNESCAP, PPP models can broadly be classified into five categories:[287]

1. Supply and management contracts;
2. Turnkey projects;
3. *Affermage* or leasing contracts;
4. Concessions; and
5. Private ownership of assets

Supply and management contracts

Supply and management agreements is a very common PPP model, and is also colloquially referred to as 'outsourcing'. Such an arrangement usually entails the management of a part, or whole, of a public enterprise by a private sector party. The private sector may also be involved in the service design and delivery, operational control, labour management and equipment procurement of the project.[288] The private partner is usually paid a fee, and assumes specific responsibilities in relation to the service. Some of the advantages of a supply and management arrangement include that it is not as complex as many other types of PPP arrangements, and it is possible to implement it in a relatively short period of time. However, almost all risks in a supply and management arrangement is borne by the public sector, and it is usually applied largely to existing infrastructure facilities (as opposed to the development of new ones).

There are several different types of management contracts. Some of the most common types of management contracts include supply or service contracts,

[287] *United Nations ESCAP (n 281).*
[288] *ibid.*

maintenance management contracts, and operational management contracts. As the name gives away, supply contracts typically entail the supply of equipment, materials, power or labour. Supply contracts are often also pursued in the context of non-core activities of a project, as it is easier to contract these out to other parties. Service contracts are used when a private party is expected to deliver or provide a service directly to users of infrastructure facilities. Examples include cargo handling at airports or catering services on planes or trains. Maintenance management arrangements involve the maintenance of an asset or facility, and may either be done by an external party, or the facility operator. Operational management contracts are used when a private party is contracted to run a facility.

Turnkey projects

Turnkey projects are also known as 'design-build' projects, and is often the model used in traditional public-sector infrastructure projects as a procurement method. These projects would typically include a bidding process through which a private contractor is selected to design and build a facility, and criteria like fee, rate, or total cost would determine who wins the bid. The contractor will then assume risks around the designing and construction phases of the project.

In a turnkey project, the private sector's involvement is usually relatively low cost, and only for a relatively short period of time. Some of the advantages of a turnkey project include that it is a well understood and tested model, it involves a contract agreement that is not too complex, and contract enforcement is generally not an issue. Some of the downsides of this model include the lack of incentive for the private partner to complete phases early, most of the risks in the project are still borne by the public partner, and it typically doesn't yield great results in terms of innovation.

Affermage or leasing contracts

An '*affermage*' or leasing contract is an arrangement in which a leaseholder is responsible for operating and maintaining an infrastructure facility or services, and more often than not facilities or services that already exist. The leaseholder, or operator, is usually also not required to make a large investment. However, this model may also be combined with other models such as 'build-rehabilitate-operate-transfer', in which case the period of the contract tend to be much longer, and the leaseholder is expected to make a much larger investment. In a leasing contract, the operator would typically take lease of both the infrastructure facility and all equipment for a set period of time. The public authority would usually retain the investment responsibilities and risks, while the operational risks are transferred to the private party or leaseholder.

Some of the advantages of a lease contract include that it could be implemented in a relatively short time, that private sector investment could be determined by the contract needs and be either short or long term, and that this model of PPP is often more acceptable from a political and strategic perspective in some countries. The downsides to lease contracts include that it has relatively little incentive for the private party or leaseholder to invest in the project, most of the risks are borne by the public sector, it is mostly useful for existing infrastructure facilities, and that considerable regulatory oversight is necessary.

Concessions

Concession agreements are arguably the most commonly used model in PPPs, and some common forms include 'build-operate-transfer' (BOT) and franchise agreements. In a concession agreement, the government defines and grants specific

rights to an entity, which is usually a private party in this case, to build and operate a facility for a fixed period of time. Ownership and the right to supply the services usually remains with the government. In a concession agreement, payments can take place both ways - the concessionaire can pay the government for the concession rights, and the government can also pay the concessionaire for the development of the facility or the delivery of the services. Payments to the concessionaire may be a way to make the project more financially viable, or reduce the commercial risk that the private partners are expected to take.

In a concession agreement, the private sector partner bears a significant share of the risk. The private partner is also usually expected to make high levels of investment in the project. Concession agreements also have high potential for efficiency gains in all phases of project development and implementation, as well as innovation improvements, due to their high levels of involvement and relatively high degrees of involvement in all aspects of the project. The downsides to concession agreements include that they are highly complex to implement and administer, it may have underlying fiscal costs to the government, it may take a long time to finalise negotiations between the different parties, and it may also require close regulatory oversight.

The QMMH project in Lesotho is a good example of a concession agreement, and most of the points highlighted above are illustrated in the case study. For example, the Tšepong consortium, which acted as the private partner, carried significant risks and responsibilities, and was expected to make high levels of investment in the project. As a result of its in-depth involvement, the Tšepong consortium also had the opportunity to build and operate the project in a manner that would lead to high efficiency gains. However, as also illustrated in the case study, the Government of

Lesotho struggled to monitor performance, to apply good regulatory oversight, and the project had severe underlying fiscal costs to the government.

Private ownership of assets

In private ownership models the private party is responsible for the design, construction and operation of the infrastructure facility and service delivery, with the government relinquishing the right of ownership of assets or facilities. Some common forms of private ownership include 'build-own-operate' (BOO), Private Finance Initiative (PFI), and divestiture by license or sale. The rationale behind a private ownership arrangement is to aggregate the design, construction, operation and ownership of an infrastructure facility or asset, to maximise the incentives for efficiency and innovation gains. The private partner is usually then only compensated for successful service delivery at a pre-defined standard.

In this model of PPP, the private sector partner bears a significant share of the risk, and is expected to make high levels of investment in the project. These arrangements tend to be quite complex to implement and manage. Private ownership agreements may also have underlying fiscal costs to the government, and close regulatory oversight may be necessary. It needs to be highlighted that, while the name suggests that ownership is held by the private partner, in the context of a PPP the ownership will be transferred to the public entity at some point.

PPP Guidelines

In the Addis Ababa Action Agenda (AAAA), several Member States of the United Nations committed to undertake activities focused on capacity building around PPPs, as well as facilitate discussions and knowledge sharing around PPPs. In light of these

stated commitments, the following principles for the effective governance of PPPs could be extracted from the AAAA[289]:

- That careful consideration should be given to the structure and use of blended finance instruments;
- Risks and rewards should be shared fairly;
- Social and environmental standards should be met;
- Sustainable development should be a driving factor, with an emphasis on factors such as accessibility, affordability, and resilience in infrastructure;
- Ensuring clear accountability mechanisms;
- Transparency, including in procurements frameworks and contracts;
- Public participation in decision making;
- Effective management, accounting, and budgeting for contingent liabilities and debt sustainability; and
- PPP policies and strategies should be aligned with national priorities.

With these principles in mind, several key public organisations from around the globe developed PPP guideline documents. In 2018, the United Nations Department of Economic and Social Affairs (UNDESA) published a report[290] that looked at 12 of the most prominent PPP guidelines, including those developed by the Asian Development Bank, the World Bank, the European Investment Bank, the European Commission, the International Monetary Fund, the Organisation for Economic Cooperation and Development, the UN European Commission for Europe, and the UN Economic and Social Commission for Asia. The UNDESA study of PPP guidelines considered, among

[289] United Nations, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)' (n 130); Aizawa (n 65).
[290] Aizawa (n 65).

other things, the consistency of the guidelines with the AAAA principles, the coherence of different guidelines, and the key success factors promoted by different guidelines.

A number of the PPP guidelines give advice on the understanding and utilisation of VFM. Some of the guiding documents[291] describe VFM as a cost-benefit exercise, by which to determine what the value is that a certain approach would add above and beyond traditional methods of procurement. It is also emphasised that VFM, or more specifically 'added value', could essentially mean higher quality for the same amount of money, or the same quality for less money.[292] Each of the current PPP guidelines have a different, albeit related, thematic focus area.[293] Some of the thematic issues that are covered by the guidelines include public governance, public sector financial management, transparency and disclosure, contract provisions, and general PPP implementation. While there are areas of convergence across the different guidelines, the differences outweigh the similarities. This divergence again illustrates the complexity of PPPs, and the important role that context plays in each PPP project.

While existing guidelines on PPPs cover a myriad of issues that are important in the context of infrastructure, there are also some glaring gaps. For example, the guidelines generally focus on commercial and economic aspects, and don't include the viewpoint of the public, or non-commercial stakeholders.[294] The guidelines only

[291] Asian Development Bank (n 224); United Nations Economic Commission for Europe, 'Promoting People First Public-Private Partnerships (PPPs) for the UN SDGs' (2016) <http://www.un.org/esa/ffd/wp-content/uploads/2016/01/Promoting-People-first-Public-Private-Partnerships-PPPs-for-the-UN-SDGs_UNECE_IATF-Issue-Brief.pdf>; Aizawa (n 65).
[292] United Nations Economic Commission for Europe, 'Guidebook on Promoting Good Governance in Public-Private Partnerships' (2008); Aizawa (n 65).
[293] Aizawa (n 65).
[294] *ibid.*

peripherally incorporate environmental, social and governance (ESG) dimensions of sustainability, and are completely silent on the issue of climate change. It is important to bear in mind that, ultimately, the goal of infrastructure projects is to deliver a public good or service, whether delivered through a PPP or traditional state driven method. In other words, non-commercial stakeholders are an important stakeholder group, whose interests are crucial to consider, and one would expect guidelines on PPPs to reflect that. Additionally, stakeholders are also rights-holders, and are entitled to certain rights under international human rights frameworks. Existing guidelines are completely silent on this matter. The guidelines are reflected on again in Chapter 6, where certain methodologies are introduced to address many of the shortcomings mentioned above.

Project phases and lifecycle of a PPP

Bearing in mind the overarching objective of understanding PPPs in the context of the impacts they might have on people and the environment, it is useful to briefly look at the different phases of a typical PPP project, and how these collectively form the project lifecycle. The consideration of different phases is especially important in the context of impact assessments, since different phases of the project lifecycle will impact people in different ways. Nonetheless, whereas this section briefly looks at project phases typically associated with PPPs, the phases typically considered in impact assessments are discussed in more detail in Chapter 5. As with the case of definitions and guidelines, different entities and PPP units around the globe will have their own ideas and understandings of the exact phases and steps involved in a typical PPP. However, while there may be different versions and descriptions of a typical PPP project cycle, there are some fundamental phases that are standard.

Generally, projects can be divided into the project preparation period, and the project term. The project preparation period usually involves phases[295] that include the inception phase, the feasibility study phase, procurement, and approval. The project term could then include[296] phases such as the development phase, the delivery phase, and the exit or transfer phase. An alternative breakdown[297] includes the planning and identification stage, during which partners are identified irrespective of the procurement method. This is followed by the project preparation stage, which would include project screening, appraising, and preparing the project contract. The implementation and procurement stage will follow, during which the PPP will be structured and awarded to the best bidder, and then the construction and operation stages will commence.

In the context of social and environmental impacts the project appraisal or screening phase, and the operation phase are of great importance. The project preparation phase, and in particular the screening and appraisal activities, offers an opportunity to assess the different impacts, and risks, that a project will most likely have. Consequently, it is the most important window of opportunity to pro-actively manage or mitigate any adverse impacts that a project may have, or amend the project in accordance with some of the potential risks it poses. This phase is also directly linked to the risk identification and allocation exercise, which is crucial in ensuring that all potential risks are accounted for.

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[295] These examples are taken from the South African PPP Unit webpage, which can be found at South African National Treasury, 'PPP Project Cycle of the South African National Treasury' <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/The%20Project%20Cycle.pdf> accessed 15 August 2018.

[296] *ibid.*

[297] 'An Overview of the PPP Process Cycle: How to Prepare, Structure and Manage a PPP Contract | The APMG Public-Private Partnerships Certification Program' (n 68).

During the project operation phase, the project is very likely to have a variety of impacts, both positive and negative, on a number of different stakeholders. These impacts could also occur at different levels, sometimes referred to as the micro-, meso-, and macro-level impacts, and is discussed in more detail in Chapter 4.[298] In all likelihood, the operations phase will also make up the majority of the project lifetime. Any risks associated with the operations phase therefore need to be monitored and addressed consistently, and in an ongoing manner. These phases are discussed again in more detail in Chapter 6, where a methodology is proposed for the application of HRIA techniques in infrastructure PPPs.

Conclusion

The involvement of the private sector in infrastructure development and service delivery is a highly contentious topic. However, while several models of privatisation have been explored throughout recent centuries, PPPs is recommended as a model that can potentially harness the strengths of both public and private provision, while overcoming the weaknesses of both purely public and purely private projects. However, as illustrated in this chapter, PPPs can be very complex and potentially have numerous shortcomings. It is thus important to manage PPPs very carefully, to ensure that the parties actually reap the benefits that made this model an option in the first place.

PPPs are widely promoted by international organisations and DFIs. As a result, a number of PPP units and frameworks have surfaced in recent years. At the same time, a number of PPP guidelines have been developed (often by the same institutions promoting PPPs) to guide states in developing their capacity on PPPs. While these

[298] Aizawa (n 46).

guidelines have been useful, there are also numerous gaps that are highlighted in this chapter. The guidelines are particularly lacking on social and human rights issues, which is arguable one of the main reasons why these factors are often unaccounted for in infrastructure PPPs.

Risk identification and allocation between partners lies at the heart of PPPs. It is therefore imperative that processes and methodologies related to risk identification and allocation include all issues that could potentially be problematic in the context of PPPs. As explained in Chapter 1, there are various human rights risks and concerns when it comes to infrastructure PPPs, and it is clear from the discussion above that the current processes and methodologies do not adequately consider these risks and concerns. To gain a better understanding of what these risks and concerns are, the next chapter takes an in-depth look at the human rights dimensions of PPPs.

Chapter 4: The human rights dimensions of infrastructure PPPs

> *'Privatization is premised on assumptions fundamentally different from those that underpin respect for human rights, such as dignity and equality. Profit is the overriding objective, and considerations such as equality and non-discrimination are inevitably sidelined. Regulatory and other constraints are viewed as obstacles to efficiency, and accountability for other than economic outcomes sits uneasily at best. Rights holders are transformed into clients, and those who are poor, needy or troubled are marginalized. Caring, compassion, social interaction, solidarity and community, among other things, are alien concepts that belong elsewhere.'*[299]
>
> *Philip Alston*

Introduction

In the second chapter, it was explained why a human rights lens is necessary when planning and developing infrastructure projects, especially when the private sector is involved. The third chapter went on to explain the complexities around PPPs, and in particular, the underlying principle that risk should be distributed among partners in a PPP, and ideally to the partner(s) that are best able to deal with the risk in question. The next piece of the puzzle, however, is determining what the potential human rights dimensions of an infrastructure PPP are, to determine the risks, and who are best able to deal with those risks. As such, this chapter sets out to explore and highlight the different human rights dimensions of infrastructure PPPs.

[299] Philip Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights on Privatization and Its Impact on Human Rights' (United Nations General Assembly 2018) A/73/396 24–25 <http://undocs.org/A/73/396> accessed 9 January 2019.

There are two key human rights components that need to be explored. The first component, relates to the human rights responsibilities and obligations of the actors involved in a project. Since most (if not all) infrastructure projects involve a range of actors that often include the state, financial institutions, contractors, and private partners, it is important to understand the human rights obligations of each of these actors. This is especially important in the context of a PPP, where private or non-state actors are often expected, and contracted, to take over some of the responsibilities that would vest in the state under public provision of services and infrastructure. The international human rights obligations of non-state actors have been a point of contention and much debate over the last 30 years, and while there still seems to be a wide range of different opinions on the matter, a number of key developments in recent years have helped to clarify some of the issues.

The second component, relates to the human rights risks and impacts associated with large infrastructure projects. Infrastructure projects, especially those with large footprints, pose a series of challenges when it comes to respect for human rights. It often includes the relocation and resettlement of people, a range of environmental impacts, consultation and consent of those impacted, and it may also affect the physical and economic accessibility of essential services that are protected under international human rights law. To ensure that these risks are taken into account at every phase of the project, it is important to know what to look out for, and ensure that processes and policies are developed in a way that includes input from those most likely to be affected by (as well as gain from) these projects.

The chapter will start by looking at the international human rights obligations of states and non-state actors (including international organisations, and private actors). This includes an overview of the sources of public international law, and international

human rights law, as well as the literature and case law around legal subjectivity and the obligations aspect in particular. An important issue that is also highlighted in this chapter, is the human rights obligations of different actors in situations of privatisation, especially in the context of the fulfilment of socio-economic rights. The second part of the chapter will then focus on the human rights risks and impacts that are linked to infrastructure, what the implications are for PPPs, and a brief reflection on the existing guidelines on PPPs from a human rights perspective.

The human rights obligations of public, private and international actors

Different role players have different international human rights obligations, with different legal risks attached to those obligations. This is pertinent in the context of PPPs, since it consists of entities that transcend different spheres of governance, including the public sector, private sector, as well as financial institutions that could fall in either of these categories, or even be categorised as international organisations.[300]

For a long time, states were seen as the only real human rights obligation bearers, and that the obligations were of a vertical nature - in other words, human rights was considered a framework that governs the relationship between the state and the individual.[301] However, over the past few decades, there has been an increasing recognition that non-state actors have certain human rights responsibilities as well

[300] Commercial domestic banks, or even those belonging to international groups, are most likely set up as private or public (listed) companies in the jurisdictions that they operate in, while multilateral development banks tend to be regarded international organisations.
[301] The centrality of states in the human rights discourse is evident from the history of the human rights movement. For a brief overview, see Winston L Frost, 'The Developing Human Rights Discourse: A History of the Human Rights Movement' (2000) 10 Trinity Law Review 1.

under international human rights law, and that human rights may apply horizontally as well - in other words, between different non-state actors.

As stated in Chapter 1, the term 'obligations' will be used to refer to a legally identifiable duty in relation to human rights, based on a source (or more than one source) of international human rights law. As will be set out below, international human rights law is considered part of public international law, sharing many of the same principles, and consequently influenced by developments in public international law. The public international legal system has developed over many years through codification, case law, and literature, to acknowledge a number of legitimate sources that give rise to legal obligations.[302] Where the subject matter is focused on human rights, these laws will give rise to international human rights obligations. As a first step, it is therefore important to understand what is considered the sources of public international law, and consequently international human rights law.

Sources of international human rights obligations

The existence of international human rights obligations should not detract from the fact that most jurisdictions will have very specific domestic human rights obligations that are relevant to all parties in a PPP. In relation to the private sector and financial institutions, these obligations would typically manifest in one of two ways. In the first instance, the Constitution or Bill of Rights of the specific jurisdiction in question could explicitly state that human rights obligations are horizontally applicable, binding all juristic and natural persons. This is the case in South Africa for example, where the

[302] Article 38 of the Statute of the International Court of Justice acknowledges international conventions, international custom, general principles of law, judicial decisions, and expert opinions as the sources of international law. Statute of the International Court of Justice 1945.

Constitution states in Article 8 that it binds all natural and juristic persons, taking into account the nature of the right and the nature of any duties imposed by the right.[303] This includes the international human rights obligations of the state, which is domesticated through other laws and legislation.

In the second instance, in jurisdictions where the horizontal application of human rights is not explicitly stated, states are expected to ensure that all legislative and regulatory frameworks comply with the human rights obligations of the state, thereby supposedly creating a framework that ensures respect for international human rights as well. Once a state commits itself to a certain international human rights obligation, it becomes the obligation of the state to ensure that its legislative and regulatory frameworks are in line with its own human rights obligations. This would typically apply to the entire legislative and regulatory framework, including laws and regulations around infrastructure development, for example.

The sources of public international law,[304] and consequently international human rights law,[305] mainly consist of customary international law and general principles of international law, *jus cogens* or peremptory norms of international law, human rights

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[303] The Constitution of the Republic of South Africa 1996. A number of other states recognise the horizontal application of fundamental rights, either explicitly or through the development of jurisprudence to that effect. A few examples include Kenya, Ireland, Germany, Japan and Switzerland. For a detailed discussion on the horizontal application of fundamental rights, see Brian Sang Y K, 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence' (2018) 26 African Journal of International and Comparative Law 1; Danwood Mzikenge Chirwa, 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' (2006) 10 Law, Democracy & Development 21.

[304] Article 38(1) of the Statute of the International Court of Justice recognises international conventions, international custom, general principles of international law, and 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' as sources of public international law. See Statute of the International Court of Justice.

[305] Clapham (n 48). It should be noted, however, that different legal scholars have different categorizations of international human rights sources. See for example Skogly (n 50).

treaties, international human rights soft law, and *erga omnes* obligations. The following paragraphs give a brief overview of each of these sources of law, after which the obligations of states and non-state actors that emanate from these sources are explored in more detail.

Customary international law and general principles of public international law

Customary norms in international law derive from state practice that is sustained over a period of time, which is accompanied by an *opinio juris*. In other words, the three criteria for the determination of the existence of customary norms in international law are:

1) State practice;

2) Sustained over a period of time;

3) That is accompanied by *opinio juris* (a sense of legal obligation).

Customary law is of course an important body of law when discussing human rights obligations, as it is understood that one of the main differences between customary international law, and treaty law for example, is that it binds all international actors, regardless of whether or not they have agreed to be bound by it or signed onto an international legal instrument to that effect. This is especially important in the context of non-state actors. While a variety of non-state actors may not have the authority to sign international agreements, these non-state actors are still bound by customary international law if they are considered international organisations.[306] As will be

[306] Clapham (n 48).

discussed in more detail later, this includes international and inter-governmental organisations, as well as some international financial institutions.[307]

In the context of human rights, customary rules have evolved primarily from those norms that are considered to be universal in character and that are proclaimed in a number of international instruments.[308] There are, however, different opinions on whether or not human rights instruments such as the Universal Declaration of Human Rights (UDHR) could technically be considered customary international law. There are those that believe that the UDHR should be considered customary international law in its entirety.[309] Others take a much more positivistic approach, and argue that the UDHR is 'not legally binding, and possesses only moral and political force', and consequently does not qualify as customary international law.[310] The apparent opposition stems from the practice-oriented nature of customary international law. As mentioned above, one of the criteria for customary international law is a practice that is sustained over a period of time, which according to a number of authors, is a criterion that is almost always missing in the context of human rights.[311]

Nonetheless, while it is not clear whether instruments such as the UDHR is considered customary law in its entirety, there seems to be consensus that a number of rights contained in the UDHR are considered customary norms by nature. This includes for

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[307] See a detailed discussion on the complexities around the different obligations of different actors under the section titled 'Legal subjectivity and obligations under public international law' further on in this chapter.
[308] *Clapham (n 48)*.
[309] *See among others Louis Sohn, The Human Rights Law of the Charter, Texas International Law Journal 129 (1977), JP Humphrey, The Universal Declaration of Human Rights: Its history, Impact and Juridical Character, in Human Rights: Thirty Years after the Universal Declaration 21–37 (1979), Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, Australian Yearbook of International Law 88 (1988)*.
[310] Antonio Cassese, *International Law in a Divided World* (1986).
[311] Simma and Alston (n 309).

example rules on the prohibition of arbitrary killings, slavery, torture, detention, and systematic racial discrimination.[312] In fact, as a response to the argument that a lack of sustained practice would prevent an instrument from ever becoming customary law, the ICJ stated that:[313]

> *The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule...If a State acts in a way prima facie incompatible with the recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*

Nonetheless, the focus on *state* practice is apparent in the definition of 'customary law' itself. As a result, the term 'general principles of international law' is often applied, especially in the context of international organisations (not states), since it is widely accepted that they have the capacity to enjoy rights and bear obligations under public international law. Yet, these obligations are not formed through custom, and do not necessarily flow from a sense of legal obligation. As a result, it could be misleading to use the term 'customary international law' only in this context, albeit quite similar in terms of substantive content.[314]

Jus cogens or peremptory norms of international law

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[312] Clapham (n 48).
[313] See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), 14 (1986) para 186; Gideon Boas, Public International Law: Contemporary Principles and Perspectives (2012).
[314] Clapham (n 48).

Whereas customary international law is formed through a period of practice, and from a sense of legal obligation (*opinio juris)*, *jus cogens* or peremptory norms are rules that are accepted by the international community of states as a whole. Prominent international case law[315] and instruments[316] have cited the prohibition of torture, prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity, slave trade, and the right to self-determination as peremptory norms, to name a few. *Jus cogens* norms are considered peremptory in nature, in other words not open to be challenged, and the law on treaties as developed through the Vienna conventions state that any treaty provision would be invalid if it is in conflict with a *jus cogen* norm.[317]

The notion of peremptory norms has also received a fair amount of criticism.[318] For example, it is notoriously hard to determine whether or not the requirements to be considered a peremptory norm under public international law has been met or not.[319]

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[315] The prohibition against torture has been cited in several cases by institutions that include the UN Treaty Bodies, the European regional human rights system, the Inter-American regional human rights system, the African regional human rights system, and several international tribunals. For a comprehensive summary on the jurisprudence on torture in international law, see Association for the Prevention of Torture and Center for Justice in International Law, 'Torture in Intenational Law - A Guide to Jurisprudence' (2008) <https://www.apt.ch/sites/default/files/publications/jurisprudenceguide.pdf>.Prosecutor v Furundzija, (1998), para 153ff.

[316] Chapter III of the International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. See also UN Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency (2001), https://www.refworld.org/docid/453883fd1f.html (last visited Mar 12, 2019), where the Committee acknowledges the peremptory nature of certain human rights norms, and goes on to list a few examples that include the arbitrary deprivation of life, torture and degrading treatment, taking of hostages etc.

[317] See Articles 53, 64, and 66(a) of the Vienna Convention on the Law of Treaties 1969.

[318] For a summary on the criticism against the concept of peremptory norms, see Mark Retter, 'Jus Cogens: Towards and International Common Good?' (2011) 2 Transnational Legal Theory 537.

[319] Alexander Orakhelashvili, Peremptory Norms in International Law (1 ed. 2006), 51.

There appears to be strong doctrinal support for the idea that natural law lies at the heart of peremptory norms.[320]

When it comes to human rights in particular, it has been argued that there is an intrinsic relationship between human rights and *jus cogens*.[321] In a dissenting opinion in the *South West Africa* case, Judge Tanaka of the ICJ stated that:[322]

> *If we can introduce in the international field a category of law, namely jus cogens, recently examined by the International Law Commission, a kind of imperative Law which constitutes the contrast to jus dispositivum, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the jus cogens.*

There is still not consensus on the matter, and conversations around which human rights norms and principles should be included in the scope of peremptory norms continues. What is not disputed, however, is that it is indeed acknowledged as a source of international human rights law.

Human rights treaties

One of the main sources of international human rights law, is treaty law. Treaties are agreements between states that are voluntarily signed and ratified. A state is only bound by a treaty once that state has signed and ratified the treaty. However, since treaties are usually drafted collectively between a number of states, there may be

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320 Alexander Orakhelashvili, Peremptory Norms in International Law (1 ed. 2006), 36.
321 Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 The European Journal of International Law.
322 Kotaro Tanaka, 'Dissenting Opinion of Judge Tanaka' (1966) ICJ Reports.

instances where a state agrees with certain aspects of a treaty, but not all of them. In such a case, a state is allowed to file reservations, declarations or derogations in relation to a specific treaty, which will then only have limited applicability in the case of a ratification. The Vienna Convention on the Law of Treaties sets out the fundamental rules relating to treaties, including what defines a treaty, who has the capacity to conclude a treaty, how to interpret a treaty, as well as what to do in the event of disputes or reservations.[323]

International human rights treaties can be developed multilaterally, but also bilaterally. At the multilateral level, treaty development is usually done at the UN level (globally), or at the regional level.[324] This means that, while there may be significant overlap in the commitments contained in treaties at the global and regional levels, there may also be particular commitments tied to specific provisions in regional instruments, that are not necessarily contained in global human rights instruments. The fact that there could potentially be different human rights obligations applicable in different regions (on top of the already existing differences in domestic human rights obligations) complicates matters tremendously in the context of transnational business. For example, when a corporation that is registered in one country operates in another country, the question often arises which human rights obligations and duties should apply to the conduct of the business - this is colloquially referred to as the 'home vs host state' debate.

[323] Vienna Convention on the Law of Treaties.
[324] Regional human rights treaties are most often tied to regional human rights systems, which are linked to regional international organisations. For example, the Inter-American Human Rights System is linked to the Organization of American States, and the African Commission on Human and Peoples' Rights is linked to the African Union.

In 2014 Ecuador tabled a resolution at the UN Human Rights Council proposing a treaty on business and human rights.[325] Initially, there was a perception that the intention (and probable outcome) of the process was to develop a treaty that would be directly applicable to transnational corporations (TNCs), or at the very least be able to hold TNCs directly accountable for human rights violations. In 2017 the process delivered a document laying out the elements for a legally binding instrument on TNCs.[326] In 2018 a 'zero draft' was made public,[327] together with an optional protocol.[328] In 2019 a 'revised draft' was released, and in 2020 a 'second revised draft'.[329] While the revised drafts of the treaty have been praised by various

[325] Human Rights Council, 'Resolution 26/9: Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) 26/9 <https://www.ihrb.org/pdf/G1408252.pdf> accessed 1 May 2019.
[326] Open Ended Inter-Governmental Working Group on Business and Human Rights, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2017) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 1 May 2019.
[327] Open Ended Inter-Governmental Working Group on Business and Human Rights, 'Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2018) <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>.
[328] Open Ended Inter-Governmental Working Group on Business and Human Rights, 'Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF>.
[329] Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, 'Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2019) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>; Open Ended Inter-Governmental Working Group on Business and Human Rights, '2nd Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 8 February 2021.

commentators,[330] it does not change the current consensus around the obligations[331] of corporations under international human rights law, and still relies on state implementation as a mechanism to hold corporations accountable. The obligations of corporations under international human rights law is discussed in more detail under the section titles 'Human rights obligations of the private sector'.

Soft law instruments

When it comes to questions around human rights obligations of non-state actors, and perhaps the private sector more specifically, there has been a wide degree of reliance on soft law mechanisms to both prevent and monitor corporate human rights violations.[332] In the context of public international law, 'soft law' could include any 'international instrument other than a treaty that contains principles, norms, standards or other statements of expected behaviour'.[333] In the context of business and human rights in particular, it may also include 'widely accepted codes of conduct that have

[330] Business and Human Rights Resource Centre, 'Blog Series on the Revised Draft of the Legally Binding Instrument on Business and Human Rights' (11 October 2019) <https://www.business-humanrights.org/sites/default/files/Revised%20Draft%20Blog%20CompilationPDF5.pdf> accessed 7 June 2020; Surya Deva, 'The Business and Human Rights Treaty in 2020 - The Draft Is "Negotiation-Ready", but Are States Ready?' (OpinioJuris 2020) <http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/> accessed 10 February 2021.

[331] It is important to note the difference between human rights obligations, which are enforceable legal obligations that primarily belong to the state, and human rights responsibilities, which applies to the private sector. For a more detailed discussion on the matter, see further down in this chapter the sections titled 'Human rights obligations of the state' and 'Human rights obligations of the private sector'. Also see Office of the High Commissioner for Human Rights (n 169).

[332] Nolan (n 49).

[333] Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 The American Journal of International Law 291.

been developed by a group of stakeholders as a mechanism to prevent corporate rights abuses'.[334]

The line between hard and soft law is a blurry one, and there are different opinions on what exactly could be categorised as the one or the other. Nolan distinguishes hard law from soft law by highlighting the *intention* behind a particular instrument - regardless of the enforceability of a particular instrument, if the intention was to be legally binding at the time of conception, it is most likely considered hard (and not soft) law.[335] However, as contradictive as it may sound, this does not mean that soft law could not be binding at all, perhaps just not binding in the strictly legal sense. It is recognised that soft law can 'provide guidelines and principles which, while not legally binding, have force by virtue of the consent that governments, companies, and other civil society actors accord them.'[336] Codes of conduct, developed through multi-stakeholder initiatives (MSIs), could also include enforcement mechanisms, binding those that have voluntarily signed on to these instruments.[337]

In addition to soft law instruments that elucidate more general human rights obligations, that are applicable to a number of different actors (states, international organisations, corporations, etc.), we have also seen an increasing number of soft law

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[334] Nolan (n 49).
[335] *ibid.*
[336] Institute for Human rights and Business, 'From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries' (2011) <https://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf> accessed 22 March 2019.
[337] A good example is the International Code of Conduct (ICoC) for Private Security Providers. While it is certain that the ICoC rather falls within the realm of soft than hard law, the complaints and monitoring mechanisms attached to the ICoC provides for much stronger enforceability than many hard law instruments, which could be considered to create a definite sense of obligation among its member companies. For more information on the ICoC, see https://www.icoca.ch (last visited Mar 22, 2019).

instruments that draw attention to the human rights implications of privatisation, and in some contexts, even PPPs in particular. Some examples include General Comment No. 24 of the Committee on Economic, Social and Cultural Rights, which focuses on state obligations under the ICESCR in the context of business,[338] and a recent report of the UN Special Rapporteur on extreme poverty and human rights that focuses on the impacts of privatization on equality and human rights.[339] The African Commission Working Group on Economic, Social and Cultural Rights (WGESCR) is also in the process of drafting a resolution that focuses on the potential human rights impacts of privatisation in areas such as healthcare, education, and access to water.[340]

In the context of business and human rights, the most well-known and authoritative soft law instrument is arguably the UNGPs. The UNGPs serve as a summary of the existing international human rights obligations of the state, as well as the private sector, and is based on what became known as the 'protect, respect and remedy' framework. The UNGPs is discussed in more detail under the section dealing with the human rights obligations of corporate actors below.

Erga omnes obligations

No discussion of obligations under public international law or international human rights law is complete without touching on the issue of *erga omnes* obligations. In the *Barcelona Traction* case,[341] the ICJ stated that certain basic human rights give rise to

[338] Committee on Economic, Social and Cultural Rights, supra note 13.
[339] Alston (n 299).
[340] This information was obtained first hand by the author, after attending a joint Special Mechanism meeting with the African Working Group on Economic, Social and Cultural Rights, and the African Working Group on Extractive Industries, Environment, and Human Rights in The Gambia, Banjul, from 17 - 18 February 2019.
[341] Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), 4 (1964).

international obligations owed by states to all other states, and called it '*erga omnes* obligations'. *Erga omnes* means 'towards everyone',[342] and implies that certain human rights violations give rise to a separate right for a state (that is not the injured state) to complain about the breach of an obligation by another state. The International Law Commission (ILC) developed the concept further, and determined in the *Articles on Responsibility of States for International Wrongful Acts* that states (other than the injured state) can invoke the responsibility of another state in two instances:[343]

1) If the obligation that is breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

2) If the obligation breached is owed to the international community as a whole.

Since human rights treaties are either explicitly or implicitly designed to protect a general common interest, it could be argued that human rights obligations always fall into one of the above categories of *erga omnes* obligations.[344] In the context of non-state actors, this is particularly interesting to note, since it implies that the way in which a state or international organisation treats those under its jurisdiction or control, can trigger legitimate legal responses from other states or international organisations, even when nationals of the state bringing the complaint are not harmed. Whether this changes the nature of the human rights obligations of private actors, even when they step into the shoes of government under privatisation or a PPP, is not clear. However, it is hard to imagine a scenario where the partners in a PPP are not considered to act

[342] Clapham (n 48).
[343] Articles 48(1)(a) and (b) of International Law Commission (n 316); ibid.
[344] This is the position of James Crawford, who is a current judge of the ICJ and the former Special Rapporteur of the ILC. See Clapham, supra note 3, 97.

as either the state, an international organisation, or a private actor under control of the state.[345]

Legal subjectivity and obligations under public international law

Given the number of sources of international human rights, it is important to understand what the implications of these sources are in terms of rights and obligations. The question around who the bearers of international human rights obligations are, goes hand in hand with the issue of legal subjectivity or personality under public international law, as it could be argued that rights and obligations can only be transferred to those that are considered legal subjects. As pointed out by Clapham, discussions around legal subjectivity and personality under public international law have been inconsistent, and even confusing at times.[346] Traditionally, states were regarded by many to be the sole subjects of public international law, and arguments in favour of expanding this notion have often been met with resistance. For example, there appears to be an assumption that increasing the categories of international persons recognised under public international law (natural or juristic), will automatically expand the category of authors of international law. This is considered problematic, given the predominantly Westphalian state-centric view of public international law.[347]

[345] For a more detailed discussion of human rights under privatization, see the section further down in the chapter titled 'Human rights obligations under privatisation'.
[346] *Clapham (n 48)*.
[347] A Westphalian system prioritises state sovereignty, and acknowledges states as the main (and only) subjects of international law. In fact, it has been argued that what we understand to be public international law today, was originally conceptualised as the 'law of nations', again emphasising the centrality of nations or states. See Clapham *(Id), 61*.

Generally speaking, the potential subjects of public international law could be categorised into states, international or inter-governmental organisations, and non-state actors. The legal subjectivity of states under public international law is uncontested, and it is widely accepted that international organisations are also subjects of international law. However, when it comes to non-state actors, the picture is not as clear. Most financial institutions fall into the public, non-state, or international organisations categories, and therefore does not constitute a separate category in and of itself. As such, the same rules that apply to the category in question will apply to the financial institution, depending on the nature of the institution.

Human rights have developed over the years to fall into a number of different categories, including individual rights and collective or group rights. The idea of group rights has enjoyed particular support from Africa, where the notion of peoples' rights is strongly emphasised in the African Charter on Human and Peoples' Rights.[348] The enjoyment of individual or collective rights necessarily depends on corresponding obligations to protect, respect and fulfil those same rights.[349]

As will be illustrated in the discussion that follows, the different elements of human rights obligations (i.e. obligations to protect, respect, promote and fulfil) are applicable to the different subject groupings in different ways. For example, some argue that the state can be the only bearer of positive human rights obligations, such

[348] Organisation of African Unity, African Charter on Human and Peoples' Rights (1986), Articles 19 to 23.

[349] The human rights obligations to protect, respect and fulfil can be traced back to the International Bill of Rights. See United Nations General Assembly, 'Universal Declaration of Human Rights' <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>; UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (1966) <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> accessed 1 May 2019; Humphrey (n 309); UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights'; ibid.

as the obligation to fulfil certain human rights, while non-state actors can only have negative human rights obligations.[350] Others feel that there are indeed more binding obligations on corporations under international human rights law, with others arguing in favor of both negative and positive obligations on corporations.[351] A brief overview of the human rights obligations of each of the different categories follows.

Human rights obligations of the state

States have always been the primary subjects of public international law, and consequently international human rights law. While the exact extent of the state's human rights obligations is a subject that is continuously developed further, it is widely accepted that states have obligations to respect, protect, promote and fulfil human rights. These obligations are highlighted in the main international human rights instruments, including the UDHR,[352] the ICESCR,[353] and the ICCPR.[354] Independent experts, through serving on human rights treaty bodies, interpret and give guidance on the content of state obligations contained in international instruments by issuing General Comments.[355] Obligations are also analysed and explored whenever a dispute is brought before institutions such as the International Court of Justice (ICJ)[356],

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[350] Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (n 77).
[351] Bilchitz (n 49).
[352] Articles 16, United Nations General Assembly (n 349).
[353] See the Preamble, as well as Articles 1, 8, 10, 13, 14, 15 and 17, UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (n 349).
[354] See Articles 17, 18, 19, 21, 22, 23, 24, 26, 41, and 42, UN General Assembly, 'International Covenant on Civil and Political Rights' (1966) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 September 2020.
[355] For more information on General Comments, see https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx (last accessed 1 May 2019).
[356] The International Court of Justice (ICJ), for example, has two functions. Firstly, it exists to settle, in accordance with international law, legal disputes submitted by states. And

the African Court on Human and Peoples' Rights,[357] or the African Commission on Human and Peoples' Rights.[358]

The state obligation to respect human rights, refers to the negative duty on the state not to infringe on the enjoyment of human rights by others. In other words, the state should ensure that its activities do not disrupt the enjoyment of human rights by others. This requires a detailed understanding of the human rights of others, the ways in which those human rights are enjoyed, and the impact that potential actions will have on the enjoyment of those rights. In the context of infrastructure, this would require the state to be aware of the potential impacts that any infrastructure focused undertaking would have on human rights.

Infrastructure projects, and in particular mega-infrastructure projects, tend to have large footprints, with the potential to have severe and wide-spread impacts on human rights. To ensure that states respect human rights, they need to assess what the potential adverse human rights impacts of infrastructure projects would be, and eliminate or mitigate these impacts as much as possible.

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secondly, to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. See https://research.un.org/en/docs/icj (last accessed 1 May 2019).

[357] The African Court on Human and Peoples' Rights was established by a Protocol to the African Charter on Human and Peoples' Rights to complement the protective mandate of the African Commission on Human and Peoples' Rights, and also to '[hear] all cases and disputes submitted to it concerning the interpretation and application of the [African] Charter...and any other relevant Human Rights instrument ratified by the States concerned'. See Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (last accessed 1 May 2019).

[358] The mandate of the African Commission on Human and Peoples' Rights is threefold - the promotion of human and peoples' rights, the protection of human and peoples' rights, and the interpretation of the African Charter. See 'Mandate of the Commission' at http://www.achpr.org/about/mandate/ (last accessed 1 May 2019).

The state obligation to protect, refers to the positive obligation of the state to protect its people from adverse human rights impacts by others. In other words, the state has a duty to ensure that other role players (either other states, international or inter-governmental organisations, or non-state actors), do not infringe on the human rights of those within its territory.[359] This is usually done through legislative and regulatory means. With the right legislative and regulatory frameworks in place, the state will effectively require all role-players to respect human rights, and provide methods of redress where respect for human rights is not observed. In the context of infrastructure, this would mean that the state has an obligation to create a legislative and regulatory environment that would ensure respect for human rights by all the actors involved in an infrastructure project, including financial institutions and private actors.

The state obligation to promote human rights, speaks to its role in the advancement and acceptance of human rights. This obligation refers to the states participation in international organisations, its efforts to educate people on human rights, as well as the seriousness and commitment it demonstrates in addressing human rights problems at the domestic and international levels. In the context of infrastructure, the state obligation to promote human rights could be demonstrated through the attention it gives human rights in the legislative and regulatory frameworks it provides for infrastructure projects, as well as the way in which it plans infrastructure projects - as

[359] It should be noted that this is a contested issue. While many states still interpret their human rights obligations as being only applicable within their borders, there is a growing body of literature around extraterritorial obligations as the missing link in universal human rights protection. With this in mind, a group of international human rights law experts developed the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) in 2011. The Maastricht Principles do not create any new elements of human rights law, but rather clarifies the extraterritorial obligations of states on the basis of existing international law. For more detail, see Maastricht Conference, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2011) <https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf>.

will be illustrated in the substantive section below, a number of human rights are realised or fulfilled through the development of infrastructure.

The state obligation to fulfil human rights, refers to the positive obligation of the state to provide certain basic needs and services that would allow people to enjoy human rights. While this obligation is most often raised in the context of socio-economic rights, it is also central to the fulfilment of civil and political rights. For example, in the context of infrastructure, the state has an obligation to fulfil people's right to access to water by developing water reservoirs and water distribution facilities, to provide people with reasonable access to water. Similarly, the state has an obligation to ensure that the necessary infrastructure is in place to allow people to vote in a democratic election. Whereas the previously mentioned obligations (to respect, protect, and promote) are not excused by a lack of resources, there are clear links between the obligation to fulfil human rights, and the financial capacity of the state.

With this in mind, it is clear that human rights law also has implications on the state's management of its fiscal and financial affairs.[360] A number of international human rights instruments, including the ICESCR, explicitly highlights the obligation of the state to dedicate the maximum extent of it available resources to the progressive realisation of human rights.[361] As highlighted by Aizawa in this context:[362]

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[360] Aizawa (n 46). 27.

[361] The obligation of the state to use its maximum available resources for the fulfilment of economic, social and cultural rights is for example explicitly highlighted in Article 2 of the International Covenant on Economic, Social, and Cultural Rights, and Article 4 of the Convention on the Rights of the Child. See UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (n 349); UN General Assembly, 'Convention on the Rights of the Child' (1989) <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> accessed 1 May 2019.

[362] Aizawa (n 46) 27.

> *'States have the obligations to "to take steps," which should be deliberate, concrete and targeted as clearly as possible, and use "all appropriate means, including particularly the adoption of legislative measures" towards meeting the obligations recognized in the CESCR and other relevant conventions.'*

As such, there are two important principles to highlight. Firstly, the state is required to dedicate the maximum extent of its resources to the fulfilment of human rights. But, secondly, international human rights law also recognises the limited financial capacity of the state, and only requires the fulfilment of human rights to the extent that a state's resources allow it to do so. The obligation to fulfil socio-economic rights becomes problematic under privatisation, and will be discussed in more detail below.

The human rights obligations of the state (when collectively read), have a number of important implications for the development of infrastructure. Firstly, the state is required to plan and develop infrastructure in a way that would realise and fulfil the enjoyment of human rights. Secondly, the state is required to plan and develop infrastructure in a way that does not adversely impact on the enjoyment of human rights by others. Thirdly, the state is required to ensure that the legislative and regulatory frameworks are in place to ensure that other actors do not adversely impact on human rights. And fourthly, specifically with PPPs in mind, the state has an obligation to ensure that all human rights obligations are met, even when it transfers risks and activities to other parties.

Human rights obligations of international financial institutions

For purposes of this thesis, it is important to distinguish between multilateral development banks (MDBs) such as the World Bank, and domestic banks that focus

primarily on commercial financial services.[363] The main reason for the distinction, is the fact that domestic commercial banks are legally categorised as private actors, therefore having the same human rights obligations as other private sector entities and corporations.[364] MDBs, however, exist as international or inter-governmental organsiations, and consequently fall under an entirely different category of legal entities. Since the majority of large-scale infrastructure projects draw funds from MDBs such as the World Bank, the IFC, or the African Development Bank (AfDB), it is important to also consider what the human rights obligations of these kinds of institutions are under international human rights law.

The World Bank is an international organisation, with international legal personality.[365] However, the legal subjectivity of the World Bank (and other MDBs for that matter), is a separate issue than the *extent* of the human rights obligations of these institutions. The World Bank, as the largest of the MDBs, have expanded its understanding of development dramatically over the past fifty years, and consequently also the role that it is expected to play as a development financier. This includes its engagement with the issues of human rights.[366] For a long time the World Bank relied on its Articles of Agreement to avoid questions around human rights, which explicitly states that:[367]

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[363] Some domestic commercial banks finance infrastructure as well, though for purposes of this discussion it would not make a difference to the legal personality or category of the institution. It is still categorised as a private sector entity, and would be treated as a corporation under public international law.

[364] An exception, however, could be in the case of state-owned banks. Nonetheless, if a bank is state-owned, the human rights obligations of the bank should be considered in light of the obligations of the state.

[365] Skogly (n 50).

[366] For a historical overview of the World Bank and IMF's understanding of its role in development, and engagement with human rights, see Bradlow, 'The World Bank, the IMF, and Human Rights' (n 50).

[367] Section 10 under Article IV of the Articles of Agreement of the World Bank states that the Bank may not interfere in the political affairs of any member, and 'nor shall they be influenced in their decisions by the political character of the member or members

> *The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I. (emphasis added)*

The reasoning of the World Bank was that human rights are political in nature, and that social issues should not be considered since the Articles explicitly require only economic issues to be considered. However, over the years it became increasingly clear that almost all political, social and cultural issues will have an economic impact, given enough time.[368] As set out in Chapter 2, the Bank also started focusing more on poverty alleviation towards the end of the 20th century, and it became increasingly clear that the Bank can no longer ignore its relationship with human rights.[369]

Some argue that, while it is clear that MDBs have legal personality and that they operate on the international and domestic planes, the existing rules on the law of responsibility renders them immune from liability for human rights violations at the domestic level, and that the borrowing state should be held liable for violations that

concerned. Only economic considerations shall be relevant to their decisions...'. See World Bank, 'IBRD Articles of Agreement' (1989) <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> accessed 1 May 2019.

[368] The World Bank, for example, decided to include female genital mutilation as an economic issue. See Bradlow, 'The World Bank, the IMF, and Human Rights' (n 50).

[369] The World Bank's attitude towards human rights have ebbed and flowed through the years, often linked to the leadership of the Bank, and perhaps the Presidents and the General Counsels of the Bank in particular. For a discussion on the Bank's different attitudes toward human rights under different leadership, see David Kinley, 'Human Rights and the World Bank: Practice, Politics, and Law' (2006) 2 World Bank Legal Review 353, 360–363.

occur as a result of a project that is funded by an MDB.[370] However, it is useful to draw a distinction between the human rights situation in a borrowing state, and the human rights obligations of the World Bank as such.[371]

When it comes to the human rights situation in the borrowing state, decisions around financing will always be clouded by questions of conditionality and political selectivity, which makes it very hard to determine what exactly the human rights policy of MDBs should be in this context. In other words, what are the conditions that could or should be attached to financial assistance from the World Bank, and to what extent can these conditions be linked to human rights? And to what extent would the conditions drive a borrowing state in a specific political direction, one that is favoured by the Bank? Bradlow offers some insights on what the human rights policy of an MDB could potentially contain, and highlight indicators that include participation, human rights impacts, and accountability as means to ensure good human rights outcomes in borrowing states.

When it comes to the second component, namely the institutional human rights obligations of the World Bank (and potentially other MDBs as well), there are different views. On the one hand, some argue that MDBs such as the World Bank have human rights obligations by virtue of their position in the UN system or other international organisations,[372] the agreements they enter into with other international organisations,

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[370] Crippa (n 76).

[371] See Clapham, supra note 3; See also Bradlow, supra note 47. Bradlow draws a similar distinction between what he calls the 'operational human rights issue', and the 'institutional human rights issue'. The operational issue focuses on the Bank's ability to promote and protect human rights in a borrowing country, while the institutional issue pertains to the internal rules and procedures of the Bank.

[372] This point is perhaps more applicable to institutions such as the World Bank and the International Monetary Fund (IMF), which is a specialized agency of the UN. However, this

and the fact the member states or governments on the boards of these institutions have their own human rights obligations. Skogly goes further to note that IFIs have the obligation to respect human rights, a limited obligation to protect human rights, but no obligation to fulfil human rights.[373] On the other hand Clapham asserts that IFIs, as international organisations, are bound by customary international law, and that they potentially have the full bouquet of human rights obligations under the right circumstances. This would include the obligations to respect, protect and fulfil human rights.[374]

The obligation to respect human rights has to some extent made its way into the safeguard policies of a number of MDBs. Safeguards in general are used as a means to prevent and mitigate any adverse environmental and social impacts that a project will have. As will be detailed in the next chapter, there are some overlaps between the international human rights framework, and environmental and social impact assessment (ESIA) frameworks, which is a tool that is often employed or required by the safeguard policies of the MDBs. However, ESIAs do not cover human rights in adequate detail, and consequently a number of MDB funded projects have impacted adversely on human rights.[375] In the context of infrastructure, it is thus important for MDBs to ensure that the assessment tools that are used sufficiently

principle will also apply to other MDBs that are linked to multilateral international organisations.

[373] Clapham (n 48). 150.

[374] *ibid.*

[375] Some examples include the series of dams along the Narmada River in India, the Panama Canal through the Chiapas region, and the North-South Expressway in Malaysia. For more detail on these projects, and the response of MDBs to coordinated campaigning efforts against them, see Likosky, 'Human Rights Risk, Infrastructure Projects and Developing Countries' (n 41); Likosky, 'Mitigating Human Rights Risks under State-Financed and Privatized Infrastructure Projects' (n 11); Likosky, 'Adapting Human Rights to Privatised Infrastructure Projects' (n 11).

consider the potential human rights impacts, as a means to ensure respect for human rights.

Human rights obligations of the private sector

The human rights obligations of the private sector has been a subject of much debate for many years. One of the main contentions, has been the legal subjectivity of corporations under international human rights law, or public international law more broadly, as it is argued that an entity could not have legal obligations if it is not recognized as a legal subject. There are two schools of thought on the matter that is relevant to discuss here. Firstly, there are those that argue that, as a matter of principle, corporations have no legal subjectivity under public international law, and consequently no legal obligations under international law. Secondly, a number of legal scholars argue that corporations have, at the very least, limited legal subjectivity under public international law, with limited legal obligations. Both these positions will be explored briefly.

As discussed above, states have always been the primary legal subjects and duty bearers under international human rights law. The theory is that, as part of the state's obligations to respect and protect human rights, it should develop a legislative and regulatory framework that would ensure respect for human rights by any other non-state entities that operate within its jurisdiction, including the private sector. The international human rights obligations of the state will then be reflected under domestic law, and require private entities to comply with these provisions without the need for them to be considered as legal subjects under international law. While this makes sense in theory, the reality is that some of the corporations (especially TNCs) are extremely powerful, often with more resources than the states in which they

operate. As a result, it is often very hard for states to regulate these corporations effectively, and hold them accountable for any transgressions.[376]

Nonetheless, others feel that the approach should be slightly more nuanced. As stated by Hans Smit:[377]

> *[the] conceptual approach [of determining the legal personality of corporate entities under international law] may lead in the direction of an erroneous answer. For it suggests that the answer must be either in favour or against finding such personality, while it is increasingly recognized that the answer cannot be cast in absolute terms. A particular corporate entity other than a state may have only certain rights or certain obligations under international law and have legal personality only insofar as necessary adequately to assert such rights or to discharge such obligations. The description of the nature of the inquiry must therefore be cast in relative terms. The proper inquiry is for what purposes a particular corporate entity should be treated as possessing legal personality under international law. Under this approach, the existence of what might be called relative legal personality depends on a number of factors, including the nature and purposes of the entity, its activities in international intercourse, and the rights or obligations of which recognition is sought. Whether it exists therefore depends on the particular setting in which the question is raised.*

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[376] A slightly separate but related issue, is the challenges that states experience in adapting human rights laws and regulations as a result of stabilization clauses in investment treaties. For a detailed discussion on this topic, see Jernej Letnar Černič, 'Corporate Human Rights Obligations and International Investment Law' (2010) 3 ACDI Anuario Colombiano de Derecho (Colombian Yearbook of International Law) 243.

[377] David Adedayo Ijalaye, The extension of corporate personality in international law (1978)., ix.

The development of a limited legal subjectivity, and consequently also a limited set of human rights obligations, gained a lot of momentum at the dawn of the 21st century. The UN Sub-Commission for the Promotion and Protection of Human Rights approved in August 2003 the draft Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (the draft Norms).[378] The draft Norms served as a restatement of the human rights obligations of companies under international law, as it was understood at the time.[379] The draft Norms were based on the idea that 'even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure the respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and as a result 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments'.[380]

The Norms, however, were deeply contentious for a number of reasons, including the earlier mentioned issue around the legal subjectivity of corporate actors under public international law.[381] While the draft Norms argued that corporations would have limited human rights obligations under international law, it was still an explicit acknowledgement that corporations could have obligations nonetheless. The

[378] Commission on Human Rights (n 77). For a detailed overview of the development of a human rights framework in the context of business and human rights under the UN, see Jernej Letnar Černič, 'United Nations and Corporate Responsibility for Human Rights' (2011) 8 Miskolc Journal of International Law 23.
[379] Deva and Bilchitz (n 49).
[380] Commission on Human Rights (n 77); Deva and Bilchitz (n 49).
[381] Deva and Bilchitz (n 49).

Commission on Human Rights refused to adopt the draft Norms, and instead requested the UN Secretary General to investigate the matter further.[382] In 2005, Professor John Ruggie was appointed as the Special Representative to the Secretary General on business and human rights, and in 2008 he presented the 'Protect, Respect, and Remedy' framework to the UN Human Rights Council. The framework rests on three pillars, namely:[383]

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. The corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of other and to address adverse impacts that occur; and
3. Access to judicial and non-judicial remedy for victims of corporate human rights abuse.

The framework was well received, and Ruggie was tasked to operationalise and promote the framework. The framework was developed further, and in 2011 Ruggie presented to the Human Rights Council (the successor to the Commission on Human Rights) the UNGPs, which was unanimously adopted.[384] The UNGPs are based on the same three pillars as the framework, and is currently recognised as the most authoritative statement of the human rights duties or responsibilities of states and corporations at the UN level.[385] The adoption of the UNGPs was applauded by many

[382] Commission on Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises' (2005) E/CN.4/2005/L.10/Add.17.
[383] United Nations, 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights' (2010) <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> accessed 21 March 2019.
[384] Office of the High Commissioner for Human Rights (n 169).
[385] Deva and Bilchitz (n 49).

as a major step forward, as it managed to achieve consensus across a wide range of often conflicting interests.

The UNGPs does not, however, depart from the notion that states are still the primary bearer of human rights obligations, and that corporations only have limited obligations. In fact, the UNGPs describe the 'responsibility to respect human rights' as the main duty of corporations in the context of international human rights, implicitly highlighting the negative nature of the obligation, and the intentional use of the word 'responsibility' as opposed to 'obligation'.[386] States, however, are tasked with all the positive and negative duties associated with human rights such as the obligations to respect, protect, promote and fulfil human rights.[387] The UNGPs also explicitly state, as part of its general principles, that:[388]

> *Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.*

While the UNGPs were certainly a massive step forward in terms of understanding the obligations of corporations under international human rights law, it has also been heavily criticised for failing to deal with some of the most pertinent challenges around business and human rights, such as for example access to remedy for victims of

[386] Office of the High Commissioner for Human Rights (n 169). While there are many different opinions on the difference in meaning between 'responsibility' and 'obligation', Deva and Bilchitz interprets (and criticises) the use of the word in this particular context to imply that 'companies do not have any binding obligations; rather, they merely have *responsibilities*'. See Deva and Bilchitz (n 49).
[387] Office of the High Commissioner for Human Rights (n 169); Deva and Bilchitz (n 49).
[388] Office of the High Commissioner for Human Rights (n 169).

corporate human rights abuse.[389] Many of the critics appear to be concerned about the narrow, imprecise, and non-binding nature of both the Framework and the UNGPs, and the way in which it still relies on state-centric instruments to provide clarity on the obligations of non-state actors, or companies more specifically.

Human rights obligations under privatisation

As stated in the previous chapter, privatisation is a spectrum and PPPs is considered a form of privatisation. When it comes to PPPs, and the nature of the relationship between the state and the private partners in infrastructure and service delivery arrangements, the positive human rights obligations in particular becomes quite problematic. As indicated in the discussions above, it is widely accepted that both private actors and financial institutions at the very least have negative obligations to respect human rights. When it comes to the positives duties, the answer is not as clear, but the current consensus seems to suggest that private actors do not have positive human rights obligations. But to what extent does the situation change when the state explicitly transfers certain duties to the private sector, that are directly linked to the positive human rights obligations of the state?[390]

In the context of socio-economic rights, the state has a positive obligation to progressively realise these rights to the maximum of its available resources.[391] When it comes to service provision, this obligation requires the extension of infrastructure and

[389] Deva and Bilchitz (n 49).
[390] The UNGPs offer some guidance in principles 5 and 6, which state that 'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights' and 'States should promote respect for human rights by business enterprises with which they conduct commercial transactions'. See Office of the High Commissioner for Human Rights (n 169).
[391] See Article 2(1) of the ICESCR, UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (n 349).

the development of policies that ensure that the services are accessible - both physically and economically.[392] It is up to the state to decide how it will progressively realise rights, and privatisation is one policy option that is available in this regard. The CESCR has expanded on a number of detailed elements, that give guidance on how to realise and fulfil socio-economic rights. For example, states are required to develop specific policies around rights provision[393], and engage with rights-holders in the development of these policies.[394] States must also constantly monitor the realisation of rights within their territories[395], and ensure that rights are fulfilled in a manner that does not discriminate, reduces inequality, and considers the needs of the most disadvantaged.[396]

Whenever the private sector is involved in infrastructure development or service delivery that is tied to the fulfilment of socio-economic rights, as is often the case with PPPs, it is important that the elements of the obligation to fulfil is taken into account. It is already widely acknowledged that certain state responsibilities can be attributed

[392] Nicholas McMurry, 'Privatisation and the Obligation to Fulfil Rights', *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2015).
[393] See Committee on Economic, Social and Cultural Rights, 'General Comment 11: Plans of Action for Primary Education (Article 14)' (1999) E/C.12/1999/4; Committee on Economic, Social and Cultural Rights, 'General Comment 12: The Right to Adequate Food (Article 11)' (1999) E/C.12/1999/5; Committee on Economic, Social and Cultural Rights, 'General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12)' (2000) E/C.12/2000/4; Committee on Economic, Social and Cultural Rights, 'General Comment 15: The Right to Water' (2003) E/C.12/2002/11 <http://www.refworld.org/pdfid/4538838d11.pdf>.
[394] Committee on Economic, Social and Cultural Rights, 'General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12)' (n 393).
[395] Committee on Economic, Social and Cultural Rights, 'General Comment 11: Plans of Action for Primary Education (Article 14)' (n 393).
[396] Committee on Economic, Social and Cultural Rights, 'General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3)' (2005) E/C.12/2005/4.

to businesses when they perform a public function.[397] And while the test for what is considered a public function is different in almost every jurisdiction, there is a strong case that the realisation of human rights is a public function.[398] The broad obligation to fulfil or realise rights cannot be transferred entirely to the private sector, which is one of the reasons why the legal responsibilities of the private partner in a PPP will be contractually determined. It is upon the state to ensure that the contract accords with its own obligations to fulfil rights.[399] As alluded to earlier, ensuring a clear delineation of the private partner's human rights responsibilities in a PPP would require the contract to consider elements such as targets and monitoring, policy development and inclusiveness, maximum available resources, and non-discrimination.[400]

An alternative approach to the question around the obligation to fulfil, is to require business not to undermine the state's ability to meet its own human rights obligations.[401] Even where there is a contract in place between the state and a

[397] Clapham (n 48). Clapham lays out a number of scenarios in which this could be the case, based on Articles 5, 8, 9, 10, and 11 of the Articles on State Responsibility. These include scenarios where the private entity is empowered by law to exercise elements of governmental authority, when the private entity was acting on the instructions, or direct control of the state, when the private actor was exercising elements of governmental authority due to defaulting government authorities, when the private actors becomes the government of the state, and when the state adopts the conduct of the company as its own.

[398] This notion is directly linked to the human rights obligations of the state, and the fact that the there is consensus around the state as the primary duty bearer when it comes to the protection, promotion, respect, and fulfilment of human rights. See also McMurry (n 392).

[399] Paragraph 5 under the 'State Duty to Protect' explicitly mentions that 'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.' See Office of the High Commissioner for Human Rights (n 169).

[400] For a more detailed discussion on the what the contracts could potentially contain, see the discussion around the application of human rights impact assessments to PPPs in chapters 5 and 6 of this thesis.

[401] Under the commentary to Paragraph 11 of 'The Corporate Responsibility to Respect Human Rights', it is stated that '[b]usiness enterprises should not undermine States' abilities to

private party, in relation to service delivery or any other aspects of privatisation, the state's human rights obligations supersedes the contractual obligations. A possible exception to this rule, that is often highlighted in the literature, is with international investments made under bilateral investment treaties. For example, the International Centre for the Settlement of Investment Disputes (ICSID) found in the case of *Compañia del Desarrollo v. Costa Rica* that the state had to fully compensate a company for the expropriation of property, even when it was allowed and done as a means to fulfil what the state considered to be its human rights obligations.

Summarily, the privatisation of services or infrastructure under PPPs could potentially have an impact on how the state's obligation to fulfil human rights is met. As it stands, there doesn't seem to be an acknowledged human rights obligation on business to fulfil human rights - this is still widely considered to be the duty of the state. Bearing in mind that it is permitted under international human rights law for the state to decide *how* it will fulfil rights, with privatisation as an option, it is imperative that the state ensures that this obligation is met one way or another. Unfortunately, it appears that the current international human rights framework, and especially those focusing on business and human rights, does not effectively regulate privatisation in a manner that ensures that these obligations are met.

Infrastructure and human rights

Infrastructure is closely tied to human rights in various ways. The construction of roads and power generating facilities provide people with the economic infrastructure they need to move around, work, and make a decent life. Schools, hospitals and water

meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes'. See *Office of the High Commissioner for Human Rights (n 169)*.

distribution facilities provide people with access to basic needs, which are also guaranteed as fundamental socio-economic rights under international human rights law. There are also close links between poverty and (a lack of) infrastructure, and most poverty alleviation strategies around the globe prioritise infrastructure development as one of the necessary components to addressing poverty. As the world progresses into an era where people are also dependent on access to the internet to facilitate access to some of the most basic services and needs, information and communications technology (ICT) infrastructure will also increasingly become a necessity. Countries that are connected, both in physical and technological terms, not only do better in good economic times, but are also better equipped to weather bad economic conditions.[402]

With the adoption of the 2030 Agenda and the Sustainable Development Goals (SDGs), the member countries of the United Nations reiterated again the important role that infrastructure play in realising human rights.[403] Goal 9 of the SDGs in particular aspires to 'build resilient infrastructure, promote sustainable industrialization and foster innovation'. In addition to the individual goals highlighted in the SDGs, the SDG framework also emphasises interlinkages between different goals, which means that the development of sustainable infrastructure, for example, should not come at the cost of or undermine the ability to make progress on other goals. As a response, numerous multilateral development banks (MDBs) have pledged to increase

[402] See Stephen P Groff, 'Regional Infrastructure Connectivity: What, How and When?' (*Asian Development Bank*, 23 October 2013) <https://www.adb.org/news/op-ed/regional-infrastructure-connectivity-what-how-and-when-stephen-p-groff> accessed 1 May 2019.
[403] Agenda 2030 is explicitly grounded in the UN Charter, the Universal Declaration of Human Rights, and other international human rights treaties and instruments.

development assistance to sustainable infrastructure projects, and in the process realise human rights.

Yet, it is surprising to find that policy, operational, and evaluative research around infrastructure have not engaged with the human rights dimensions in great detail.[404] As such, the United Nations Office of the High Commissioner for Human Rights (OHCHR) commissioned a study on the human rights implications of mega infrastructure projects in 2017.[405] The report usefully distinguishes between three levels of human rights impacts in the context of infrastructure – human rights impacts at the micro, meso, and macro levels. Of course, infrastructure projects can impact human rights at more than one of these levels, and some process-related issues, such as challenges related to weak accountability, can cut across all three levels. Nonetheless, the differentiation between different levels of impacts is useful to determine which human rights impacts are most likely to occur during which phase of the project, whether it be during the planning, construction, operation or decommissioning phases, or at the levels of access and service delivery.

The three-tiered impact classification is also useful to demonstrate those most likely to be impacted. The larger the infrastructure project, the more likely it is to impact across multiple levels.[406] It is important to note, however, that not all negative human rights impacts will necessarily also be considered human rights *violations*.[407] Inevitably,

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[404] Aizawa (n 46).
[405] *ibid.*
[406] *ibid.*
[407] Human rights can be limited, for example, which could arguably also constitute a negative impact, but only under specific conditions. Generally, rights can only be limited to a specified extent, and for certain limited and democratically justifiable purposes. Some prominent examples of rights instruments that allow the limitations of human rights include the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, and the Constitution of South Africa. See also International Institute for Democracy and

infrastructure projects will always have some degree of negative human rights impact. These negative impacts should be mitigated as best possible, and the human rights framework can help identify what the potential trade-offs will be in a large infrastructure project, thereby helping those in charge make better and more informed decisions. Each of the different levels of human rights impacts in infrastructure problems will be explored briefly.

Micro-level human rights impacts

Micro-level impacts are directly related to the footprint of the project, or the physical activities associated with the project.[408] These impacts tend to be tangible, direct, and specific. It affects individuals, households, groups, and communities. The project phases that are most likely to contain micro-level human rights impacts include the planning, constructions, operations, and decommissioning phases. Specific human rights that could be impacted at the micro-level include the rights to work, health, education, adequate housing, and access to water and sanitation.[409] Other micro-level impacts that tend to be prevalent throughout the lifecycle of the project include violations of the rights to access to information, and consultation and participation.[410]

Electoral Assistance, 'Limitation Clauses' (2014) <http://constitutionnet.org/sites/default/files/limitations_clauses.pdf> accessed 2 October 2020.

[408] *Aizawa (n 46)*.

[409] A good overview of micro-level impacts can be found in Rubinson (n 45) 202.

[410] Information around projects can be very hard to access. This is especially true when the private sector is driving a project, as opposed to the state, in which case it is arguably easier to argue that the information is of public interest and should be made available. Similarly, the rights of communities to be consulted and to participate in the project can be severely limited if the project partners do not specifically create environments and platforms for these purposes.

During the early planning phases of the project, micro-level human rights impacts are most commonly a result of poor site identification, a lack of consultation, disputes around land acquisition, and poor resettlement plans. The construction phase often generates the most wide-spread and severe human rights impacts on workers, communities, and the environment. Since the construction phase is also the most labour intensive, the impacts on workers are also most pronounced during this phase. Once the project moves along to the operations, the micro-level impacts tend to be less severe than those during the construction phase, though these impacts tend to be longer lasting or ongoing. The operations of large infrastructure projects could for example impact on the right to health of workers and adjacent communities, as well as impact on the environment.

An example of micro-level impacts that is not uncommon, is the impacts of large influxes of workers on local communities. One such example is the Uganda Transport Sector Development Project (UTSD). The UTSD's ESIAs failed to properly asses the impacts that the influx of workers will have on the local population. After complaints were launched to the World Bank Inspection Panel (Inspection Panel), an investigation found many cases of child sexual abuse and teenage pregnancies caused by road workers, as well as the spreading of HIV/ AIDS, sexual harassment of female employees on project sites, inadequate resettlement practices, inadequate occupational health and safety measures, and negative construction impacts.[411] However, in 2016 the World Bank mobilised funding to address the findings of the

[411] Inspection Panel, 'Republic of Uganda: Transport Sector Development Project - Additional Financing' (2016) P121097 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/98-Investigation%20Plan.pdf> accessed 1 May 2019.

panel by funding redress to the victims, requiring background checks on contractors in future, and the use of environmental and social performance bonds.[412]

Meso-level human rights impacts

The meso-level human rights impacts are the impacts on the users and would-be users of the infrastructure. These impacts could be just as tangible or specific as the micro-level impacts, though these impacts tend to be shared by a wider segment of the population. As with all the other levels, meso-level impacts will be most severely felt and experienced by the more vulnerable groups of society, such as those living in poverty, or people experiencing direct, indirect or structural discrimination.[413] Some overarching issues often associated with meso-level human rights impacts include the accessibility and affordability of services, discrimination against those with specific needs, inadequate disclosure, consultation, and accountability, and some of the more fundamental problems linked to privatisation like the commercialisation of basic needs.

As mentioned earlier, international human rights law has implications on the financial management of the state. It sets out specific norms and standards on the accessibility and affordability and certain services that include housing, water, sanitation, healthcare and education - all of which are very closely linked to the enabling infrastructure behind these services. The provision of basic services such as health, education, water and sanitation are human rights obligations of the state.[414] An

[412] *ibid.*
[413] Aizawa (n 46).
[414] The rights to education and the highest attainable standard of healthcare are freestanding rights under the ICESCR, while the rights to adequate housing, food and water and sanitation stem from the right to an adequate standard of living. See UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (n 349).

important element of providing these services, is ensuring that they are accessible. In fact, the CESCR has for example stated that the right to water include attributes such as availability, quality, non-discrimination, and accessibility (both in economic and physical terms).[415] Other socio-economic rights are interpreted in a similar manner, including the rights to healthcare and education.

Accessibility and affordability are issues that are often raised in the context of privatisation or PPPs. There are a number of reasons why this could be more prevalent in projects that involve the private sector. Since user fees or tariffs are often used as a method for recuperating project expenses, it means that the project is dependent on the payment of fees or tariffs. This could potentially lead to what is known as 'cherry-picking' or 'cream-skimming', where more affluent areas are targeted, and poorer areas excluded from service areas, on the assumption that they are not able to pay. To avoid situations that lead to the exclusion of the poor, states could use subsidy structures, or include universal service obligations in negotiations with private actors.

A good practical example of meso-level human rights impacts could be found in the water sector in Latin America. Following the widespread privatisation of water infrastructure and services in the UK in the 1980s, Latin America decided to follow suit. Regulatory reforms attracted more than $290 billion in infrastructure investment in the 1990s, which represented almost half of the global infrastructure investment during that period.[416] Most of the investments were made in the energy, water and sanitation, and telecommunication sectors. However, the water sector in particular

[415] Committee on Economic, Social and Cultural Rights, 'General Comment 5: The Right to Water' (2003) <http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf>.
[416] Antonio Estache, Vivien Foster and Quentin Wodon, 'Accounting for Poverty in Infrastructure Reform: Learning from Latin America's Experience' (World Bank Institute 2002) <http://documents.worldbank.org/curated/en/413901468758394547/pdf/multi0page.pdf> accessed 1 May 2019.

exposed a number of problems. Within the first two years, more than 76% of all the water deals were renegotiated. Other problems identified in the course of the project included excessive rate hikes, failure to provide connections to a large number of households, cancellations, and excessive profit taking. More recent water projects have not been much better, with claims that private participation in water projects have a failure rate up to five times higher than other sectors such as transport, energy and telecommunications.[417]

An important meso-level factor that should be taken into account when planning infrastructure projects, is the different needs and expectations of different groups that will ultimately use the infrastructure. Some groups that may have specific needs in the context of infrastructure include women, young people, elderly persons, persons with disabilities, indigenous peoples, and poor or marginalised communities.[418] Ensuring that infrastructure is planned in a manner that considers the needs of these groups, mitigates subsequent possibilities for discrimination against these same groups.

Macro-level human rights impacts

Macro-level impacts are those that can be experienced by the population at large. These impacts tend to be less specific and quite wide-spread, and are often related to fiscal management, public financial management, or public governance. Due to poor cost-benefit analyses, infrastructure projects (especially those of a large scale) are often under-budgeted and over-optimistic in terms of expected financial,

[417] John Vidal, 'Water Privatisation: A Worldwide Failure?' *The Guardian* (30 January 2015) <https://www.theguardian.com/global-development/2015/jan/30/water-privatisation-worldwide-failure-lagos-world-bank> accessed 1 May 2019.
[418] Aizawa (n 46).

economic, and socio-economic benefits.[419] This could lead to wasted public resources, severe impacts on taxpayers, and in a worst-case scenario eventually lead to austerity measures that impacts on the population at large. Impacts on the environment also take place at the macro-level, as well as climate change impacts on infrastructure projects.

While some of the macro-level human rights impacts could be identified and mitigated through proper cumulative impact assessment strategies, many of the macro-level impacts will depend greatly on the state to act in a manner that is transparent and consistent with its own human rights obligations. In the context of macro-level human rights impacts, having the right administrative frameworks in place is crucial, as well as access to judicial and non-judicial accountability mechanisms to hold decision-makers accountable for their actions. With this in mind, the international human rights framework has a lot to offer. Regional accountability mechanisms such as the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, could be useful in holding governments accountable for the decisions they make.

Human rights and PPPs

The involvement of the private sector in infrastructure projects is motivated by a number of reasons. Most arguments in favour of private sector involvement tend to focus on additional technical expertise, efficiency gains, as well as the additional financial resources it brings to the table. However, it is important to manage the involvement of the private sector carefully, as it may bring with it a number of

[419] Bent Flyvbjerg, 'What You Should Know about Megaprojects and Why: An Overview' (2014) 45 Project Management Journal.

complications. The World Bank in particular has documented a number of key lessons learned over the years when it comes to PPPs.[420] Some have suggested that private sector participation does not necessarily correlate with better access to infrastructure, and that the poor is often marginalised when infrastructure development is driven through PPPs.[421] This view was confirmed by the World Bank Group's Independent Evaluation Group (IEG), when it found that pro-poor aspects of PPPs, including accessibility, were not given enough attention.[422]

Yet, the involvement of the private sector in infrastructure development through PPPs is strongly promoted in development strategies, and supported by MDBs. But to achieve sustainable development goals, the human rights impacts of PPPs need to be identified, considered and included in all the different phases of the project cycle. Having explored the different human rights dimensions of PPPs, including the obligations of the different partners and the potential impacts of the projects, it would be useful to develop tools that can help identify each of these aspects in the context of a specific infrastructure project. This is, of course, based on the conclusion from Chapter 3 that current tools and guidance on PPPs do not adequately cover the human rights dimensions of infrastructure projects.

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[420] Independent Evaluation Group (n 190).

[421] In particular, reference is made to experiences from Latin America in the 1990s, in the water sector. See Aizawa (n 46).

[422] In its 2014 evaluation of 176 PPPs that were supported by the IFC, the World Bank Independent Evaluation Group found that the biggest data gap existed around the fiscal and accessibility effects of PPPs on poor communities, and that this aspect should be given more attention in guidance on PPPs that are provided by the Bank and other international organisations. As a result of the lack of data, it is unclear how PPPs affect accessibility when directly compared to public provision. The World Bank, however claims that IFC-supported PPPs have a high success rate in achieving development goals. See Independent Evaluation Group (n 190).

In January 2018, the UN Department of Economic and Social Affairs (DESA) commissioned a study on a number of existing PPP guidelines[423] to assess to what extend these guidelines are in line with the principles identified in the Addis Agenda.[424] While not explicitly focused on human rights, the principles focus on issues that include fair risk and reward sharing between partners, social and environmental standards, sustainability, the accessibility and quality of infrastructure, accountability, transparency, and participation. The study found that the guidelines mainly considered the viewpoints of the commercial stakeholders, and that the generation of public goods was generally not considered. The guidelines also only partially consider the environmental, social and governance dimensions of sustainability, and are silent on issues of climate change. A major gap identified in the study, is the fact that the guidelines do not adequately explain how environmental, social and governance (ESG) issues should be managed once they are identified in earlier assessment phases.[425]

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[423] Aizawa (n 65). The guidelines that were reviewed for the study included the 'Public Private Partnership Handbook' of the Asian Development Bank (ADB); the 'Public-Private Partnership Reference Guide' developed by the ADB, International Bank for Reconstruction and Development (IBRD) and the Inter-American Development Bank (IDB); 'The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects' by the European Investment Bank (EIB); the 'Guidelines for Successful PPPs' by the European Commission; the guidelines on 'Public-Private Partnerships, Government Guarantees and Fiscal Risk' by the IMF; 'PPPs: In pursuit of risk-sharing and value for money' by the Organisation for Economic Co-operation and Development (OECD); the 'Principles for Public Governance of Public-Private Partnerships' by the OECD; the 'Guidebook on Promoting Good Governance in Public-Private Partnerships' by the UN Economic Commission for Europe (UNECE); 'Promoting People first Public-Private Partnerships for the UN SDGs' by UNECE; 'A Guidebook on Public-Private Partnership in Infrastructure' by the UN Economic and Social Commission for Asia (UNESCAP); the 'Report on Recommended PPP Contractual PPP Provisions' by the World Bank; and 'A Framework for Disclosure in Public-Private Partnership Projects', also by the World Bank.
[424] The Addis Ababa Action Plan (Addis Agenda) is a framework for sustainable development financing, which includes the 2030 Agenda for Sustainable Development and the means of implementation for the SDGs.
[425] Aizawa (n 65).

As highlighted in Chapter 3, a defining characteristic of PPPs is that risks (and responsibilities) are shared between the parties. It was also highlighted that the accurate and thorough allocation of risks require those risks to be identified, and relies on processes and methodologies that prioritise those risk categories. It was illustrated subsequently that human rights risks and responsibilities are currently not adequately considered in guidelines on PPPs, or commonly used risk identification methodologies and matrixes. Since the human rights obligations of the different partners in a PPP can vary, it is important that the obligations (and risks related to non-fulfilment of obligations) are identified, and considered when allocating risks. This is to ensure that all human rights obligations are accounted for, especially in circumstances where risks are transferred between parties that may have an impact on their ability to meet their human rights obligations.

Conclusion

It is clear that all the different actors involved in a PPP will have human rights obligations. The extent of these obligations, as well as the context and scope, can be found in the international human rights frameworks. It is also clear that infrastructure is closely linked to human rights - both in terms of the building blocks that are required to fulfil human rights, but also in terms of posing potential serious adverse impacts on human rights at different stages of the project, and at different levels of society. With this in mind, one would assume that current guidance documents on PPPs would highlight the need to identify the human rights obligations of each of the different actors, the content of those obligations in the context of the specific project, as well as the potential adverse human rights impacts. Yet, this is not the case.

Infrastructure development through PPPs is pushed by governments, the private sector, as well as MDBs. Traditionally, the MDBs used safeguard policies as a means to ensure that adverse environmental and social impacts are mitigated or eliminated where possible. However, the different levels of human rights impacts tend to fall outside the scope of regular environmental and social considerations.[426] It is therefore necessary to include an explicit human rights focused approach when developing infrastructure - both through traditional public provision, but especially also when the private sector gets involved. Chapter 5 will take a closer look at tools that may be used to achieve these objectives. In particular, this thesis proposes the use of HRIAs.

[426] For a brief overview of how EIAs were used to mitigate adverse human rights impacts, and failed to a large extent, see Rubinson (n 45).

Chapter 5: Human Rights Impact Assessments

'[T]he notion of human rights due diligence is as much routine as it is revolutionary. It is routine in the sense that businesses customarily conduct due diligence to satisfy themselves that a proposed business action, transaction or acquisition has no hidden risks to the business. It is revolutionary in the sense that instead of only considering risks to the business, human rights due diligence requires the business to consider risks to people. While the two approaches are not mutually exclusive, human rights due diligence requires a 180 degree shift from an approach that focuses solely on the business entity to one that has an equivalent focus on the human rights of individuals and groups affected by a business' activities or relationships.'[427]

Introduction

PPPs has been described as a 'molten mass of public and private, domestic, foreign and international law', which can result in an accountability deficit when it comes to the violation of human rights.[428] This is in no small part due to the fact that, when the public and private sectors work together on a project, it is not always clear what the human rights responsibilities and duties of all the involved parties are, or which human rights could be impacted in the course of the project. Human rights impact assessments (HRIAs) could be a useful tool in this regard. As highlighted in a publication by the World Bank[429]:

[427] Kemp and Vanclay (n 54) 89.
[428] Likosky, 'The Privatisation of Violence' (n 10).
[429] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55).

> *HRIAs, based on the normative framework of international human rights law, identify rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) and seek to strengthen the capacities of rights-holders to claim their rights and of duty-bearers to fulfil their human rights obligations.*

Impact assessment tools have been used for many years, in a wide variety of focus areas that include environmental impacts,[430] social impacts,[431] health impacts,[432] sector-specific impacts,[433] and more recently also human rights impacts. As this chapter will explore in more detail, there are different approaches to how human rights could be included in the impact assessment process, and different methodologies that have been developed according to the specificities of different projects. However, to date there doesn't seem to be a specific impact assessment methodology recommended for ensuring that human rights issues are addressed in PPPs. This chapter will take one step towards closing that gap.

With the previous chapter in mind, the application of an HRIA in the context of a PPP would primarily serve three purposes. Firstly, it would aim to identify the rights-holders, as well as the corresponding duty-bearers, involved in a project. As discussed in the previous chapter, there is still ambiguity around the human rights responsibilities of non-state actors, and the responsibilities may also differ depending on the project

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[430] Richard K Morgan, 'Environmental Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 5.
[431] Ana Maria Esteves, Daniel Franks and Frank Vanclay, 'Social Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 34.
[432] Kendyl Salcito and others, 'Experience and Lessons from Health Impact Assessment for Human Rights Impact Assessment' [2015] BMC International Health and Human Rights <https://link-springer-com.uplib.idm.oclc.org/content/pdf/10.1186%2Fs12914-015-0062-y.pdf>.
[433] While this thesis does not deal with sector wide impact assessments (SWIAs), for more information on SWIAs, see The Danish Institute for Human Rights, 'Sector Wide Impact Assessments (SWIA)' <https://www.humanrights.dk/business/tools/sector-wide-impact-assessments-swia>.

phase and the services involved. A HRIA could potentially help clarify some of these responsibilities. The second purpose for using an HRIA in the context of a PPP, is to identify and understand the potential substantive human rights impacts of the project. The third purpose, is to ensure that a project that is aimed at achieving certain human rights objectives, is designed and implemented in a manner that achieves those objectives.

The chapter will start by giving a background to impact assessment studies, and explain what the purposes of IAs are, as well as the history and current state of IAs. Environmental and social impact assessments (ESIAs), which are the most commonly used forms of IAs will then be briefly discussed, with an emphasis on social impact assessments (SIAs) and its links with human rights. With this in mind, the added value of HRIAs will be explored, as well as the different approaches to including human rights in IAs, and methodologies and tools that have emerged from the field of practice. The chapter will conclude by discussing existing IA methodologies in the context of PPPs.

Background and history of impact assessments

As indicated in the name, impact assessments (IAs) are primarily aimed at assessing what the impacts are of a specific undertaking or activity, either past, current, or future. More specifically, IAs may provide an indication of the relevance, effectiveness, efficiency, impact and sustainability of such activities.[434] While this is true in a general sense, the field of IA is also linked to tool-oriented methodologies, in which questions around economic, social and environmental justice is turned into

[434] Lund-Thomsen (n 232) 4.

technical problem-solving exercises that could potentially be rendered manageable by policy makers and other stakeholders.[435]

The use of IA as a tool first became popular in the environmental movement. The National Environmental Policy Act (NEPA) developed in the United States in 1969, and enacted in 1970, represented the first formal incorporation of IAs in legislation.[436] Since then, there has been a massive uptake of EIAs, with a study in 2011 indicating that 191 of the 193 member nations of the UN either adopted some form of EIA in national legislation, or signed some form of international instrument that refers to the use of EIAs.[437] Of the 191 states, fewer than 10 appeared not to have some form of domestic legislation that contains a reference to EIA or an equivalent process.

EIAs are strongly entrenched in numerous international legal instruments. Some examples include the UN Convention on Environmental Impact Assessment in a Transboundary Context,[438] the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[439], the UN Framework Convention on Climate Change[440], the UN Convention on the Law

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435 *ibid 5.*
436 Morgan (n 430).
437 *ibid 6.*
438 See the UN Convention on Environmental Impact Assessment in a Transboundary Context 1991. The convention mainly focuses on setting out the obligations of state parties to carry out EIAs for certain projects, and to consult and inform each of other about projects that may have significant environmental impacts across borders.
439 See the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998. Also commonly referred to as the Aarhus convention, this convention focuses on the right to access to information, public participation, and access to justice in the context of projects with significant transboundary environmental impacts.
440 See the UN Framework Convention on Climate Change 1992 (FCCC/INFORMAL/84). This convention formed part of the 'Rio Conventions' – the other two conventions focus on biodiversity and desertification. The UN Framework Convention on Climate Change (UNFCCC) sets out an overall framework for intergovernmental efforts to address challenges related to climate change.

of the Sea[441], and the Protocol on Environmental Protection to the Antarctic Treaty.[442] It is thus safe to say that EIA is internationally recognised, and widely used as a key instrument for the management of potential adverse environmental impacts.

While the approach used of EIAs has always developed according to the changing needs of policy- and decision-makers, other forms of impact assessments such as SIAs and HIA have to some extent been developed as a result of the shortcomings of EIAs. The social aspects and impacts of a project is often considered under EIAs. However, EIAs and SIAs have emerged as two linked but separate areas of practice, with different focus areas and underlying principles.

It is worth restating the view that IAs can never be completely objective, and consequently the findings will inevitably reflect one bias or another.[443] For example, in the context of a PPP, those in favour of PPP projects are most likely to find in their IAs that the benefits of a particular project or activity outweigh the drawbacks, and that the adverse impacts could be mitigated sufficiently. The same goes for those opposed to PPP projects, whose IAs will likely prioritise the drawbacks of the project or activity. Nonetheless, there appears to be academic and policy consensus that IA remains an important and effective tool, and that more rigorous methodologies need to be developed to improve the efficacy of the tool.[444]

[441] UN Convention on the Law of the Sea 1994.
[442] The Protocol on Environmental Protection to the Antarctic Treaty 1991.
[443] *Lund-Thomsen (n 232) 4.*
[444] *ibid 2.*

From environmental to social impact assessments

As mentioned above, SIAs were initially considered a technique for predicting social impacts as part of EIAs,[445] but are now often stand-alone processes required by legislation.[446] SIAs refer to a 'process of analysing, monitoring and managing the social consequences of planned interventions, and by logical extension the social dimensions of development in general.'[447] SIAs are widely practiced around the world, and have become part of the regulatory approval process for infrastructure and resource extraction projects, among other things.[448]

While EIAs do not require adherence to a predetermined environmental outcome, the SIA community has developed a set of core values and principles that are used as a guiding framework when assessing social impacts.[449] The International Principles for Social Impact Assessment (IPSIA) was developed under the auspices of the International Association for Impact Assessment (IAIA). Some of the rationales behind the development of the IPSIA were to assist with policy development at the domestic level, provide international and minimum standards for SIAs, promote the use of SIAs globally, provide best practices, clarify terminology, establish the appropriate scope of SIAs, and promote the integration of SIA in other forms of IA.[450]

In the IPSIA, it is recognised that SIAs are broader than the limited social elements considered in EIAs. SIAs include activities such as environmental planning and design intervention, the identification of interested and affected peoples, the coordination

[445] Esteves, Franks and Vanclay (n 431) 34.
[446] Esteves, Franks and Vanclay (n 431).
[447] *ibid 34*.
[448] Esteves, Franks and Vanclay (n 431).
[449] Vanclay (n 56) 5.
[450] *ibid.*

of participation by stakeholders in the IA process, the documentation of the historical context, the collection of baseline data and social profiling, identification of activities that are likely to cause impacts, and the prediction of likely outcomes.[451] The content of the IPSIA is ultimately aimed at helping policy and decision makers identify potential and actual social impacts of a proposed activity, to help with decisions around different phases of the project life-cycle.

The IPSIA is largely structured around three main features - core values, principles, and guidelines. Core values are 'fundamental, ideal-typical, enduring, statements of belief that are strongly held and accepted as premises'.[452] Some of the core values in the IPSIA include the belief that 'there are fundamental human rights that are shared equally across cultures, and by males and females alike', and that 'there is a right to have those fundamental human rights protected by the rule of law, with justice applied equally and fairly to all, and available to all'.[453]

The fundamental principles contained in IPSIA are 'statements by which to plan a specific course of action and which clarify how it should [be] done'.[454] These include for example the idea that respect for human rights should underpin all actions, and that the promotion of equity and democratisation should be the major drivers of development planning.[455] Finally, the guidelines in the IPSIA are described as 'statements which provide advice or direction by which to plan a specific course of

[451] *ibid 8.*
[452] *ibid.*
[453] *ibid 9.*
[454] *ibid 8.*
[455] *ibid 9.*

action',[456] and that these guidelines should be developed in the context in which they are to be applied.[457]

It is clear from the conceptualisation of SIAs, as well as subsequent efforts to define and give guidance to SIA practitioners (such as the IPSIA), that there is already a firm acknowledgement of the important role that human rights play in SIAs, and that human rights should be explicitly considered an element of SIA tools and procedures. This naturally leads to the question - why bother with HRIA at all, if it is already considered in SIAs?

Different approaches to human rights impact assessments

The extent to which human rights is considered in SIAs have been a topic of much debate,[458] with a number of concerns raised about the inadequacy of traditional EIA and SIA processes to account for human rights in a detailed manner.[459] Consequently, there are two overarching approaches. On the one hand, human rights issues could be integrated into other forms of IA. On the other hand, there is the possibility of doing a dedicated or stand-alone HRIA. For purposes of this thesis, 'HRIAs' refer to stand-

[456] ibid 8.
[457] *ibid 11.*
[458] See for example Richard Boele and Christine Crispin, 'What Direction for Human Rights Impact Assessments?' (2013) 31 Impact Assessment and Project Appraisal 128; Nora Götzmann, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' [2016] Business and Human Rights Journal; Esteves and others (n 55); Kendyl Salcito and others, 'Assessing Human Rights Impacts in Corporate Development Projects' (2013) 42 Environmental Impact Assessment Review 39; Götzmann, Vanclay and Seier (n 55); Kendyl Salcito and others, 'Assessing Corporate Project Impacts in Changeable Contexts: A Human Rights Perspective' (2014) 47 Environmental Impact Assessment Review 36; Kemp and Vanclay (n 54).
[459] See for example The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55); Esteves and others (n 55); Aim for Human Rights, 'Human Rights in Business: Guide to Corporate Human Rights Impact Assessment Tools' (2009).

alone or dedicated assessments, and other forms of assessment (EIA, SIA, etc.) that include a human rights focus will be specified as such.

In some cases the human rights impacts of a project can be effectively addressed by using environmental, social and health impact assessments (ESHIAs) of an international standard.[460] However, there are circumstances in which a project would require an explicit human rights focus, a dedicated HRIA, or even an IA focused on a specific human rights issue.[461] Examples of conditions that may be used to determine the need for a dedicated HRIA include high levels of bribery and corruption, weak governance and poor rule of law, widespread or systemic discrimination, the presence of indigenous peoples, high levels of poverty or inequality, exploitative labour conditions, complex land tenure regimes, and a historical context that involves significant human rights issues.[462] Bearing in mind the magnitude of infrastructure projects, they would almost always warrant a human rights focused IA, whether stand-alone or integrated.

In recent years a number of academics and IA practitioners have explored how, and to what extent, human rights issues can effectively be integrated into IAs, and SIAs in particular.[463] Both dedicated and integrated approaches have their own strengths and weaknesses.[464] The main considerations in, and differences between, integrated and stand-alone approached are set out in more detail in the paragraphs below.

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[460] The Danish Institute for Human Rights and IPIECA (n 55) 21.
[461] *ibid.*
[462] Since ESIAs tend to cover human rights or social issues in a relatively general manner, especially when compared to HRIAs, the complex nature of some of these issues will most likely not be adequately explored under ESIAs. For a detailed discussion on these points, see *ibid.*
[463] Kemp and Vanclay (n 54); Götzmann, Vanclay and Seier (n 55); Esteves and others (n 55).
[464] The Danish Institute for Human Rights and IPIECA (n 55) 14.

Integrating human rights in other forms of IA

The first step in most prescribed HRIA methodologies, is the project screening phase.[465] During the project screening phase, the project partners will determine whether or not IAs are required for the project. The criteria applied in this decision are usually prescribed by the relevant domestic legislation, by the policies of the financial partners or lenders, or by the policies of other non-state and private actors involved.[466] It is also during this phase that the decision is made regarding the HRIA approach that will be used (stand-alone or integrated). This decision is usually informed by a number of factors that include the historical context, the level of trust and conflict in the area, as well as the type of activities that will be carried out during different stages of the project.

Integrated approaches to HRIA have a number of strengths.[467] Integrated approaches benefit from established accountability mechanisms, often invoked or used in other forms of IA.[468] The integration of human rights into other forms of IA could also avoid a duplication of work, and a better, more efficient use of time and resources. Since public consultation and participation is an important aspect of most IA methodologies, integrating one IA methodology in another can help avoid stakeholder fatigue. And finally, since the term 'human rights' resonates differently

[465] Reference a few methodologies
[466] The Danish Institute for Human Rights and IPIECA (n 55) 12.
[467] For a comparative study on different methodologies, see AIM FOR HUMAN RIGHTS (N 459). Also see Désirée Abrahams and Yann Wyss, 'Guide to Human Rights Impact Assessment and Management' (International Business Leaders Forum & the International Finance Corporation 2010).
[468] The relationship between accountability and IA processes usually lie on a domestic legislative level, and the value that IA requirements in domestic legislation add in terms of legal liability. For an analysis see William R Sheate, 'Purposes, Paradigms and Pressure Groups: Accountability and Sustainability in EU Environmental Assessment, 1985-2010' (2012) 33 Environmental Impact Assessment Review 91.

with different groups of people, some may feel more comfortable addressing human rights issues together with other more familiar environmental and social issues.

There are of course also a number of weaknesses or shortcomings when it comes to integrated.[469] In instances where the required IAs and related processes are determined and defined by domestic laws and regulations, it may not be a simple task to integrate human rights into other forms of IA, since these processes and methodologies could be pre-determined and defined. Practitioners that conduct other forms of IA may also not have the necessary expertise on human rights, which would then result in substandard integration. There may also be a situation where integrated approaches fail to clearly highlight the human rights elements of the IA, which makes it harder to address. And finally, in contexts where human rights is a sensitive topic, it may put people at risk if it is integrated into other forms of IA that may be less controversial when it doesn't include a human rights focus or element, and as a result compromise all IA processes.

Dedicated or stand-alone HRIA

Dedicated or stand-alone IAs also have a number of strengths and weaknesses that are worth briefly discussing. Since stand-alone HRIAs are specifically focused on human rights, they tend to draw from much more specialised human rights expertise, which increases the chances of finding adequate solutions to human rights challenges.[470] Dedicated HRIAs focus on and prioritise the parties that will or have

[469] The Danish Institute for Human Rights and IPIECA (n 55) 14.
[470] This is also evident from the number of human rights experts, international organisations, and Special Procedures that have weighed in on topics around HRIAs. See for example Olivier de Schutter, 'Report of the Special Rapporteur on the Right to Food: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' (United Nations General Assembly 2011) A/HRC/19/59/Add.5; Ruggie, 'Human Rights Impact Assessments - Resolving Key Methodological Questions' (n 54).

experienced human rights impacts, which often includes vulnerable communities or groups that may be more exposed to adverse human rights impacts. These groups could potentially go unnoticed if human rights is considered as a peripheral or additional issue. HRIAs are not a legal requirement for projects in most domestic legal regimes,[471] which means that HRIAs can be conducted outside normal IA requirements. This could be a strength if there is opposition to the HRIA being conducted in the first place, but also a weakness if the consequences to adverse findings are limited. Finally, and related to this point, is the fact that stand-alone HRIAs give non-state actors the freedom to identify human rights issues (and address them), irrespective of any legal requirements around other forms of IA.

However, it is important to also acknowledge the potential downsides or weaknesses of dedicated HRIAs. Firstly, since these processes could take place outside the normal IA framework, it could be hard to incorporate any mitigation or management strategies into existing management systems, and there could be a lack of buy-in and accountability from the relevant parties. Secondly, dedicated HRIAs require funds and resources, in addition to those used on other IAs. When combined with the fact that HRIAs tend to not be a legal requirement,[472] it leads to a situation where actors often prefer not to conduct HRIAs at all. Thirdly, where dedicated HRIAs are conducted in contexts where human rights are not promoted or protected, it may

[471] Nora Götzmann, 'The Concept of Accountability in HRIA', *Handbook on Human Rights Impact Assessment* (Edward Elgar Publishing 2019) 379.
[472] There are some exceptions. For example, in recent years the UK, France and the Netherlands have adopted specific domestic laws that require some form of human rights due diligence, if only for specific issues or within specific context. For more information on these laws and its content, see European Parliament Directorate-General for External Policies, 'Substantive Elements of Potential Legislation on Human Rights Due Diligence' (2020) Policy Brief 1 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf> accessed 19 June 2020.

exacerbate or give rise to potential political sensitivities or even conflicts, or create expectations within communities that are not easily or realistically achievable.

It is clear that both integrated and dedicated or stand-alone HRIAs are valuable, each with its own strengths and weaknesses. It is thus worth considering these strengths and weaknesses on a case by case basis, to determine which is most appropriate, and would be most effective in addressing or mitigating potential or materialised adverse human rights impacts. This would be no different in the context of infrastructure PPPs, since each project would need to be assessed within its own context.

The added value of human rights impact assessments

To understand the value that can be added to other forms of IAs by HRIAs (whether separate, integrated, or issue specific), it is useful to look at the similarities or commonalities between HRIA practices and traditional SIAs, but perhaps even more importantly, to also highlight some of the key differences between these tools.[473] Some of the commonalities include that both forms of IA have as a primary objective the identification of negative impacts, and how to mitigate them, the convergence between the core principles of both SIA and HRIA such as non-discrimination and equality, and that both forms of IA strongly emphasise the importance of both the process and outcomes of the project under analysis. And finally, both HRIA and SIA share a commitment to principles of accountability and transparency.[474]

[473] Götzmann, Vanclay and Seier (n 55) 16.
[474] However, it is acknowledged that there are particular challenges around the transparency of HRIAs that are further discussed below under 'Transparency and Access to Information'.

When it comes to the differences between the two types of IA, the World Bank took the lead by commissioning a study in 2013[475] to look at the literature around impact assessments, its relevance for development, and in particular also the difference between HRIA and other forms of impact assessments. The paragraphs that follow highlight important substantive and procedural distinctions between HRIAs and other forms of impact assessments.

HRIA basis in international human rights law

One of the fundamental distinct features of HRIAs, is that its normative foundation lies in international human rights law, while SIA for example is informed by standards such as those contained in the IPSIA.[476] International human rights law is different from most other established normative principles and standards, in that it is developed through a process of multilateralism that allows for states to voluntarily commit themselves to legal obligations, which are then often domesticated by developing laws and regulations at the national local level. As explained in the previous chapter, international human rights law has very specific legal obligations attached to it, which is enforceable through international, and often national, legal platforms.

In most cases, states would either refer to or include their international human rights obligations within their domestic constitutions or bills of rights. States would usually also specify what the relationship between their international human rights obligations and domestic human rights obligations are. For example, in dualist systems a state would need to domesticate international legal obligations in order for it to be domestically

[475] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55).
[476] Götzmann, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' (n 458); Boele and Crispin (n 458).

justiciable, while in monist systems international human rights obligations are considered to be part of the domestic legal framework. While this distinction does not change the nature of a state's international human rights obligations, it will most likely determine the extent to which other domestic laws and frameworks (including those focusing on EIAs and other forms of impact assessment) could be interpreted to already include international human rights obligations.

It is important to reiterate that states commit themselves to international human rights law voluntarily. This is done through processes of ratification or accession. In theory, when a state has certain domestic legal obligations that are inconsistent with those contained in international human rights law, it will simply not ratify the treaty in question. In practice, however, we often see states signing on to international instruments while not appearing to take the obligations contained in those instruments seriously[477] Alternatively, states are also allowed to raise exceptions to certain provisions within treaties in instances where the state wants to commit itself to a treaty, but not necessarily all of the provisions in the particular treaty. Summarily, as a result, the normative foundation of HRIAs is legal in nature, and not arbitrarily imposed on states.

Body of developed jurisprudence and clarifications

International human rights law, as a body of work, is constantly analysed and interpreted by a number of international organisations and experts. For example,

[477] A highly publicised example, was when South Africa failed to arrest Sudanese President Omar Al-Bashir upon a visit to South Africa for a summit of the African Union, in contravention of South Africa's obligations under the Rome Statute. See Matt Killingsworth, 'ICC Ruling on South Africa and Al-Bashir: Pragmatism Wins the Day' *The Conversation* (27 July 2017) <https://theconversation.com/icc-ruling-on-south-africa-and-al-bashir-pragmatism-wins-the-day-81500> accessed 14 September 2020.

treaty bodies such as the Committee on Economic, Social and Cultural Rights would develop General Comments with the specific purpose to help states interpret international human rights law, and understand their own obligations under international human rights law.[478] In other words, the international human rights system has several bodies and mechanisms in place to ensure that states are clear on what is expected of them, which in turn contributes to the clarity of the frameworks in which HRIAs are embedded.

Two examples of international bodies providing clarity around international human rights issues, and perhaps more particularly human rights obligations, are the General Comment 24 of the Committee on Economic, Social and Cultural Rights (CESCR) that focuses on state obligations under the ICESCR in the context of business, and a recent report published by the Special Rapporteur on Extreme Poverty and Human Rights on the impacts of privatisation.[479] To have international bodies interpret and explain the content of international human rights law is different from most other normative bases and frameworks, which do not always have institutions that are mandated to clarify obligations and expectations.

A detailed and comprehensive focus on human rights principles and issues

[478] For an overview of the CESCR and its mandate, please see https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx (accessed 30 July 2019).

[479] The International Committee on Economic, Social and Cultural Rights for example elaborated in General Comments 24 that the positive human rights duty of states obliges them to adopt a domestic legal framework that would require human rights due diligence in the context of business activity. For more detail see Committee on Economic, Social and Cultural Rights, 'General Comment 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (n 53); Alston (n 299).

While principles such as equality, participation, transparency and accountability are acknowledged in other IA frameworks,[480] these principles are firmly embedded and well understood in the context of human rights.[481] As a result, HRIAs address these principles in a much more systematic and comprehensive manner than other forms of IA. One example is the way in which HRIAs prioritise public participation and consultation in projects.[482] In fact, community based human rights impact assessments (COBHRA) places communities and rightsholders at the core of the process, with central roles throughout the process.[483]

International human rights are also universal and comprehensive, and typically considers economic, social and cultural aspects as well as civil and political aspects. The inclusion of these different categories of issues reinforces the cross-sectoral approach of HRIAs in the assessment process. Other forms of IA may be more narrowly focused, and perhaps overlook issues as a result. It should be noted, however, that HRIAs have been criticised for its relatively weak focus on environmental and economic issues, unless these are linked to human rights.[484]

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[480] For example, many of these principles are also highlighted in the IPSIA. See Vanclay (n 56).
[481] In fact, there is a strong case that these principles are obligatory and binding on state signatories of key international instruments such as, United Nations General Assembly (n 349); UN General Assembly, 'International Covenant on Economic, Social and Cultural Rights' (n 349); UN General Assembly, 'International Covenant on Civil and Political Rights' (n 354).
[482] For different perspectives on the role that rightsholders can play at different stages of a project, see Caroline Brodeur, Irit Tamir and Sarah Zoen, 'Community-Based HRIA: Presenting an Alternative View to the Company Narrative', *Handbook on Human Rights Impact Assessment* (2019); Kaitlin Y Cordes, Sam Szoke-Burke and Tulika Bansal, 'Collaborative and Participatory Approaches to HRIA: The Way Forward?', *Handbook on Human Rights Impact Assessment* (2019); Susan Joyce, 'Challenges and Strategies for Meaningful Rights-Holder Participation in Company-Commissioned HRIA', *Handbook on Human Rights Impact Assessment* (Edward Elgar Publishing 2019).
[483] Brodeur, Tamir and Zoen (n 482) 50.
[484] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 8.

Assessing impacts from a different perspective

Whereas other forms of IA tend to consider risks and challenges from a business or project perspective, HRIA requires the project partners to consider risks from a community or rightsholder perspective.[485] As already stated in a report to the UN Human Rights Council in 2011:[486]

> *Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders. (emphasis added)*

This approach requires a significant departure from the traditional understanding of 'risks' in infrastructure projects, especially from the project partners' perspectives. As mentioned in Chapter 3, project partners in infrastructure PPPs typically use risk matrixes, that place risks into different categories – with no specific focus on or category for human rights under existing risk matrixes, and risk considered only from a project perspective.[487] HRIAs, in contrast, prioritises the perspectives of different rights-holders, and the human rights impacts that they may experience as a result of infrastructure projects.

Different approaches to accountability

[485] Brodeur, Tamir and Zoen (n 482).
[486] John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (Human Rights Council 2011) A/HRC/17/31 16 <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> accessed 20 June 2020.
[487] Bovis (n 67); Bing and others (n 67).

As stated previously, because of the fact that the normative foundation for HRIAs lies in law, there is a real possibility that adverse impacts identified under HRIAs are also human rights violations, with legal consequences. This could be true for SIAs and other forms of IA as well, as far as the impacts are linked to specific legal obligations. Whereas the fact that the obligations and principles in HRIAs are linked to international (and often domestic) human rights law, it should be noted that accountability needs to be firmly entrenched in the governance frameworks of HRIAs.[488]

In order to realistically promote accountability, HRIAs frameworks need to consider four key elements.[489] Firstly, there needs to be transparency in relation to the process and outcomes of the HRIA. This requires going beyond mere access to information, to actively showing and publishing findings on human rights impacts in projects.[490] Secondly, HRIA and associated mitigation measures should ideally be enforceable for it to be used as a tool to hold parties to account for human rights violations. Thirdly, HRIAs should include an explicit focus on public participation, and capacity building around human rights. And finally, HRIA frameworks need to ensure that HRIAs are *effective*. Effectiveness is directly linked to purpose, which emphasises the importance for HRIAs to have clear objectives and scope.[491]

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[488] For a detailed discussion on the accountability in the context of HRIAs, see Götzmann, 'The Concept of Accountability in HRIA' (n 471).
[489] ibid 378.
[490] Merely providing access to information has led to what is referred to as 'social, citizen-led or demand-side accountability'. For a more detailed discussion, see John Gaventa and Rosemary McGee, 'The Impact of Transparency and Accountability Initiatives' (2013) 31 Development Policy Review 3, 4.
[491] 'Effectiveness' of HRIAs are arguably linked to three elements – understanding objectives, management of process, and response to the findings of the assessment. For a more detailed discussion, see Deniz Utlu, 'Towards a Definition of Effectiveness in HRIA', *Handbook on Human Rights Impact Assessment* (Edward Elgar Publishing 2019) 369.

Key concepts in HRIAs

In recent years there has been a proliferation of materials on HRIA. Some are developed or commissioned by international organisations such as the UN or the World Bank, while others are published by IA practitioners, academics, civil society organisations, and individual experts.[492] As these groups refined their thinking around HRIA, a number of important concepts and key considerations emerged that loosely shape how HRIAs are understood today. In a recent publication that draws together a wide range of existing literature on HRIAs, ten key criteria are highlighted in the context of the process and content of HRIAs.[493] These include participation, non-discrimination, empowerment, transparency, accountability, benchmark, scope, assessment, mitigation, and access to remedy. Some of these and other key concepts and criteria will be briefly explored in the following paragraphs.

The timing of HRIAs

Generally speaking, HRIAs can happen either in advance or before a project (referred to as *ex ante* assessments), or after a project (referred to as *ex post* assessments). *Ex ante* assessments are done before interventions take place, and aim to measure the potential future effects of interventions. This could enhance policy development, or enable policy makers to adjust or change policies, projects or programmes, and should be done at the earliest possible stage.[494]

[492] For a detailed overview, see Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, Methods and Approaches' (n 58).
[493] Götzmann, *Handbook on Human Rights Impact Assessment* (n 57) 13.
[494] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 8.

Ex post assessments measure the actual impact of a policy, project, or programme, and usually compares the situation at the time of the assessment, with the situation before the policy or project was implemented.[495] *Ex ante* assessments tend to be more difficult than *ex post* assessments, as it is easier to assess impacts that have already occurred, than predict what the potential impacts will be of an upcoming project or future endeavour.[496] Of course, even if an *ex ante* assessment tends to be more challenging, it is ideal to identify and prevent any adverse impacts before they actually occur or materialise.

In practice, more traditionally used IAs such as EIAs and SIAs are usually done *ex ante*. Doing *ex ante* ESIAs are often required by domestic legislation or regulations, and seen as a step in obtaining the necessary authorisation to proceed with a particular project. In contrast, the majority of HRIAs that are publicly available, have been *ex post* assessments, and conducted by civil society organisations.[497] This does not necessarily mean that other entities such as state agencies or private actors do not conduct HRIAs, but perhaps speaks to the availability of these assessments (and/ or their findings) in the public domain. It is not impossible to imagine a scenario where an *ex ante* HRIA, that showed potential adverse human rights impacts, is used against a project proponent if the project is allowed to proceed and those impacts actually occur. While this is of course very positive from an accountability perspective, it could also be the reason why actors are hesitant to make HRIA findings publicly available.

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[495] *ibid.*
[496] James Harrison and Mary-Ann Stephenson, 'Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments' (Scottish Human Rights Commission 2010) 38.
[497] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 9.

HRIAs should be conducted at different stages of a project, and be continuously revisited and updated. In practice, this means that HRIAs should ideally be conducted *ex ante,* to allow project partners to proactively mitigate any adverse impacts, but also *ex ante*, to allow project partners to address any adverse impacts that may have materialised. The timing of the assessment is also closely linked to the purpose or objectives of the assessment. This aspect will be explored in more detail in the overview of different HRIA phases below.

Who should be conducting an HRIA?

HRIAs could in principle be conducted by a number of different actors, though this is often also linked to the objectives of the HRIA. For example, HRIAs conducted by civil society organisations tend to be conducted after the project is already implemented, and used to collect evidence of adverse human rights impacts or violations in an attempt to then use the evidence to hold the violators to account. States, private actors, or international organisations may conduct HRIAs (usually *ex ante*) to identify and mitigate potential adverse impacts, both as a requirement of laws or policies, but also to manage risks.

The questions around who should be conducting HRIAs are particularly important in projects where a number of different actors are involved, such as PPPs. As explained in the previous chapter, each of the different actors involved in a PPP have different human rights obligations, and it is important for each of the different actors to ensure that their involvement in a project is consistent with their human rights obligations. In other words, based on the obligations highlighted in the UNGPs, private actors should

conduct HRIAs to ensure that they respect human rights, and public actors could use HRIAs to ensure that human rights are respected, protected, promoted and fulfilled.[498]

In the context of this thesis, and bearing in mind the research problems and questions highlighted in Chapter 1, various actors would need to conduct HRIAs in infrastructure PPPs. Alternatively, HRIAs should be conducted with different actors, perspectives, obligations, and purposes in mind. These aspects will be elaborated on in more detail in Chapter 6, where a potential HRIA model is proposed for infrastructure PPPs.

Stakeholder engagement and participation

It is important to engage with stakeholders as early in a project as possible, but also to continue doing so throughout the project. It is equally important to ensure that stakeholder feedback is considered and adequately incorporated into the project - from planning and decision-making, to implementing and monitoring. A number of organisations around the globe have developed guidelines and best practices on how to engage with communities, and which principles should shape the engagement process.[499] An example is the use of what has become known as the 'free, prior and informed consent' (FPIC) approach, which is aimed at ensuring that communities are not coerced into a decision, that they are engaged before any substantial decisions are made, that they are well informed of the project details, and that they indeed give their consent for the project to continue.[500]

Acknowledging the importance of stakeholder engagement and input, a number of organisations have also worked on methodologies in which the stakeholder

[498] Olivier de Schutter (n 470) 6–7.
[499] See for example the materials listed by Joyce (n 482) 300.
[500] Oxfam America, 'Community Voice in Human Rights Impact Assessments' (2015) 5.

perspective is the determining factor throughout the entire HRIA process. One such example is the development of COBHRAs. In COBHRAs, potentially impacted communities play a prominent role in the design and implementation of HRIAs. In this context the *Getting it Right* toolkit is perhaps best known, which is a COBHRA toolkit that was developed and tested for the first time by Rights & Democracy in 2005, and further refined and tested in partnership with Oxfam and the International Federation for Human Rights (FIDH) in 2009.[501]

It is critically important to ensure that the voices and input of marginalised or potentially vulnerable groups are considered in a project, since these groups are often most negatively impacted. Depending on the context and location of the project, these groups could include women, children, persons with disabilities, the elderly, or persons from a specific ethnic group.

Transparency and access to information

As alluded to earlier, access to information is critical for meaningful participation and effective accountability. As stated in the Guide to Corporate Human Rights Impact Assessments developed by Aim for Human Rights:[502]

> *Engagement and transparency go hand in hand. It should be clear to the stakeholders why an HRIA assessment was undertaken in one project and why other projects are not assessed. The same is valid for the components of an assessment and why certain issues are left out of the assessment. And, crucially,*

[501] For a web-based version of the tool, see Oxfam America, 'Community-Based Human Rights Impact Assessment Initiative' <https://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/> accessed 30 July 2019. Also see Oxfam and FIDH, 'Community-Based Human Rights Impact Assessment: The Getting It Right Tool Training Manual'.
[502] Aim for Human Rights (n 459) 10.

> *the engagement process can only function properly if stakeholders have adequate and timely access to all relevant information in a language that is understandable to all.*

Transparency is relevant in two ways when it comes to HRIAs.[503] Firstly, it relates to the transparency of the project or policy that is being assessed. In other words, to what extent is it possible to acquire information about the specific project or policy? Some policies or projects may be more transparent than others, depending on the project proponents and the purpose of the project. In the context of infrastructure PPPs, the project is most likely aimed at serving the public, and includes the state as one of the project proponents. As such, there is a reasonable expectation that information about the project should be publicly accessible. Secondly, transparency is also linked to the HRIA process itself. The methodologies that are being used should be made clear, as well as the findings of the HRIA, and the planned actions based on the findings of the HRIA.

There are some instances in which information may justifiably be kept from the public.[504] Examples include restrictions on proprietary information or commercial secrets that may lead to unfair competition, or sensitive information that may jeopardise the safety of people. However, information should be disclosed and made available to the public as much and frequently as possible, and exemptions to the rule must be carefully and narrowly defined. In practice, reports of HRIAs conducted by CSOs or state agencies tend to be more accessible than those conducted by non-state or private actors. This impacts negatively on the extent to which meaningful

[503] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 16.
[504] ibid 17.

engagement can take place, but also on the effectiveness of accountability mechanisms.

Accountability

Accountability is a major concern in the context of PPPs, since it is often hard to identify the different obligations or liabilities amongst the parties involved. This is an area where HRIAs can play an important role, since one of the key contributions of a human rights perspective is the focus on accountability. As explained earlier, this is in part due to the fact that HRIAs are embedded in law, and the fact that non-compliance or violations may have legal consequences. In addition, well-conducted HRIAs typically also assess the extent to which the project being evaluated includes effective grievance and accountability mechanisms. This goes beyond access to justice through formal judicial systems. As stated in the UNGPs, access to remedy should be ensured by both state and non-state actors, through judicial and non-judicial means.[505]

The International Business Leaders Forum (IBLF) and International Finance Corporation (IFC) have identified five guiding principles to ensure an effective grievance mechanism.[506] These are proportionality, cultural appropriateness, accessibility, transparency and accountability, and the need to offer protection. It is perhaps useful to clarify that, in this context, proportionality refers to the idea that the grievance mechanism should be scaled to the size of the project and the risks it poses, as well as have adequate human and other resources to deal with any complaints. A crucial

[505] See Pillar III of the Office of the High Commissioner for Human Rights (n 169).
[506] Whereas it may appear to be 6 principles, the IBLF use 'transparency and accountability' as one principle, since they are of the opinion that accountability is unattainable without transparency. See Abrahams and Wyss (n 467).

element of accountability, is ensuring that human rights duty bearers are identified, as well as their corresponding human rights duties and obligations understood.[507]

Access to remedy

As explained in Chapter 4, a key component of human rights (and the BHR framework in particular) is access to remedy.[508] Access to remedy is facilitated through a number of means that include setting up appropriate grievance mechanisms and procedures, as well as cooperation by project partners with relevant authorities to ensure adequate access to both judicial and non-judicial remedies. As will be explored in more detail below, grievance mechanisms not only play an important role in providing access to remedy, but is also an important tool in the monitoring of human rights in a project.

Overview of key HRIA phases

In recent years a number of materials have been developed to provide more detailed guidance on HRIA methodologies. Some focus on stand-alone or dedicated HRIA,[509] some on the integration of human rights or HRIA into other forms of IA,[510] and others provide general guidance on HRIA[511]. As with any form of IA, the HRIA process is typically divided into different steps or phases. While different toolkits are structured

[507] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 18.
[508] Office of the High Commissioner for Human Rights (n 169).
[509] Oxfam America (n 501); Oxfam and FIDH (n 501); Aim for Human Rights (n 459).
[510] The Danish Institute for Human Rights and IPIECA (n 55); Esteves and others (n 55).
[511] Ruggie, 'Human Rights Impact Assessments - Resolving Key Methodological Questions' (n 54); Abrahams and Wyss (n 467); Alejandro González, 'Evaluating the Human Rights Impact of Investment Projects: Background, Best Practices, and Opportunities' (PODER 2014) <https://www.projectpoder.org/wp-content/uploads/2015/01/PODER-HRIA-Best-Practices-Dec-2014.pdf> accessed 22 January 2019; Harrison and Stephenson (n 496).

around different phases, the different phases generally involve screening, planning and scoping, data collection and baseline development, impact analysis, impact mitigation and management, monitoring and reporting, and evaluation.[512] The paragraphs that follow will give a brief overview of each of these phases, drawing from some of the most notable toolkits and materials.

Screening

The first step in most HRIA processes involves screening whether a project would require a HRIA in the first place,[513] and would identify the human rights due diligence approach that should be used. The project screening phase should identify any groups that enjoy or may require additional human rights protection (such as indigenous peoples or vulnerable groups), as well as those that will require extra attention and assistance to participate in the impact assessment process. It is important to remember that the form of impact assessment done or utilised may be determined by the host government, and the domestic legislative or regulatory framework. However, if the prescribed impact assessment tools and frameworks do not require a human rights lense, or make it difficult to use HRIAs in an integrated manner, the project may choose to carry out an HRIA that is best suited to the nature of the project.

[512] Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, Methods and Approaches' (n 58) 4; Abrahams and Wyss (n 467); Götzmann, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' (n 458); Harrison and Stephenson (n 496); Simon Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (1st edn, Intersentia 2009). Also see the analysis done by Harrison and Stephenson, from which they propose eight stages focused on screening, scoping, evidence gathering, consultation, analysis, conclusion and recommendations, publication, and monitoring and review.

[513] The Danish Institute for Human Rights and IPIECA (n 55) 12.

It is important to note that a key objective of the screening phase is to ensure that priority areas enjoy the attention they need, and also to ensure that resources are used in a sensible manner. Typically, not all policies and processes would require full HRIAs, and the screening phase is aimed at identifying the ones that do.[514] Nonetheless, while screening is used to allocate resources in a manner that is efficient and effective, a robust process and methodology is necessary to ensure that key human rights issues are not overlooked.

Planning and scoping

During the planning phase the project team would need to decide, amongst other things, whether to follow a dedicated or integrated approach to the HRIA. Some of the factors that may influence this decision include the development stage of the project, the nature of the project, and the resources available for conducting the IA.[515] Once an approach is decided on, the next step is to do scoping, and determine the terms of reference for the IA. It is also necessary to determine what the human rights context of the specific location and country is, and the general level of human rights enjoyment. The human rights obligations of the host government should be defined by looking at the international conventions that has been signed and ratified,[516] to what extent these obligations are found in domestic laws, and to what extent victims of human rights violations can access remedy.

[514] Harrison and Stephenson (n 496) 42.
[515] *Abrahams and Wyss (n 467) 20.*
[516] International conventions serve as an important source in this context, but it is worth pointing out that all the sources of international human rights law mentioned in chapter 4 should be considered for the sake of thoroughness.

Some HRIA methodologies consider the scoping phase to mainly consist of the identification of the key policies or activities, and what they seek to achieve.[517] However, it is recommended that all scoping exercises consider six important elements:

1. Who should carry out the assessment. It is recommended that the assessment be carried out by an independent team, with the required skills and expertise, and ideally not someone too close to the project, such as the project partners.
2. The nature of the proposed policy or project. This includes understanding who initiated the policy, who is responsible for implementing the policy or project,[518] what the legal context is, how it relates to other projects, objectives, and what the resource implications would be.
3. Who could potentially be affected by the policy or project. This is especially important in the context of identifying groups that would need to be consulted throughout different phases of the project.
4. Based on the project or policy proposal, it is important to identify the potential human rights impacts. Of course, this would be only the starting point in the process, as other potential impacts are identified during other phases of the project. However, there are often very clear and apparent potential impacts that could be identified and flagged as early as the scoping phase.
5. Evidence needs to be highlighted that may be necessary to determine the impacts, as well as potential gaps in the evidence base. Whereas this step is closely linked to the next phase that focuses on data collection, the primary

[517] Harrison and Stephenson (n 496) 43.
[518] In the context of PPPs, this would go hand in hand with the risk allocation process. If it is found that a party is responsible for a policy that doesn't suit them well because of human rights considerations, it is worth investigating whether the risks should not be allocated differently in relation to that particular policy.

aim is to identify potential evidence here, and then build on it in subsequent phases.

6. It is important to also consider the timescale of the assessment, and in particular where the assessment will fit into other key phases of the project. This is not a common feature in HRIA methodologies, but one that is of crucial importance.[519] Being cognisant of the timescales would help identify and address potential policy or other strategic decisions at the appropriate times – in other words, when these decisions could still be effective in the project outcome.

Data collection and baseline development

The data collection phase tries to identify, in as much detail as possible, the potential and actual human rights risks and impacts of the project.[520] This includes a consideration of the company's human rights policies, processes, and commitments, the relevant human rights frameworks (both international and domestic), as well as the environmental, social, and health contexts in which the project is developed or taking place.[521] This information is used to develop a baseline, which is a foundational step in measuring the impacts arising from the policies or project activities.

Baseline studies are a combination of indirect, direct, primary and secondary data gathering exercises, and focus on the local, domestic and international spheres of the project activities and frameworks.[522] This necessarily includes engaging with communities that may be potentially impacted by the project, as well as other

[519] Harrison and Stephenson (n 496) 46.
[520] *Abrahams and Wyss (n 467) 25.*
[521] The Danish Institute for Human Rights and IPIECA (n 55) 15.
[522] *ibid.*

relevant stakeholders such as credible organisations working in the project area.[523] Where particular human rights issues are identified, the study may require engagement with specialised expertise, or further engagement with particular sub-groups within surrounding or impacted communities. Examples of sub-groups that may have specific interests and human rights issues include women, children, the elderly, or persons with disabilities.

It should be noted that not all HRIA tools propose the same approach when it comes to understanding the human rights dimensions of a project, as described above. For example, in the development of what they call 'Human Rights Topic Catalogues', NomoGaia proposes in their HRIA toolkit that the goal should not be to understand the nationwide or even local human rights baseline, as they argue that this would be an overwhelming undertaking.[524] Instead, they propose using knowledge about the project's design to predict where human rights would potentially be impacted, and then using knowledge about the context to 'predict how existing realities alter the human rights baseline in ways that are meaningful to the project'.[525]

However, it is stressed that the 'Human Rights Topic Catalogues' exercise proposed by NomoGaia does not replace a human rights baseline for a country, but rather allows one to look at the project through a human rights lens that is specific to the project in question. The NomoGaia approach could be particularly helpful in circumstances where resources are stretched or limited, or when working against a limited timeline. Nonetheless, the development of a human rights baseline is still

[523] ABRAHAMS AND WYSS (N 467) 32.
[524] NomoGaia, 'Human Rights Impact Assessment: A Toolkit for Practitioners Conducting Corporate HRIAs' (2012) 13.
[525] *ibid.*

preferable, as it allows a more detailed and in-depth understanding of the human rights context.

The GHRIAM tool categorises the third step in the HRIA process as the 'Engagement' phase. In the context of GHRIAM, this refers to the engagement of stakeholders to verify the findings and data that have been collected. This should not be confused with community or stakeholder engagement, which is an important procedural requirement throughout the entire HRIA process, and not only at the point of data collection and verification.[526] Nonetheless, even in the verification of data, it is suggested that project partners develop stakeholder identification and engagement plans that include principles such as accessibility, inclusivity, and transparency.[527] The employees and workers of project partners should be engaged, as well as communities, civil society, and potentially vulnerable groups.

Employees may be consulted that have worked on other similar projects, or that have been involved in the project for a long time. Stakeholders such as civil society actors could also be useful in providing data on any past human rights problems that the project partners have faced, and to understand specific human rights concerns in the local context. In addition to collecting data from stakeholders, engagement during this phase of the process serves to verify the accuracy of the data. NomoGaia, in their toolkit, follows a different methodological structure, which includes the gathering of data and rating of human rights enjoyment under one phase (phase II).[528] In the subsequent phase (phase III), they then examine and verify these ratings through feedback from stakeholders that include rights-holders, companies, and relevant

[526] Abrahams and Wyss (n 467) 35.
[527] *ibid* 39.
[528] NomoGaia (n 526) 14–16.

governments.[529] While slightly different, NomoGaia's approach arguably leads to the same outcome, which is the verification of data.

Impact analysis

The next step in the process focuses on impact analysis.[530] There are a number of techniques that may be used to do the analysis.[531] The company may wish to compare past baseline studies or IA findings, such as EIAs, SIAs, or ESIAs, to the data that have been collected. This could be useful in understanding how the situation has changed – whether there has been increased or decreased enjoyment of human rights over a period of time. However, as mentioned several times, the assessment of human rights in an IA is done against international human rights standards.

In most cases the International Bill of Rights is used as the relevant international human rights framework, in addition to the specific international human rights commitments of the country. The International Bill of Rights includes the Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols. Relevant domestic human rights frameworks, such as those contained in domestic constitutions, also form part of the human rights framework and play an important role in the analysis of human rights impacts.

[529] *ibid 20.*
[530] Abrahams and Wyss (n 467) 45.
[531] *ibid.*

There are a number of important factors to include in the scope of the impact analysis.[532] Firstly, it should include the key human rights risks associated with the country of operation. Secondly, the human rights risks of key relationships between partners and associated entities (including third parties) should be considered. Thirdly, the scope should include the human rights risks and impacts relating to the project activity itself. Fourthly, risks and impacts to both stakeholders that are directly and indirectly affected by the project activity should be included. And finally, the nature and level of the risks and impacts throughout different phases of the project lifecycle should be considered.

In assessing the potential human rights impacts of a project, it is recommended that project partners use a set of indicators, or a series of questions.[533] Ideally, the indicators should be developed at the scoping stage, to ensure that relevant data is collected on each of the indicators. Furthermore, the indicators need to be context specific, and relevant to the specific human rights frameworks that are considered and used in the particular project. A number of resources on the development and use of human rights focused indicators are publicly available, and include areas such as community engagement and consultation, with a particular focus on the involvement of potentially vulnerable groups.

Impact mitigation and management

Once the potential and actual human rights impacts of the projects have been identified and analysed, the next step is to develop appropriate mitigation and

[532] *ibid.* While the considerations that Abrahams and Wyss highlight are largely done in the context of business activities, for purposes of this section the principles are applied more broadly to non-business entities and partners as well.
[533] Harrison and Stephenson (n 496) 53.

improvement action plans.[534] The development of appropriate action plans require identifying different options and courses of action. It is important that mitigation and improvement actions are feasible, and acceptable to different stakeholder groups. From a feasibility perspective, it means that the plans need to be cost-effective, pragmatic, easily implementable, and accepted and adopted by all the relevant partners. In terms of being acceptable, the action plans should be designed with the local context in mind, while also being supportive of relevant international norms.

When it comes to a mitigation approach, there are several courses of action to consider, based on a 'mitigation hierarchy'.[535] The first and best option would be to avoid the adverse or negative impact altogether. This of course requires that the potential for adverse impacts be identified relatively early in the project, to allow the project partners to make decisions or take actions to prevent it from materialising or actually occurring. If the adverse impacts cannot be avoided, the impact should be reduced, or mitigated. The next step, often in conjunction with the previous, is to try and restore the situation to the condition before the adverse impact took place. Where adverse impacts are unavoidable, and especially when it is impossible to restore a situation to an earlier state, it may be necessary to compensate for loss, damage, or inconvenience. The actions that are decided on are usually included in the mitigation and management plans, and could be a combination of all these steps.

While it is imperative that project partners appropriately address potential adverse human rights impacts, and not try to offset any negative impacts by positive

[534] *Abrahams and Wyss (n 467) 48.*
[535] *The Danish Institute for Human Rights and IPIECA (n 55) 17; Abrahams and Wyss (n 467) 49.*

contributions,[536] some IAs may also include improvement action plans.[537] There are different views on this - while the GHRIAM includes a section on improvement action plans, others contend that in practice HRIAs are not used to identify and maximise benefits.[538] Nonetheless, improvement action plans are designed to ensure that positive benefits associated with the project are built upon and realised. Once all mitigation and improvement action plans are developed they are submitted to the management authorities of the project.

Without the proper implementation and management of mitigation and improvement action plans, the IA process adds very limited value. Successful implementation and management require the project partners to maintain accurate and systematic records of decisions and actions that have been taken on the basis of the plans. The outcomes of these actions should also be reviewed regularly to ensure that the actions achieve the goals they set out to achieve, and amended if necessary. Ideally, an oversight committee should be established that includes representatives of groups that may have been adversely impacted by the project activities.

Monitoring, reporting, and evaluation

The actions taken by the project partners to mitigate adverse impacts, as well as improve or realise the benefits of the project, need to be evaluated and monitored on a continuous basis. The GHRIAM suggests that monitoring, external and internal

[536] The Danish Institute for Human Rights and IPIECA (n 55) 18.
[537] Abrahams and Wyss (n 467) 50.
[538] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) ix. For more detail on the ways in which HRIAs could potentially be used to maximise the benefits of a project, see the discussion under the subsection titled 'Project preparation', under the section titled 'Proposed methodology for HRIAs in infrastructure PPPs' in chapter 6.

reporting, and the evaluation of the effectiveness of the systems that have been put in place are all mutually reinforcing.[539] To ensure that relevant stakeholders are aware of the measures that have been put in place, these actions need to be transparent. HRIA processes are often criticised for being very opaque, and as a result of limited use.[540] This is partly due to the persisting culture of 'naming and shaming',[541] where project partners are hesitant to make any human rights impacts public. As mentioned earlier, the concept of human rights due diligence, including the use of HRIAs, goes hand in hand with what is referred to as the 'knowing and showing' approach, where actors identify their human rights impacts and show what they are willing to do about it.[542]

Grievance mechanisms are also an effective way to monitor a project, including any mitigation or improvement measures that have been put in place. Grievance mechanisms may be developed either at the business activity level, or the project partner level. If correctly set up, grievance mechanisms would gather concerns and perceptions of stakeholders, and ideally allow project partners to respond to these concerns and perceptions before they escalate to further serious human rights issues. An effective grievance mechanism should be proportionate to the project size, with

[539] Abrahams and Wyss (n 467) 57.
[540] Götzmann, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' (n 458) 15; The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) 16.
[541] 'Naming and shaming' is a technique commonly used by civil society organisations, in which a specific state, non-state actor, or any other transgressor of human rights, is targeted for specific attention and condemnation in the hope that through such publicity, they will be pressured into changing their behaviour. For a discussion on different naming and shaming campaigns, and the extent to which it is effective or not, see James Meernik and others, 'The Impact of Human Rights Organizations on Naming and Shaming Campaigns' (2012) 56 Journal of Conflict Resolution 233, 235–237.
[542] Kemp and Vanclay (n 54) 89.

adequate resources to address concerns. It should be culturally appropriate, by complementing the ways in which local communities handle concerns, and ideally be developed in collaboration with communities. The grievance mechanisms should be accessible, both physically and otherwise (linguistically, for example). The mechanisms should be transparent and accountable to all legitimate stakeholders, and should also offer protection to complainants against potential victimisation and/ or retribution.

A HRIA should ideally not be a once-off event, but rather an ongoing and dynamic process. To ensure that this is the case, all HRIAs (specifically the first one in a particular project) should put in place monitoring and reporting procedures on human rights. These procedures would typically review the implementation of recommendations from IAs, as well as review the potential impacts highlighted in the IA process, to see whether these impacts have materialised or other unexpected impacts have surfaced. As alluded to earlier, HRIA reports tend to be very hard to find, and not widely available. While private entities are encouraged to publish these reports, it could be argued that public authorities have an obligation to make these reports public. Since PPPs typically involve and are closely linked with public authorities, this obligation arguably apply in a PPP context as well.

It is worth highlighting that the UNGPs also address the notion of human rights due diligence, which includes HRIAs, and some of the key phases discussed above.[543] While not as detailed as some of the other materials referred to earlier, the UNGPs suggest that human rights due diligence should include 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking

[543] See Principles 17 to 21 of the UNGPs in this regard. Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights' (2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

responses, and communicating how impacts are addressed'.[544] The UNGPs further encourage businesses to adapt their due diligence activities according to the nature of their operations, to meaningfully engage with other stakeholders in the due diligence process, integrate their due diligence findings into other areas of their business operations, monitor their performance in light of the findings, and report on the findings.[545]

Conclusion

In the wake of a number of human rights violations and adverse impacts, it became increasingly clear that existing or traditional IAs such as EIA and SIA do not adequately consider human rights.[546] In addition, over the last decade, both the literature and materials on HRIA have developed to show that there are clear differences between HRIA methodologies and approaches, and other IAs such as SIA. There is a growing body of literature that also show the added value of either conducting separate or stand-alone HRIAs, or integrating human rights into existing IAs.

In theory, HRIAs can 'be used to assess actions that are specifically designed to have an impact on human rights, in which case it will be used to determine maximum positive impact.'[547] A more traditional use of HRIAs, however, is in projects or activities that were not intended to impact on human rights, but that may do so nonetheless. HRIAs may also be used to identify rights-holders and duty-bearers, and the substantive human rights impacts of a proposed policy or project. While there are numerous different guidelines and materials on HRIAs, each with its own methodology

[544] Office of the High Commissioner for Human Rights (n 169).
[545] ibid 17–24.
[546] Oxfam America (n 500); NomoGaia (n 526).
[547] The World Bank, 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 55) ix.

and structure, it is also clear that there are certain trends and commonalities that emerge in terms of content and process. In the overviews above, key concepts and criteria are highlighted,[548] and a broad description of the key stages or phases are provided.[549] Consequently, a HRIA should in principle be effective if it is in line with the key principles, and include the phases set out in this chapter.

Having explored HRIAs in more detail, and confirming that it is indeed used as a tool to address some of the problems associated with infrastructure PPPs,[550] the final chapter will draw conclusions on the application of HRIAs in the context of PPPs, and explore ways in which HRIAs methodologies and principles could be applied in infrastructure PPPs. The chapter will conclude by highlighting specific recommendation to different stakeholders in the context of PPPs.

[548] Most notably those highlighted in Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, Methods and Approaches' (n 58) 13.
[549] The phases described in this chapter is a combination (and amalgamation) of several different methodologies. See for example Harrison and Stephenson (n 496); The Danish Institute for Human Rights and IPIECA (n 55); Abrahams and Wyss (n 467); Aim for Human Rights (n 459).
[550] For more detail on the problems associated with PPPs, and infrastructure PPPs more specifically, see Chapters 1 – 3 of this thesis.

Chapter 6: The way forward - conclusion and recommendations

'In conclusion, to achieve the 2030 Development Agenda reflected by the SDGs, national governments have the challenge of developing and implementing strategies, plans and policies that target a systemic transformation. Integrated development planning…that simultaneously achieves growth, poverty eradication and environmental sustainability, and that considers the synergies and trade-offs between sectors and development objectives, is central to achieving this. Integrated planning and implementation is the defining feature of the way forward, and all stakeholders at all levels (local, national and global) have a part to play in its realization.'[551]

Findings and conclusions

Infrastructure is a crucial element of development. Since this thesis follows a modern approach to development, with sustainable development at its core, it is argued that infrastructure PPPs need to be planned, implemented and managed in a manner that is consistent with sustainable development. One of the issues that is shortcoming in this regard, is the current focus on human rights in existing PPP frameworks. Sustainable development cannot be achieved without the protection and fulfilment of, and respect for, human rights.

In the introductory chapter it is stated that the overarching research problem under investigation, is that human rights are not considered adequately in the planning,

[551] Partnership for Action on Green Economy, 'Integrated Planning & Sustainable Development: Challenges and Opportunities' (United Nations Development Programme 2016) Synthesis Report 90 <https://www.undp.org/content/dam/undp/library/Sustainable%20Development/PAGE_Integrated_Planning_and_SD_SynthesisReport.pdf> accessed 25 June 2020.

design, and implementation of infrastructure PPPs. This problem statement is broken down into three more specific research problems. Firstly, it is possible for Infrastructure PPPs to not contribute to the fulfilment or realisation of human rights, even when it is intended to. Secondly, it is not always clear where the human rights obligations lie in infrastructure PPPs, which could lead to severe accountability gaps. And thirdly, large-scale infrastructure projects often have very negative substantive impacts on human rights, whether developed through PPPs or not.

The focus of the study is on infrastructure PPPs, since PPPs are widely promoted by international organisations and IFIs as a model for the development of infrastructure. Some of the reasons cited for the promotion of PPPs include efficiency gains and access to capital. While the purpose of this study is not to determine whether PPPs or any other form of privatisation is inherently bad or not, it is clear that there are notable concerns tied to the commercialisation of public goods or services, of which infrastructure is arguably one.[552] One of these concerns, for example, is that the commercialisation of infrastructure necessarily leads to discrimination, and exclusion of the poor.[553]

International organisations and IFIs have strongly pushed for the development of PPP units and legislative frameworks across the globe. In addition, many of the same institutions have developed policy guidelines and toolkits on PPPs. None of these

[552] There are different opinions on whether or not infrastructure should fall in this category, and whether PPPs highlight the need to consider infrastructure a public good. In this regard, see Randall Bartlett, 'Is Infrastructure a Public Good? No, Sort of, and What Role for the Public and Private Sectors' (*The Last Page Blog*, 15 May 2017) <https://www.ifsd.ca/en/blog/last-page-blog/infrastructure-public-good#:~:text=Positive%20externalities%20are%20the%20benefits,public%20education%20comes%20to%20mind.&text=Infrastructure%20certainly%20does%20not%20fall,toll%20road%20is%20clearly%20excludable.> accessed 25 June 2020.
[553] Minow (n 52).

guidelines and toolkits consider human rights in any meaningful way, or highlight it as a key consideration during any phase of an infrastructure PPP project. Even in the context of risk identification and allocation, which is a prominent characteristic in PPPs, human rights risks are not specifically highlighted and accounted for. Instead, it is expected that human rights should fall into broader categories focusing on social risks, or picked up in general international and domestic legal analyses.

There are several human rights dimensions when it comes to infrastructure PPPs. Broadly speaking, these dimensions could fall into two categories. Firstly, the human rights dimensions linked to infrastructure projects. And secondly, the human rights dimensions linked to privatisation, and PPPs more specifically. Infrastructure projects range from small-scale project such as local roads or transport facilities, to mid-size projects such as the construction of hospitals and schools, to mega projects such as the construction of dams and airports.

In some instances, infrastructure is developed with the intention to fulfil certain human rights obligations. The development of schools and hospitals, for example, help the state fulfil its obligation to provide access to education and healthcare. The development of roads and other transport infrastructure facilities promote the right to work, and freedom of movement. Yet, even in cases where the fulfilment of human rights is the ultimate goal, infrastructure is not planned accordingly, which puts those goals and the fulfilment of rights at risk.

Infrastructure almost always have human rights impacts, and the impacts occur at different levels. This study employs the use of micro-, meso-, and macro-level impacts. While proper planning can help avoid some of the impacts, other impacts are unavoidable, and should be mitigated as much as possible. For example, large scale infrastructure projects such as dams or power stations will inevitably have impacts on

the environment, but it is up to the project partners to ensure that the impacts are mitigated, and do not cause environmental impacts that are harmful to the health of those in close proximity to the project.

When impacts occur, and risks are realised, it is important to understand who is responsible. From a project standpoint, the responsible party will most likely be the one to ensure that impacts are addressed or mitigated. In the event of adverse impacts, the responsible party is also accountable, and will need to ensure that access to remedy is provided to those negatively impacted. As highlighted earlier, infrastructure PPPs involve a number of partners and role-players, and the human rights obligations are not always clear. This is problem often associated with privatisation more broadly, and PPPs is no exception.

IA tools have gained popularity over the past few decades. Initially IA tools were used to predict and manage environmental impacts, but were soon expanded in scope to also include social and health issues. While there are important overlaps between human rights and the issues typically considered in SIAs, evidence shows that all too often human rights are not adequately considered, and adversely impacted in projects that underwent SIAs. As such, over the past few years a body of literature and materials have been developing on HRIAs, and its applications. There is no single universally accepted HRIA methodology. Instead, there are a number or key principles and criteria for effective HRIAs, and broad procedural guidelines.

This study proposes the use of HRIAs to address the human rights problems associated with infrastructure PPPs. Specifically, it is recommended that HRIAs be used in the planning, design and implementation of infrastructure PPPs. It is further recommended that HRIAs be used to identify the different right-holders, and duty bearers, to ensure that no accountability gap is created in infrastructure PPPs. And

finally, it is recommended that HRIAs are used to identify key human rights risks and potential substantive impacts. This will assist in the risk allocation process, but more importantly, help the project partners to ensure that adverse impacts are avoided where possible, and mitigated where necessary.

Noting the complexity of PPPs, and the relative flexibility with which HRIA methodologies are developed and published, the mere proposition to use HRIAs in PPPs is of limited use. As such, the next section will propose a specific methodology for the use of HRIAs in infrastructure PPPs, bearing in mind the different specificities around PPPs, human rights and infrastructure, and HRIAs highlighted in previous chapters. In particular, the methodology considers a typical infrastructure PPP project cycle, the stages during which notable human rights issues are at play, and different HRIA techniques that can be used to holistically address the problems highlighted earlier.

Proposed methodology for HRIAs in infrastructure PPPs

As discussed in Chapter 3, infrastructure PPPs could generally be divided into the following project cycle phases:

- Identification
- Preparation
- Transaction and procurement
- Implementation and construction
- Operation and management

The application of an HRIA in a infrastructure PPP requires understanding each of these phases in more detail, to ensure that the necessary methodological steps are

applied during each phase, and to the project lifecycle in general. It may be that some phases of the infrastructure PPP will only require particular HRIA techniques, whereas other phases may require the full application of HRIA methodologies. In the following paragraphs, each of the PPP lifecycle phases will be discussed in detail,[554] bearing in mind the human rights problems highlighted earlier, and potential HRIA methods and techniques that may be applied during each phase.

Identification

The project identification phase is closely linked to government planning. During this phase, the government in question considers which infrastructure projects form part of its national priority. While infrastructure planning is traditionally largely based on economic planning and economic needs, it is recommended that governments also consider sustainable development goals (broadly speaking, not the SDGs necessarily), and human rights. A HRBAD would require governments to look at existing human rights gaps or shortcomings, and to plan infrastructure around them. There are numerous resources that may be used to identify existing gaps, including reports developed by civil society organisations and researchers, country reports to international organisations, or studies initiated by international organisations and IFIs that are made public. A practical example would be the lack of access to education or healthcare, that would guide governments into prioritising the development of infrastructure around healthcare facilities and schools.

[554] The content of the discussion of each phase is largely based on Module 5 of an E-learning course on PPPs provided by the UN Economic and Social Commission for Asia and the Pacific. For more detail, see Economic and Social Commission for Asia and the Pacific, 'E-Learning Series on Public-Private Partnerships' <https://www.unescap.org/our-work/transport/financing-and-private-sector-participation/public-private-partnership-course> accessed 25 June 2020.

Once potential projects have been identified, the public authority needs to consider whether or not the project will follow the route of a PPP, or make use of traditional project development and delivery. This would typically entail the VFM exercise referred to in Chapter 3, and the guiding question here needs to be – is the project likely to bring more value by following a PPP than a traditional model of public delivery? It is typically recommended that certain criteria be employed to measure the PPP suitability of a project, that would include the scale of the project, the extent of the infrastructure needs over the long term, and whether the private sector has the capacity to deliver on the technical and other components of the project.

It is at this point that the concerns linked to privatisation generally, and PPPs more specifically, need to be considered. As a reminder, some of the risks highlighted in Chapter 3 include the sharing of risks between partners, the complexity of PPPs, public interest concerns, the accessibility of services or infrastructure delivered through PPPs, public participation in PPPs, and the transparency (or rather lack thereof) in PPPs. With this in mind, some questions that need to be considered from a human rights perspective, to determine the VFM of a PPP, include:

- Would there be any additional value in following a PPP model, as opposed to a traditional public provision model?
- Would the sharing of probable risks and responsibilities between project partners convolute the human rights obligations of the different partners, and lead to an accountability deficit if human rights are adversely impacted?
- Would the complexity of a PPP diminish the intended benefits of the project in a way that would affect the non-fulfilment of human rights?
- If a private partner is involved, would the public interests be prioritised and protected (including labour, environmental and human rights standards)?

- Would a PPP model necessitate the commercialisation of public goods or services?
- Would a PPP model, and the associated fee or tariff structures, lead to the exclusion of groups with lower economic means from accessing or using the infrastructure?
- Would the use of a PPP model lead to decreased transparency and access to information around the project details?

If it is decided that a PPP does indeed pass the VFM test, the next step in this phase is to do a pre-feasibility study or analysis. This involves determining the project scope and characteristics, and the objectives that it seeks to achieve. The public authority will also use the pre-feasibility study to assess the technical, financial, and legal requirements of the project, in order to determine whether a PPP can be used. Whereas the pre-feasibility stage is only preliminary to a more detailed feasibility study, it is nevertheless crucial in deciding on whether a PPP approach should be explored in more detail, and whether significant resources will be spent in doing so. In all likelihood, once a project passes the pre-feasibility stage, it is much closer to being implemented as a PPP than before.

There are many similarities between the pre-feasibility stage, and the more detailed full feasibility analysis employed in the next phase. As such, many (if not all) of the methodological techniques in HRIAs could be applied to both stages in similar ways. However, given the objective of the pre-feasibility stage, which is to decide on the apparent or preliminary feasibility of the project, it is recommended that a human rights screening be done, at the very least.

As a reminder, screening is done to determine whether or not a HRIA is required in the first place, and which human rights due diligence approach is most appropriate in

the particular project. It should identify areas and groups that may require special attention, protection or assistance, and ensure that the appropriate amount of resources is dedicated in order to do so. Since the pre-feasibility stage of a PPP also involves a preliminary assessment of the technical, financial and legal viability of the project, the human rights screening of policies, laws and regulations would also assist in understanding whether or not the project will require more in-depth human rights analysis, and whether this affects the overall feasibility of the project.

Project preparation

The project preparation phase is arguably the most complicated, most resource intensive, and also most time-consuming. It is also the phase during which most of the HRIA related considerations would need to take place. This phase is typically focused around the preparation of a business case for the project, determining the technical, financial, and other requirements for the project, and conducting in-depth and detailed feasibility studies. The overall social and economic benefits of the project are also considered during this phase, to ensure that the benefits outweigh the costs associated with the project. The legal and regulatory challenges are considered, as well as any adverse environmental and social impacts that the project may have.

At this point of the project, and depending on the outcome of the human rights screening done in the previous phase, several key HRIA related steps are most likely to be employed. Based on the overview of the previous chapter, the recommended steps to include in this phase are planning and scoping, data collection and baseline development, and impact analysis. A significant part of the project preparation phase, is also identifying and refining the different roles and responsibilities of each

potential partner, and the subsequent allocation of risks. The human rights impact analysis in particular is very useful in this regard.

During the planning and scoping of human rights, it should be determined whether a dedicated or integrated HRIA approach would be followed. This would depend on other existing legal and regulatory requirements, and to what extent other forms of IA will be used. The criteria set out in the previous chapter should be considered, to assist in making this determination. Once the approach is decided on, the terms of reference for the HRIA are set out, and the human rights context of the project is explored in more detail. While traditionally mainly focusing on the obligations of governments, the planning and scoping phase can also be used to identify the apparent human rights obligations of all the different partners that would be involved in the project.

Following the planning and scoping, data needs to be collected on potential and actual human rights risks and impacts of the proposed project, and a baseline needs to be developed. Whereas stakeholder engagement should be mainstreamed throughout all the different phases of the project lifecycle, it is particularly important at this stage, to ensure that all data is collected and included in the baseline. Finally, an impact analysis should be used to compare the baseline to baselines from other IAs where possible. The human rights should be identified that are associated with the country and location of the project, the partners that would most likely be involved in the project, risks related to the project activity, and risks associated with specific stakeholders.

It is recommended that the human rights risks be considered in the context of the three-tiered classification system used for human rights impacts in infrastructure, as set out in Chapter 3 of this thesis. As such, risks would be considered at the micro-, meso-

, and macro-levels of the project. Once these risks have been identified, it should be added to the risk matrix already typically used in PPPs. Upon the allocation of human rights risks, the different obligations of the project partners should be considered, to ensure that human rights risks are also allocated to those partners best able to deal with those risks. Building on the human rights obligations highlighted in Chapter 4, it is recommended that the public authority always take ultimate ownership for human rights related risks, to ensure that no accountability deficit emerges. This does not mean, however, that the public authority should be the one taking control over all human rights due diligence activities, but rather that it should enact the necessary legislation and regulations to ensure accountability. The private partners need to be made aware of their own human rights obligations, and potential human rights risks that are allocated to them, and ensure that these risks are adequately dealt with.

The project preparation phase requires all technical and financial requirements to be considered in detail. This includes the financial impact on fees, tariffs, and users of the infrastructure. Bearing mind the potential impacts on financial accessibility, different financial models should be considered to ensure that the PPP is structured in a way that does not adversely impact access to infrastructure and services in a way that would also constitute human rights violations. The consideration of different financial models in this regard could also go a long way in ensuring that the proposed project does in fact reach its objectives of providing certain benefits and services in a manner that is consistent with the human rights obligations of all the partners.

Procurement and transaction

The procurement and transaction phase of the project entails identifying the correct partners for the project, and bringing the project to transaction close. The

procurement process should be competitive, and guided by principles such as fairness and transparency. To start the procurement process, all relevant bidding documents need to be prepared, including the proposed PPP contract that would define the roles and responsibilities of the different partners. Building on the previous phase, the PPP contract should ideally also include any human rights roles and responsibilities. The procurement process also sets out the criteria that will be used to select project partners. This is another crucial opportunity to set out criteria that includes human rights considerations, and the intention to only bring in partners with good human rights records, or good human rights policies and systems in place.

The procurement phase can be further broken down into 5 stages – pre-tender, pre-qualification, bidding, evaluation, and financial close. During the pre-tender stage, procurement notices are distributed to inform potential investors. At pre-qualification, all interested partners are scrutinised to ensure that only those with the necessary technical, financial, and other skills are identified as pre-bidders. During the bidding stage, all bidders are engaged to clarify any outstanding issues, and asked to submit proposals. These proposals are then evaluated during the evaluation stage – typically first looking at the technical proposal of the bidder, and then the financial proposal. Once a bidder is selected, the final negotiations will commence, and no further material changes to the proposal is allowed. Finally, the project is brought to financial close.

An alternative route to the procurement process, is where unsolicited proposals are brought to the government or public authority. There are some concerns linked to this process. Firstly, it creates an environment that is conducive to corruption, due to the lack of transparency that is typically associated with unsolicited proposals. And secondly, unsolicited proposals may divert the government's attention away from

national infrastructure priorities, and consequently infrastructure planning that is needs based, or as suggested earlier, human rights based. In practice, other interested partners are often invited to submit competing proposals in the event of unsolicited proposals.

Implementation and construction

Once the project details have been clarified in the preceding phases, and the project sites identified, the project partners will commence with the implementation and construction of the project. Whereas different elements of the HRIA process are recommended for each phase of an infrastructure PPP, the implementation and construction phase may very well warrant a full HRIA to be conducted, perhaps specifically in the context of construction.[555] Earlier phases focus on the planning and design of the project, but the construction of large scale infrastructure projects carry inherent environment and social risks.

An additional HRIA step that should be implemented during this phase of an infrastructure PPP, is the mitigation and management of human rights impacts. If the proposed steps set out above are followed, by the time the implementation and construction phase of the project is reached, all partners should be aware of potential human rights impacts, risks, and the human rights obligations of the different partners.

[555] There are two reasons why a full HRIA could be useful at this point, even though an *ex-ante* HRIA for example, may have already been conducted. Firstly, an *ex-ante* assessment is to some extent anticipatory by nature. In other words, anticipated adverse human rights impacts are identified, which may or may not be completely accurate. Of course, the value in this is that these impacts may be mitigated, and hopefully therefore never fully realised. Nonetheless, the construction phase serves as a crucial implementation phase of the project, and new human rights impacts may have surfaced, or already happened since the conceptualisation of the project. Secondly, an *ex-ante* assessment takes a general view of the entire project, and not necessarily a very detailed look at any specific stage. Since the construction phase is notorious for having a wide range of potential adverse impacts, it arguably warrants a very detailed HRIA in and of itself.

As such, mitigation and management strategies should be employed during this phase to ensure that adverse impacts are avoided where possible, and mitigated where necessary.

Operation and management

Any PPP project requires clear procedures for project management. This includes monitoring the performance of the private partner, clear reporting requirements, and protocols for continuous adjustment. Further procedures need to be set in place for renegotiations, and the resolution of any disputes between the different partners.

Building on the HRIA methodologies explored in the previous chapter, it is clear that this phase of an infrastructure PPP is in line with the HRIA requirements around monitoring, reporting, and evaluation. In other words, each of the requirements listed above could be considered through a human rights lens as well. It is important that the human rights performance of all partners are monitored, in other words, how well they fulfil their human rights obligations. There needs to be specific human rights reporting requirements, either in dedicated human rights reports, or integrated into other reporting requirements. Since the human rights context and environment will also continuously change, human rights considerations should be built into protocols for adjustments and renegotiations that would ensure the continuous protection of human rights, and fulfilment of other related human rights obligations.

The management of an infrastructure PPP also involves the eventual project end, and potential handover between partners. As highlighted in Chapter 3 of this thesis, PPP projects are usually transferred at the end of the contract period from a private partner to the public partner. The transfer from one partner to another, and the associated transition period, need to be carefully executed to ensure that the project

partners and stakeholders are not adversely impacted. It is important that the use of the infrastructure, and any associated services, are uninterrupted by this process, and that the quality of the infrastructure and services remain intact. It is also important to ensure that any human rights risks identified in each phase of the project is fully acknowledged and internalised by the public partner.

Recommendations

If HRIAs are weaved into the different phases of infrastructure PPPs, as proposed above, the research problems identified at the start of the thesis would be addressed. Summarily, the application of HRIAs in infrastructure PPPs would ensure that:

a) Infrastructure PPPs are designed, planned and implemented in a manner that contributes to the enjoyment of human rights and sustainable development more broadly;
b) All the relevant human rights obligations of the different partners are highlighted and considered in a manner that prevent accountability deficits from appearing; and
c) Substantive human rights impacts associated with infrastructure PPPs are identified and considered in a manner that avoids adverse impacts where possible, and mitigate adverse impacts where necessary.

The application of HRIAs in infrastructure PPPs, however, will require a concerted effort from a range of different stakeholders. Some of the key stakeholders include governments, international organisations, IFIs, potential private sector partners, civil society, and the research community. In addition to the recommendations included in the proposed methodology above, the following paragraphs focus on specific recommendations to each stakeholder group.

Governments

The primary role that governments play in infrastructure, development, and human rights, is apparent throughout the course of this thesis. Governments are the primary role-players in the planning and implementation of infrastructure. Governments are the primary role-players in the pursuit of development, economic and otherwise. And governments are the primary role-players when it comes to the protection, promotion, fulfilment, and respect for human rights. Therefore, governments are also the stakeholder that hold the most power in changing the way infrastructure PPPs are designed and implemented. The following specific recommendations are made to governments:

- Ensure that public goods are available, and accessible to the public. This thesis does not investigate in detail the extent to which infrastructure is, or should be, considered a public good. However, seeing that infrastructure is developed to serve the public, it is important to ensure that the services or facilities are both physically and economically accessible;
- Ensure that development strategies pursue environmental and social development, in addition to economic development. As discussed in Chapter 2 of the thesis, there are different views on what development entails. It is argued that sustainable development can only be achieved if a modern approach is followed that includes economic and non-economic development goals. Governments should ensure that these development goals are reflected in national development strategies;
- Adopt a human rights based approach to infrastructure planning, that is focused on poverty alleviation and the fulfilment of basic human needs. In doing needs-assessments, it is recommended that governments investigate the

current status of human rights enjoyment, and use that as a starting point in identifying priority areas for development. Public participation is crucial in this regard;

- Ensure that infrastructure planning is inclusive. This implies that the needs and interests of different groups are considered, as well as ensuring that infrastructure is planned, designed and implemented in a manner that makes it accessible to as many as possible;
- Mainstream human rights throughout different government functions and departments. It is clear from this thesis that infrastructure development, and perhaps infrastructure PPPs even more so, cuts across multiple different government entities and programmes. As such, it is recommended that human rights be mainstreamed through different functions, so that all the involved parties have the capacity to consider the projects and processes in the context of human rights;
- As the coordinating body of PPPs, ensure that HRIAs are applied. This includes the obligation to ensure that all partners are aware of the human rights dimensions of the project, and their own obligations in this regard. It is recommended that governments include these requirements and objectives in the relevant PPP legislative and regulatory frameworks;
- Implement models that ensures equal access to infrastructure and services. To avoid situations that lead to the exclusion of the poor, it is recommended that governments use subsidy structures, or include universal service obligations in negotiations with private actors;
- Ensure that the right judicial and non-judicial mechanisms are in place to hold decision makers accountable. In the context of macro-level human rights impacts, it is recommended that governments have the right administrative

frameworks in place, as well as judicial and non-judicial accountability mechanisms to hold decision-makers accountable for their actions;

- Require human rights obligations and responsibilities be a specific consideration in PPP contracts;
- It is recommended that governments explicitly consider potential human rights impacts when deciding between privatisation and traditional service provision or infrastructure development. This includes and explicit consideration of human rights impacts in the VFM exercise;
- Carry out monitoring and evaluation of the human rights performance of other parties in infrastructure PPPs, especially in the event that human rights obligations are transferred from the state to other parties. As highlighted in Chapter 4, the human rights obligations of all parties are different, but governments arguably still have the most comprehensive and far-reaching obligations of all parties. In addition, even when an obligation related to a risk is 'transferred' to another party, the government is not exonerated from its obligation, and should continue to ensure that the obligation(s) are met;
- Include the principles around effective governance of infrastructure PPPs in national frameworks. An example is the effective governance principles highlighted in the AAAA, which touch on human rights and human rights related principles;
- Ensure that the legal nature of human rights obligations is clear in policies, laws, and regulations around infrastructure PPPs. In the context of IAs, the language in the requirements is often framed around 'principles'. However, it is recommended that governments point out to all parties the *legal* nature of human rights obligations;

- Ensure that mitigation measures for adverse human rights impacts are enforceable. If and when potential adverse human rights impacts are identified in the context of an infrastructure PPP, it is recommended that the government scrutinise any proposed mitigation measures to ensure that they are realistic, purpose-driven, and enforceable. This implies also creating mechanisms through which parties can be held responsible for the not implementing mitigation measures;
- Mandate and require HRIAs to be done as early as possible in the process, to ensure that the findings can influence proposals or decision-making. As states earlier in this chapter, it would be best to require parties to already consider the human rights dimensions of a project at the design phase, as this would allow these considerations to influence the design and implementation of the project. It is recommended that governments require private partners to set out the human rights dimensions in the project proposal;
- Make information around infrastructure PPPs available to the public, and ensure access to information where relevant and necessary. Since infrastructure projects are almost always of public interest, it is recommended that governments make information around infrastructure PPPs available and accessible to the public. This includes information about the need for the project, the bidding process and private partners, and implementation of the project;
- Information should only be made confidential where absolutely necessary, and only under exceptional circumstances. In other words, commercial aspects alone are not good enough reasons for complete confidentiality around infrastructure PPPs; and

- Ensure access to remedy, by requiring non-judicial remedial mechanisms from project partners, and providing access to justice through court systems where necessary. This implies ensuring that the appropriate legal and regulatory frameworks are in place;

International organisations and international financial institutions

Similar to governments, international organisations (including IFIs) play important roles in development, infrastructure, and human rights. As highlighted in Chapter 2, international organisations have been very active over the past three decades in putting in place coordinated international development agendas, that help member states prioritise development projects. Many of the international organisations also promote the development of infrastructure, and infrastructure PPPs more specifically, in the context of development. The majority of existing guidelines and materials on infrastructure PPPs are also developed by international organisations. And finally, international organisation play an important role in the continuous development of the international human rights framework. With this in mind, the following specific recommendations are made to international organisations:

- Ensure that global development agendas around sustainability adequately include the promotion and fulfilment of human rights. Whereas international organisations have promoted the fulfilment of human rights in the context of development, it is done in a relatively piecemeal and fragmented manner. It is recommended that international organisations work towards finding a holistic and standardised approach to human rights and development;
- Ensure that non-economic perspectives, and the views of non-commercial stakeholders, are adequately considered in materials and guidelines on PPPs;

- It is recommended that the UN, in particular, ensure that its commitment to HRBADs is implemented and mainstreamed throughout different programmes and operations;
- Provide guidance around a human rights based approach to infrastructure planning. Bearing in mind the commitment to sustainable development, it is recommended that international organisations provide more detailed guidance on the development of infrastructure PPPs to fulfil human rights;
- Ensure that guidance materials on PPPs consider the human rights obligations of all parties concerned, including the non-state actors. As explained in Chapter 4 above, all parties in a PPP have different human rights obligations. It is recommended that any guidance materials on PPPs developed by international organisations point out this fact, and the associated nuances;
- Encourage the development and expansion of IDL to also explicitly include areas such as international human rights law. Since international organisations play an important role in the development of international law, it is recommended that international organisations recognise an expanded understanding of international development law that includes areas of public interest law in addition to international economic law;
- Encourage stakeholders to explicitly consider human rights in risk matrixes and VFM exercises. Most of the current guidelines on the use of risk matrixes, and VFM exercises, are published by international organisations (and IFIs in particular). It is recommended that human rights impacts and risks be explicitly considered in this regard;
- Provide guidance on risks that should not be transferred from one partner to another. In Chapter 4 it is alluded to that governments are not exonerated from their human rights obligations because the risks associated with those

obligations are transferred to another party. With this in mind, it is recommended that international organisations provide guidance on whether certain risks (particularly those linked to some human rights obligations) can or should be transferred in the first place;

- Further develop and expand on effective governance principles around infrastructure PPPs. As mentioned in Chapter 3, the AAAA already contains a series of effective governance principles that are closely linked to human rights. It is recommended that these principles be expanded and promoted in the context of national policy framework development;
- Provide guidance on integrated IA approaches that include environmental, social, and human rights considerations adequately; and
- Provide guidance and best practice on the entrenchment of accountability in PPP frameworks, and develop the capacity of international accountability and complaints mechanisms (such as the World Bank Inspection Panel, for example) to consider human rights impacts in the context of infrastructure PPPs.

Private sector partners

The focus on PPPs, as a form of privatisation, necessarily involves the private sector. Private actors involved in infrastructure PPPs can range from private financial institutions, to construction companies, to general management firms. Regardless, the private sector play a key role in infrastructure PPPs, and the following specific recommendations are made to the private sector:

- Ensure that services and facilities are accessible. In the context of a PPP, the private partner has tremendous influence on these aspects of the project in

terms of the design of the project, and how it is ultimately laid out in the project proposal. With this in mind, it is recommended that private partners explicitly consider the accessibility of services and facilities (both economically and physically) in the design of the project;

- Map out and consider the human rights roles and responsibilities of all partners (and especially private sector partners) in the scoping of the project. As mentioned in the section above, it is not clear whether it makes sense to transfer certain risks from the government to the private partner. With this in mind, it is recommended that the private partners map out the potential human rights risks, to ensure that all associated human rights obligations are accounted for;
- Ensure that the human rights requirements in laws and regulations meet international standards and expectations. While this recommendation may seem aimed at governments at first, it is recommended that the private partner assess existing national frameworks against international human rights obligations to ensure full compliance. To manage risks, private partners are encouraged to follow the highest attainable standards, even if and when it goes over and beyond what is required under domestic frameworks;
- Explore different funding mechanisms and tariff models to avoid discriminatory practices. Linked to the recommendations above related to accessibility, it is imperative that private partners consider the impacts of different financial models on accessibility, and select a model that makes the service or facility as accessible as possible;
- Include effective governance principles in internal management frameworks. As pointed out in the thesis, there are a number of guidelines and materials on best practices in this regard, and the private partners in a PPP project should

measure their own internal policies and practices against international best practices and standards;

- Acknowledge the nature of human rights obligations in the assessment of a project. While many of the guidelines refer to principles, it is recommended that private partners treat the international human rights obligations of the host state as any other legal obligation, with all the associated consequences and liabilities, whether or not incorporated into domestic legislation or regulations;
- Adopt IA practices as standard, regardless of what may be required under the relevant legislative and regulatory frameworks. As alluded to in this thesis, being aware of impacts and risks is good for the project on many different levels, and it is recommended that private partners conduct IAs to map out environmental, social and human rights risks and impacts regardless of domestic legal requirements;
- Ensure that mitigation measures are purposeful, viable, and enforceable. In other words, private partners need to ensure that the mitigation measures and their intended outcomes are linked to the problems they intend to address. These measures should also be realistic, and within the means of the project partners. And finally, these measures should be enforceable – ie, project partners need to be held accountable if the measures are not implemented;
- Engage with the public as much as possible, and ensure that information around the project is accessible to the public, and transparent;
- Adopt grievance mechanisms to facilitate access to remedy for those that may have been adversely impacted, in line with international best practices and guidelines; and
- Ensure that key stakeholders (including non-commercial stakeholders) are engaged throughout the project life-cycle.

Civil society

For better or worse, the roles that civil society play often revolve around the protection of the public interest, and perhaps more specifically the interests of those that belong to the more vulnerable groups in society. The following specific recommendations are made to civil society:

- Continue advocating for holistic, inclusive approaches to development that focus on poverty eradication and the fulfilment of basic human rights;
- Ensure that infrastructure is planned, designed, and developed in a manner that is inclusive and accessible to all. Whereas this may seem as an unrealistic expectation from civil society, it is common for civil society organisations to engage in policy design, and to hold public and private institutions to account through litigation and other measures. As such, it is recommended that civil society organisations closely monitor the planning, design, and implementation of infrastructure PPPs to ensure that they don't adversely impact on human rights;
- Monitor the human rights performance of all partners in a PPP. Noting again the different human rights obligations of different partners in a PPP, it is recommended that civil society organisations consider all these different obligations when scrutinising infrastructure PPPs (and only the actions of one particular party);
- Where necessary and relevant, assist communities in participating and engaging with project partners to ensure that their perspectives are included in the planning, design and implementation of infrastructure PPPs. Civil society organisations often work closely with local communities, which gives them a good understanding of the needs and context that the communities may

have. In addition to ensuring that those needs are communicated in the event that an infrastructure PPP may adversely impact on communities, it is also recommended that civil society organisations assist communities in actively participating in consultation processes (as opposed to simply relaying this information themselves);

- Compare national laws and regulations against the international human rights commitments and obligations of the state. It is recommended that civil society organisations scrutinise the domestic frameworks (policy, laws, and regulations) that governments have in place to ensure that international human rights commitments and obligations are included;
- Participate in HRIAs where necessary, relevant, and appropriate. In addition to the role that civil society organisations may play in facilitating community participation (mentioned above), civil society organisations may also want to participate in HRIA processes in their own capacity, due to experience in a certain location or context; and
- Facilitate access to remedy where necessary, relevant, and appropriate. Similar to the facilitation of engagement and participation, civil society organisations may play a role in helping community members access available grievance mechanisms in the event that human rights are adversely impacted.

Researchers

As highlighted in Chapter 1 of this thesis, there is relatively limited publicly available information and research on the intersections between infrastructure, PPPs, and human rights. While this thesis addresses several key aspects related to these matters, further research is necessary to fully understand the dynamics between these fields.

With this in mind, the following specific recommendations are made to the research community:

- Investigate the success rates of PPPs in different infrastructure and service types. For example, there are claims that private participation in water projects have a failure rate up to five times higher than other sectors such as transport, energy and telecommunications.[556] This raises the question whether some forms of infrastructure is better suited to PPPs than other;
- Further explore the concept of infrastructure as a public good, and what the roles and responsibilities of different actors are as a result;
- Legal researchers should assess the extent to which human rights obligations and responsibilities can be transferred from one partner to another under international human rights law, and how the transfer of these obligations affect the nature of the obligation;
- Legal researchers should also further develop literature around IDL to include international human rights law and other fields of public interest law such as environmental law;
- Do further research on the specific dynamics of privatisation in the context of infrastructure, and the extent to which it affects the accessibility and quality of the infrastructure, and the ability of the infrastructure to achieve its intended objectives;
- Continue expanding on the notion of VFM, and associated methodologies, to ensure that 'value' is holistically considered, and not with a disproportionate emphasis on economic value;

[556] Vidal (n 417).

- Legal researchers should explore in more detail the links between principles such as those contained in the IPSIA, and legal obligations. As alluded to several times throughout this thesis, there is an important difference between principles and legal obligations. It is recommended that further research be conducted around the link between obligations and principles, and the extent to which principles can undermine associated legal obligations;
- Continue exploring different models of integrated IA, that would consider in adequate detail all the different impact areas or fields (social, environmental, health, human rights, etc.); and
- Explore in more detail the potential impacts of a community veto-right on development. As mentioned before, 'community consent' is widely considered a requirement for development projects. While this implies a veto-right for the communities, the position remains unclear. It is recommended that this be explored in more detail, and furthermore, what the impact of providing a community with a veto-right may be on the development of other members of the community (or alternatively those standing to benefit from the project).

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