

§Law in Context

MICHAEL B. LIKOSKY



Law, Infrastructure,
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Law, Infrastructure, and Human Rights

From attacks on oil infrastructure in postwar reconstruction Iraq to the laying of gas pipelines in the Amazon rain forest through indigenous community villages, infrastructure projects are sites of intense human rights struggles. Many state and nonstate actors have proposed solutions for handling human rights problems in the context of specific infrastructure projects. Solutions have been admired for being lofty in principle; however, they have been judged wanting in practice. This book analyzes how human rights are handled in varied contexts and then assesses the feasibility of a common international institutional solution under the auspices of the United Nations to the alleged problem of the inability to translate human rights into practice.

Michael B. Likosky teaches in the School of Law at the School of Oriental and African Studies (SOAS), University of London, and is also currently a Global Crystal Eastman Research Fellow in the Hauser Global Law School Program at New York University School of Law. He holds a doctorate from the Law Faculty of Oxford University. Likosky has published several books including *The Silicon Empire* (2005), *Privatising Development* (2005), and *Transnational Legal Processes* (Cambridge University Press 2002). He also has twice contributed to the Oxford Amnesty Lectures (2003, 2006). He has held fellowships at Oxford University, the University of Bonn, and the Center for Media Education. He teaches law and globalization and international economic law.

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Michael B. Likosky

School of Oriental and African Studies
University of London



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Introduction

I “Defense and attack”¹

From attacks on oil infrastructures in postwar reconstruction Iraq to the laying of gas pipelines in the Amazon rain forest through indigenous community villages, infrastructure projects are sites of intense human rights struggles. Often these projects are privately carried out and involve a substantial foreign element; this only adds to their controversial character. Many state and nonstate actors have proposed legal solutions for handling human rights in the context of specific infrastructure projects. Solutions have been admired for being lofty in principle; however, more often than not they have been judged wanting in practice. This book analyzes how human rights are handled in varied contexts, focusing specifically on privatized infrastructure projects, and then assesses the feasibility and desirability of a common international institutional solution under the auspices of the United Nations to the alleged problem of the inability to translate human rights into practice.

It asks a number of questions, including: Why do groups target infrastructure projects to achieve social change through both violent and nonviolent means? Are certain strategies more successful than others? How do targeted parties respond to attacks and to social movements? What types of countermeasures do they adopt? How do measures and countermeasures interact with one another? And what does all of this mean for the realization of human rights?

In addition to the issues surrounding infrastructure projects in postwar reconstruction and within national development, it also examines such things as al-Qaeda attacks on the U.S. financial and transportation infrastructures and their impact on human rights, as well as the human rights issues arising from the spread of Western European infrastructures into the European Union’s new member states in Central and Eastern Europe. It looks at voluntary corporate codes adopted by major international investment banks in the context of privatized projects and also the use of private infrastructure companies to solve urban poverty. In these varied

1 M McDougal “International Law, Power and Policy: A Contemporary Conception” (1954) 82 *Recueil Des Cours* 1, 176.

contexts, the legal record provides a window into battles waged over basic human rights issues.²

II Litigation-based approaches

Traditionally, legal scholars have understood the relationship between privatized infrastructures and human rights through human rights litigation. Cases targeting infrastructure projects are part of a larger movement that includes suits against oil companies, corporations that colluded with the Third Reich, companies that profited from apartheid in South Africa, those that benefited from slavery in the United States, and others. This litigation is increasingly viewed as the most promising legal means for holding transnational corporations (TNCs) accountable for alleged human rights violations.³

In 1997, Harold Koh noted the emergence of this growing body of “transnational public law litigation” designed “to vindicate public rights and values through judicial remedies.”⁴ One type of transnational public law litigation involves claims pursued against TNCs alleging human rights abuses arising in the context of infrastructure projects. These suits are often brought in U.S. courts under the Alien Tort Claims Act (ATCA), targeting companies for alleged abuses perpetrated abroad.⁵ Other cases have arisen in the courts of Australia,⁶ Canada,⁷ Japan,⁸ India,⁹ and the

2 Robert Kidder tells us: “to look at law and records of legal activity is to look at the tracks left by combatants and their allies.” R Kidder “Toward an Integrated Theory of Imposed Law” in S Burman and B Harrell-Bond, eds, *The Imposition of Law* (Academic Press London 1979) 289, 300.

3 See e.g. S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Oxford 2001).

4 H H Koh “SYMPOSIUM: International Law: Article: Transnational Public Law Litigation” (1991) 100 *Yale Law Journal* 2347. See also H H Koh “The Palestine Liberation Organization Missionary Controversy” (1988) 82 *American Society of International Law Proceedings* 534. Transnational public law litigation, according to Koh, includes five characteristics:

- (1) a transnational party structure, in which states and nonstate entities equally participate;
 - (2) a transnational claim structure, in which violations of domestic and international, private and public law are all alleged in a single action;
 - (3) a prospective focus, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes;
 - (4) the litigants’ strategic awareness of the transportability of those norms to other domestic and international fora for use in judicial interpretation or political bargaining; and
 - (5) a subsequent process of institutional dialogue among various domestic and international, judicial and political fora to achieve ultimate settlement.
- H H Koh “SYMPOSIUM: International Law: Article: Transnational Public Law Litigation” (1991) 100 *Yale Law Journal* 2347, 2371.

5 For non-ATCA U.S. cases see S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Oxford 2004) 65–81.

6 *Id.* 122–125.

7 *Id.* 125–127.

8 A Sutturari “Sumatran Villagers Sue Japan Over ODA Dam” (8/14/03) *Japan Times*.

9 See U Baxi, *Valiant Victims and Lethal Litigation* (N. M. Tripathi Pvt. Ltd. Bombay 1990); U Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (N. M. Tripathi Pvt. Ltd. Bombay 1986); J Cassells, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press Toronto 1993); D Fernandes and L Saldanha “Deep Politics, Liberalisation and Corruption: The Mangalore Power Company Controversy” [2000] *Law, Social Justice & Global Development Journal* at <http://elj.warwick.ac.uk/global/issue/2000-1/fernandes.html>; M Galanter “Law’s Elusive Promise: Learning from Bhopal” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 172; P T Muchlinski “The

United Kingdom.¹⁰ The European Commission is encouraging similar routes into the courts of its member states.¹¹

In a *Foreign Affairs* article published in 2000, Anne-Marie Slaughter and David Bosco dub this litigation movement “plaintiffs diplomacy” – “a new trend toward lawsuits that shape foreign policy.”¹² Such lawsuits fall into a number of categories. The most relevant for our purposes, however, are the “[s]uits against corporations for violations of international law.”¹³ Slaughter and Bosco explain: “By targeting major corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention at the highest levels.”¹⁴ The subject matter of these cases varies, but abuses occurring in the context of infrastructure projects are an important source of litigation.

Many of these cases are brought under the U.S. ATCA.¹⁵ Passed in 1789, the statute went relatively unused until the 1980s.¹⁶ ATCA allows, among other things, foreign nationals to bring claims against TNCs for alleged human rights violations. With regard to infrastructure projects, cases have been brought against various oil companies. For example, a group in Burma initiated an action against Unocal and Total for their alleged roles in the squelching of protests by the government.¹⁷ Similar cases are being pursued against Chevron¹⁸ and Shell¹⁹ for their alleged roles in violent government actions in Nigeria.²⁰

Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors” (1987) 50 *Modern Law Review* 545.

- 10 Joseph 115–122; P Muchlinski “Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case” (January 2001) 50(1) *International & Comparative Law Quarterly* 1; P T Muchlinski “Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review” (2002) 23(6) *The Company Lawyer* 168.
- 11 E A Engle “Alien Torts in Europe? Human Rights and Tort in European Law” (Zentrum für Europäische Rechtspolitik an der Universität Bremen ZERP-Diskussionspapier January 2005).
- 12 A-M Slaughter and D Bosco “Plaintiffs Diplomacy” [2002] *Foreign Affairs* 102, 103. See also L A Compa and S F Diamond, eds, *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press Pennsylvania 1996).
- 13 Slaughter and Bosco, 103.
- 14 *Id.* 107.
- 15 Alien Tort Claims Act, 28 USC. § 1350 (2001). The statute reads in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The literature on ATCA is extensive. For a useful article on ATCA and labor rights see S H Cleveland “BOOK REVIEW: Global Labor Rights and the Alien Tort Claims Act” (1998) 76 *Texas Law Review* 1533. The adaptation of the U.S. tort-based approach has proponents within the European Parliament. However, cases arise largely in the criminal rather than the civil context. And, these primarily concern politicians not companies being brought to court. E A Engle “Alien Torts in Europe? Human Rights and Tort in European Law” (Zentrum für Europäische Rechtspolitik an der Universität Bremen ZERP-Diskussionspapier 1/05).
- 16 See A-M Burley “The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor” (1989) 83 *American Journal of International Law* 461.
- 17 *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).
- 18 *Bowoto v. Chevron Corp.*, Case No. C99–2506 (N.D. Cal.).
- 19 *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).
- 20 For similar cases, see *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998) (discussing the Amazon oil spills); *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000) (discussing the Bhopal disaster).

Although Koh provides an unqualified endorsement of this litigation, Slaughter and Bosco argue that this trend toward holding U.S. companies accountable for human rights abuses and environmental damage caused abroad leads to ambiguous results. On the positive side, the suits cause companies to pay greater attention to the impact of their actions.²¹ According to Slaughter and Bosco, however, the suits have three principal shortcomings. First, the nongovernmental organizations (NGOs) responsible for bringing suits are not necessarily democratically accountable institutions and may allow decisions that should be made through the democratic process instead to be made by the courts. Second, not all countries value human rights and the environment equally, and thus to impose U.S. human rights and environmental standards on all countries is undemocratic. Third, threatened corporations may lobby their home state governments to curtail the scope of allowable suits under ATCA.²² For these reasons, Slaughter and Bosco argue that the use of ATCA should be limited to cases involving egregious human rights abuses.²³

Whether these arguments are valid and their prescriptions desirable requires further study. With regard to infrastructure projects, we must enquire into how the U.S. courts are being used in practice. This means asking whether the courts are being used solely to settle disputes or instead are courts playing, as Koh suggests, a strategic role in ongoing human rights negotiations, as “bargaining chip[s] for use in other political fora.”²⁴ The motivations of litigants engaged in social change are not always readily apparent.²⁵ If the litigation is a bargaining chip in ongoing social movements, then is it a valuable chip, of little value, or else possibly at times a liability? Second, we might enquire into what types of NGOs are bringing suits to test whether these organizations hinder or advance democratic interests. It also might be that the decisions by host governments to engage contractually with transnational infrastructure companies in the first place were not democratically

21 A-M Slaughter and D Bosco “Plaintiff’s Diplomacy” [2002] *Foreign Affairs* 102, 110–11.

22 *Id.* Additionally, Catherine A. MacKinnon argues that these claims also discourage close relationships between the attorneys and affected communities. See C A MacKinnon, “Collective Harms Under the Alien Tort Statute: A Cautionary Note on Class Actions” (2000) 6 *ILSA Journal of International and Comparative Law* 567, 573.

23 A-M Slaughter and D Bosco “Plaintiff’s Diplomacy” [2002] *Foreign Affairs* 102, 111. See also R L Herz “Litigating Environmental Abuses Under the Alien Tort Claims Act” [2000] *Virginia Journal of International Law* 545, 573 (giving examples of violations that might rise to an egregious level).

24 H H Koh “SYMPOSIUM: International Law: Article: Transnational Public Law Litigation” (1991) 100 *Yale Law Journal* 2347, 2349. See also Y Dezalay and B Garth “Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960–2000” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 197; C Joppke “Sovereignty and Citizenship in a World of Migration” in *Transnational Legal Processes* 259; M B Likosky “Cultural Imperialism in the Context of Transnational Commercial Collaboration” in *Transnational Legal Processes* 221.

25 Social activists sometimes mask their intentions or at least do not always broadcast them see e.g. Malcolm X, *By Any Means Necessary* (4th printing Pathfinder New York 1998); S F Moore “An International Legal Regime in the Context of Conditionality” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 333; A Riles “The Virtual Sociality of Rights: The Case of ‘Women’s Rights Are Human Rights’” in M B Likosky, ed, *Transnational Legal Processes* 420.

informed ones. A democratic deficit often exists in emerging markets in which governments are semidemocratic or, at times, authoritarian. Governments may depart from democratic principles when tendering large-scale privatized projects.²⁶

Furthermore, does this transnational public interest litigation targeting TNCs aggravate or ameliorate transnational power disparities? What is the relationship between social justice movements and transnational human rights litigation? Do the interests of litigants mirror those of the activist lawyers who represent them? What do successful judgments mean in real terms for affected communities? Also, are decisions by project planners to allow these suits to go to trial rather than settling them out of court a specific human rights risk mitigation strategy? Do plaintiffs go to trial because they are trying to establish favorable precedent? What sorts of settlements, both in court and out, are reached in these cases? How do the settlements differ in word from when they are translated into practice? What lessons can be learned from drafting settlements for future cases?

A growing body of scholarship is beginning to ask these and related questions about how the ATCA and other transnational public interest litigation targeting companies operate in practice.²⁷ Along these lines, Ugo Mattei questions whether the courts are ideally suited to resolving this genre of human rights claims. He poses the question of whether “an inherently conservative judiciary can make good law for progressive purposes.”²⁸

Marc Galanter looks at how this transnational human rights litigation works in practice in the context of the claims process arising out of the massive leak of methyl isocyanate at the Union Carbide plant in Bhopal, India.²⁹ In this case, he argues that tort law proved inadequate to compensate victims of the disaster. In the Bhopal suit, the Indian government brought a claim against Union Carbide on behalf of the victims of the disaster, seeking redress in the high-compensation U.S. federal courts. The U.S. judge ruled, however, that the Indian courts were a more appropriate venue for the case (on the basis of *forum non conveniens*).³⁰ As a result,

26 S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press New York 1999).

27 See e.g. R Shamir “Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility” (2004) 38 *Law and Society Review* 635.

28 U Mattei “SYMPOSIUM: Globalization and Governance: The Prospects for Democracy: Part III: Globalization and Empire: A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance” (2003) 10 *Indiana Journal of Global Legal Studies* 383, 424.

29 M Galanter “Law’s Elusive Promise: Learning from Bhopal” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 172. See e.g. *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000) (brought under the Alien Tort Claims Act). See also U. Baxi and A Dhanda, *Valient Victims and Lethal Litigation: The Bhopal Case* (N. M. Tripathi Pvt. Ltd. Bombay 1990); J Cassells, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press Toronto 1993); P Muchlinski “The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors” (1987) 50 *Modern Law Review* 545.

30 See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195 (2d Cir. 1987). On *forum non conveniens* and the Alien Tort Claims Act see A K Short “Is the Alien Tort Statute Sacrosanct – Retaining Forum Non Conveniens in Human Rights Litigation” (2000–2001) 33 *New York University Journal of International Law and Policy* 1001; M R Skolnik “Forum Non

the case was tried in the low-remedy Indian system, and the government secured a judgment against the company.³¹ According to Galanter, although the Indian legal judgment looked good on its face, in practice, because of inadequate institutions, the tort regime failed to deliver on the promises of its judgment.³²

Based on these findings, Galanter advocates transnational tort law reform. He argues that the key to understanding the Bhopal disaster and its legal aftermath lies in approaching it from a transnational vantage.³³ The Indian litigation cannot be understood in isolation from the U.S. efforts and vice versa. As a possible solution to the ultimate failure of both systems to deliver justice, Galanter argues for the further development of a transnational private law catering to ordinary persons.³⁴ Whether Galanter's points about India can be generalized to other contexts requires further study.

Although the litigation approach is important and this study draws on insights from the literature, in practice the vast majority of human rights issues in the context of privatized infrastructure projects are handled through nonjudicial legal means. Although projects occur in multiple sectors and in large numbers of countries, litigation has only been pursued in a handful of situations. Human rights issues are more often resolved by contracts and legislative or executive action. Thus to look at human rights legal strategies solely through the lens of human rights litigation would distort the picture. In pursuing a broad definition of what counts as "law," this study follows William Twining who himself

side[s] with Griffiths and Llewellyn, who reject general definitions of law as unnecessary and misleading, because the indicia of "the legal" are more like a continuum of more complex attributes, which it is not necessary to set off artificially from closely related phenomena except for pragmatic reasons in quite specific contexts.³⁵

At the same time, many of the points made about the litigation-based efforts apply equally to nonlitigation approaches. It is not enough to have good law on paper or promising legal avenues available to project-affected communities. These legal solutions must be judged by the yardstick of social praxis.

III Non-litigation-based approaches

This book seeks to understand the relationship between human rights and transnational privatized infrastructure projects by looking closely at the legal records of

Convensiens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self after WIWA" (2002) 16 *Emory International Law Review* 187.

31 Galanter 174; "Bhopal Charges Stay, Indian Court Rules," CNN.com (8/28/02) at <http://www.cnn.com/2002/world/asiapct/south/08/28/india.bhopal/>.

32 Galanter 172.

33 *Id.* Similarly, on the importance of viewing the underlying facts of a Malaysia tort case involving a Japanese-Malaysian joint venture from a transnational vantage see M Ichihara and A Harding "Human Rights, the Environment and Radioactive Waste: A Study of the Asian Rare Earth Case in Malaysia" (1995) 4(1) *Review of European Community and International Environmental Law* 1.

34 Galanter 182.

35 W Twining, *Globalisation and Legal Theory* (Butterworths London 2000) 231.

projects which reveal “the tracks left by combatants and their allies.”³⁶ Infrastructure projects are “all too apparently a process organized through law and legal techniques.”³⁷ Projects emerge out of a molten mass of public and private, domestic, foreign, and international laws. Thus, contests over human rights are evident in public and private contracts, regulations, executive documents such as presidential directives, treaties, loan agreements, guidelines, white papers, and many other legal forms. Twining sets out the main levels involved in legal globalization. These levels include global, international, regional, transnational, intercommunal, territorial state, substate, and nonstate.³⁸ Most of the infrastructure projects described in this book draw on several of these levels. That is, the composite legal nature of projects reflects how, as Twining explains, “[d]ifferent geographical levels of legal phenomena are not neatly nestled in a single hierarchy of larger and smaller spaces. Rather, they cut across each other, overlap, and interact in many complex ways.”³⁹ Employing Boaventura de Sousa Santos’s terms, the “legal life” of an infrastructure project is constituted at an intersection of different legal orders, that is by “inter-legality.”⁴⁰

Human rights concerns infuse seemingly run-of-the-mill subject areas such as commercial law, procurement law, foreign direct and indirect investment law, banking and finance law, labor law, tariff regulations, taxation laws, insurance law, construction law, input contracts, host agreements, operation and maintenance laws, off-take sales, and power sales agreements.⁴¹ Individuals who make up organizations like governments, community groups, public and private corporations, NGOs, regional and international development banks, ratings agencies, and others are forced to think about the human rights implications of their activities.⁴²

36 R Kidder “Toward an Integrated Theory of Imposed Law” in S Burman and B Harrell-Bond, eds, *The Imposition of Law* (Academic Press London 1979) 289, 300.

37 S S Silbey “1996 Presidential Address: ‘Let Them Eat Cake’: Globalization, Postmodern Colonialism, and the Possibilities of Justice” (1997) 31(2) *Law and Society Review* 207, 209.

38 W Twining, *Globalisation and Legal Theory* (Butterworths London 2000). 139. On legal pluralism generally see M Chiba “Legal Pluralism in Mind: A Non-Western View” in H Petersen and H Zahle, eds, *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth Aldershot 1995) 71; M Chiba “Three Dichotomies of Law: An Analytical Scheme of Legal Culture” (1987) 1 *Tokai Law Review* 1; M Galanter “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *Journal of Legal Pluralism* 1; J Griffiths “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; S E Merry “Legal Pluralism” (1988) 22(4) *Law and Society Review* 709; S F Moore “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study” (1973) 7 *Law and Society Review* 719; S F Moore “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999” (March 2001) 7(1) *The Journal of the Royal Anthropological Institute* 95; B d S Santos, *Toward a New Legal Common Sense: Law, Globalisation, and Emancipation* (2nd edition Butterworths London 2002) 437; G Teubner “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo Law Review* 1443.

39 Twining, 253.

40 Santos, 437. For a discussion of Santos’ concept of inter-legality see W Twining, *Globalisation and Legal Theory* (Butterworths London 2000).

41 This list was compiled from S L Hoffman, *Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Kluwer Law International Leiden 2001) 28–29. Scott L. Hoffman, however, does not focus on or identify the human rights dimensions of project finance law.

42 M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005).

More often than not, the details of how human rights will be translated into practice are woven into contract clauses. For example, human rights concerns are memorialized in loan agreements and contracts between governments and companies governing tariffs. The centrality of contract should not come as a surprise, as Scott L. Hoffman reminds us, because “contracts form the framework for project viability and control the allocation of risks.”⁴³ Benjamin Esty tells us the “project companies” that are responsible for carrying out projects “are founded upon a series of contracts.”⁴⁴ He estimates that a “typical project has forty or more contracts uniting fifteen parties in a vertical chain from input supplier to output purchaser.”⁴⁵ At the same time, although contracts play an enormous role in carrying out projects and in mediating human rights claims, other legal forms are also significant.

Human rights infuse most legal facets of an infrastructure project and over the life of a project this means anything from rules governing tendering to construction to the subsequent operation of a project. Governments and international organizations are involved at these stages. So we are not just concerned with contracts governing relationships among private actors. For example, the tendering stage will be shaped by government regulations, often public procurement laws. Also, governments have passed laws and regulations aimed at encouraging foreign investment in infrastructure projects.⁴⁶ Furthermore, underscoring the public law aspects of projects, as a planned economy, Malaysia, for example, issues regular plans that set out government policy toward infrastructure project investment.⁴⁷

Not only is the type of law involved important, but as Francis G. Snyder stresses, the force of law depends on the particular composition of strategic actors involved in specific transnational commercial matters.⁴⁸ Related, Twining “assume[s] rather than argue[s] that law is concerned with relations between agents or persons (human, legal, unincorporated and otherwise) at a variety of legal levels, not just relations within a single nation state or society.”⁴⁹ For present purposes, these actors include governments, companies, NGOs, community groups, terrorists, individuals, and international organizations. Through their strategies, they have determined

43 Hoffman 7.

44 B Esty, *Modern Project Finance: A Casebook* (John Wiley and Sons, Inc New Jersey 2004) 2.

45 *Id.*

46 R D Feldman, C J Berrocal and H L Shartsten “Public Finance Through Privatization: Providing Infrastructure for the Future” (1986–1987) 16 *Stetson Law Review* 705, 714–719; T P Hanley, Jr. “BOT Circular: An Evaluation of the New Regulatory Framework Governing Privately-Financed Infrastructure Projects in the People’s Republic of China” (1999) 5 *Stanford Journal of Law, Business and Finance* 60.

47 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 50.

48 F G Snyder “Governing Globalisation” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 65. Also on strategic actors and international law see M McDougal “International Law, Power and Policy: A Contemporary Conception” (1954) 82 *Recueil Des Cours* 1, 176. For an important work looking at the role of non-state actors in international law from an interdisciplinary perspective focusing on various analytical forms such as networks, brackets, family trees, and systems see A Riles, *The Network Inside Out* (Michigan University Press Michigan 2000) 21.

49 W Twining, *Globalisation and Legal Theory* (Butterworths London 2000) 139.

which legal sites and issues “have flourished and developed, and which have withered and even died for lack of clients.”⁵⁰

The nature and form of the laws and regulations constituting and regulating infrastructure projects depends on the government(s) involved. Typical projects involve transnational infrastructure companies. Their involvement means that both host and home state governments will impact on the legal life of an infrastructure project. A single project might be made up of a numbers of TNCs, so it is important to pay attention to the specific governments participating in a project. Laws will vary according to the specific governments involved. For example, a single company might participate in the same infrastructure sector in two countries and have to abide by public procurement laws in one but not the other. Governments sometimes exclude infrastructure projects from public procurement laws.⁵¹ In fact, the build-operate-transfer (BOT) legal scheme, a very popular way of carrying out infrastructure projects, has “not been consistently viewed as a component of the overall procurement process.”⁵² Likewise, procurement, privatization, and public-private partnership laws vary in their content internationally.

When a project matures and reaches the operating stage, a different set of legal concerns are involved and correspondent human rights issues arise. These concerns might be present in the initial concession agreement or instead they might arise through a renegotiation of this initial contract. For example, in the case of a toll road, users will pay the private operator each time they travel on the road. If the use of the road falls below a level agreed upon between the host government and the transnational operating company, then the host government may supplement the tolls. This might be done legally through “take or pay” clauses which are often in “concession agreements whereby the state agrees to pay for a fixed amount of the product of the BOT project, regardless of whether or not it chooses to accept actual delivery or use of the service or product.”⁵³ When a private company is invited to deliver transportation infrastructure services to a poor urban community, citizens might be unable to afford tolls. To lessen this risk, governments might signal their agreement in the concessionary contract to supplement toll payments.

The laws produced by governments to manage human rights in the context of infrastructure projects are only as good as the government that issues them. Furthermore, governments will even treat various sectors of the economy differently.⁵⁴ For this reason, it is necessary to look beyond the legal commitments to how they translate into practice. For example, when the U.S. government promises that its infrastructure projects in Iraq will deliver on the human rights promises of the

50 F G Snyder “Governing Globalisation” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* 65, 92.

51 D A Levy “BOT and Public Procurement: A Conceptual Framework” (1996–1997) 7 *Indiana International and Comparative Law Review* 95, 106.

52 *Id.* 108.

53 *Id.* 107.

54 B d S Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd edition Butterworths London 2002) 198.

war, what does this mean in practice? Are the deliverables promised under the U.S. government–financed power and water projects being realized? It may be that for some the promises are made good, whereas for others they are not.

The same goes for the private partner. Commitments from corporations, be they investment banks or construction companies, will vary in their actual meaning. For example, in the case of international investment banks which have signed on to guidelines to govern how human rights will be incorporated into the infrastructure projects that they finance, individual banks have decided to translate these common commitments into practice in bank specific ways. This means that the divisions within banks charged with devising human rights plans must be looked at carefully with attention to their variability.

As well, many human rights commitments end up internalized into the legal matrix of projects because of active campaigning by NGOs and community groups. These organizations also vary in their directives and personnel and thus in their real world impact. Yves Dezalay and Bryant G. Garth tell us: “Quite clearly the NGOs and networks are not only the product of a new kind of international law, they are also the product of well-designed strategies designed by leaders of the United States, transnational non-governmental organizations (NGOs), and internationally active foundations.”⁵⁵ These strategies vary widely and some NGOs work closely with governments and companies, whereas others campaign largely from the outside.⁵⁶ Santos views the relationship between NGOs and globalization in the following way:

Notwithstanding the fact that many NGOs are active today in promoting hegemonic globalization – oftentimes by working in collaboration with such agencies as the World Bank – we can still say that while hegemonic globalization is carried out by TNCs, counter-hegemonic globalization is carried out by NGOs.⁵⁷

The involvement of particular sets of governments, TNCs, NGOs, and community groups will mean different things for human rights in the context of specific infrastructure projects. The plurality of rules emanating from this diverse set of organizations has normative implications. As Santos reminds us: “there is nothing inherently good, progressive, or emancipatory about ‘legal pluralism.’”⁵⁸

55 Y Dezalay and B G Garth “Legitimizing the New Legal Orthodoxy” in Y Dezalay and B G Garth, eds, *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (University of Michigan Press Michigan 2002) 307, 319.

56 On the variety of types of NGOs see U Baxi “What Happens Next Is Up to You: Human Rights at Risk in Dams and Development” (2001) 16 *American University International Law Review* 1507, 1525; B d S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition Butterworths London 2002) 184–186.

57 Santos 186. For an evaluating of the presentation of globalization as a battle between companies and powerful governments, on the one hand, and NGOs and community groups, on the other see M B Likosky “Editor’s Introduction: Transnational Law in the Context of Power Disparities” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) xvii.

58 Santos 89.

Just as NGOs vary in their directives and in the roles that they play, so do international organizations, which have distinct institutional compositions and also differ in their concern for and impact upon human rights. For example, the World Bank Group itself has widely variable institutions whose actions touch on the managing of human rights in the context of privatized projects. The Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) are both involved in subsidizing transnational infrastructure companies through instruments such as political risk insurance.⁵⁹ Their involvement correlates in diverse ways with how the projects that they finance handle human rights. And, the World Bank has established a third institution that works more systematically to monitor this correlation. It is the Compliance Advisor Ombudsman and it hears claims from project-affected communities for infrastructures supported by MIGA or the IFC.⁶⁰

So, attention must be paid not only to the fact that a mix of public and private, domestic, foreign, and international actors are involved in projects. Care must be taken to distinguish among actors of each category. Laws governing the human rights practices of infrastructure projects are equally variable.

IV Scope of book

This book looks at how human rights are handled by law in the context of international privatized projects by introducing three concepts and then through the application of these concepts to five detailed case studies. It then, on the basis of the case studies, explores the feasibility and possible contours of a common international institutional solution under the auspices of the United Nations for handling human rights issues in varied contexts.

To understand how governments and companies together plan and carryout projects, Chapter 2 presents the concepts of public-private partnership (PPP) and compound corporations.

A PPP refers to how governments and companies partner with one another either through the financing, construction, or operating stages of a project. The usefulness

59 Along with export credit agencies, the World Bank Group's institutions finance or provide political risk insurance to projects. See "Current Issues in Multinational Financing: Remarks" (1995) 89 American Society of International Law Proceedings 19, 25 (remarks by H. G. McCrory, Jr.).

60 www.cao-ombudsman.org. On the pursuit of claims by non-state actors against projects that the World Bank finances directly through its Inspection Panel see E Brown "Invoking State Responsibility in the Twenty-first Century: Symposium: The IFC's State Responsibility Articles" (2002) 96 American Journal of International Law 798, 815; R E Bissell "Current Development: Recent Practice of the Inspection Panel of the World Bank" (October 1997) 91 American Journal of International Law 741; J A Fox "The World Bank Inspection Panel: Lessons from the First Five Years" (2000) 6 Global Governance 279; E Hey "Article: The World Bank Inspection Panel: Toward the Recognition of a New Legally Relevant Relationship in International Law" (1997) 2 Hofstra Law and Policy Symposium 61; Dr S Schlemmer Schulte "Article: The World Bank Inspection Panel: and Its Role for Human Rights" (1999) 6 Human Rights Brief 1. The Asian Development Bank and other development banks also have dispute resolution panels or policies. Some panels and ombudsmen will hear claims from privatized projects.

of introducing the PPP approach to understand privatized projects lies in its focus on the defined roles within privatization of both governments and companies. The aim is though not to stop at the general observation that public and private parties are involved in projects. Instead, it is to look closely at which specific parties partake in projects, how they participate, and what their participation looks like at different stages. The nature of this participation and the forms that it takes will vary according to the country in which an infrastructure is being built and also the sector of the economy implicated. Furthermore, as we shall see repeatedly in the course of this book, it also will depend on the home state of the transnational company involved. Stressing the fact that projects transcend national borders, our concern is with transnational PPPs.

The specific companies that do the work under PPPs are referred to as compound corporations or companies that materially mix public and private laws to achieve specific aims. The purpose of adopting a compound corporation approach is to focus on how the public-private relationships characteristic of PPPs express themselves through hybrid corporate forms. This mixing is so significant that the companies themselves are not clearly public or private. Furthermore, it is often presumed that a discretionary government involvement in infrastructure projects is something that negatively impacts on corporate affairs. Although, at times, this is undoubtedly the case, in most infrastructure projects, governments play a key role in ensuring that the company is awarded a commercially viable infrastructure contract.⁶¹ Also, governments may ensure that companies can collect user charges. For example, governments may guarantee that a fixed user charge is met by supplementing consumer payments for a project that is used below expectations.

After introducing these two concepts, we next turn to Chapter 3, which presents the concept of “human rights risk” for understanding the strategic dimensions of human rights law as it relates to transnational PPPs. A human rights risk is the likelihood that a human rights problem will disrupt the plans of project designers and operators. Although a human rights risk has normative implications, it is something that is strategically constructed.

The reason for adopting a human rights risk approach is that it focuses our attention on how human rights strategists are adapting themselves to the shift away from state-financed and carried out projects and toward PPPs. Recognizing the PPP basis of projects, strategists are targeting both governments and companies. Furthermore, the focus on strategies allows us to look also at how governments and companies themselves pursue responsive strategies designed to mitigate the risk that human rights strategists will disrupt and perhaps even derail infrastructure plans.

61 For an earlier discussion of how, in the context of privatization, governments have been oligarchized with a small group of public and private actors controlling their institutions see M B Likosky “Response to George” in M Gibney, ed, *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford University Press Oxford 2003) 34; M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 23–51.

Part II then presents five detailed case studies in which compound companies carry out transnational PPPs, which are targeted by human rights risk strategists. Each of these PPPs involves a unique mix of public and private law, domestic, foreign, and international, in which human rights risk strategies emerge in very different ways. The groups of countries involved generally vary from one project to another. Infrastructure projects discussed are primarily undertaken in developing countries and transition societies, although not exclusively. The legal forms through which human rights are managed is wide-ranging, although commonalities also exist.

The purpose of adopting a case-based approach is to understand how the three concepts interrelate with one another in the context of specific projects. This allows us not only to catalogue public-private configurations and human rights risk strategies, but also it helps us to understand how this interrelation unfolds in a dynamic fashion over time. Strategies and actors interrelate with one another in politically contingent ways and contexts. Furthermore, by looking at how human rights are handled in varied contexts, it is possible to begin to devise legal solutions to human rights problems applicable cross-nationally.

Chapter 4 looks at the role of infrastructures in the reconstruction of postwar Iraq. This is a story of insurgency and counterinsurgency. How postwar infrastructure projects relate to human rights is contested, ambiguous, and often occurs at a subterranean level.

Chapter 5 turns to a situation in which human rights interests are pursued by governments and companies in response to terrorist attacks on infrastructure projects. Our primary concern is the PPP-based response to the attacks by al-Qaeda on the U.S. transportation, banking and financial, and postal infrastructures. However, this chapter also discusses the PPP-based responses to terrorist threats and attacks internationally.

This contrasts with a conventional human rights story told in Chapter 6 of how human rights are handled in the context of a Peruvian gas pipeline running through the lands of several indigenous communities in the Amazon rain forest. The project is the Camisea gas pipeline and it is the biggest of its kind in Peruvian history. The records of human rights battles are memorialized in the loan agreements of private international investment banks and the Inter-American Development Bank, and elsewhere.

Also concerned with development issues, Chapter 7 turns to the role of transportation infrastructure in the enlargement of the European Union. Whether the European Union will deliver on its public good promises to the new member states is not a foregone conclusion, and green papers, white papers, and concession contracts provide some hint as to whether this will indeed be the case.

And, finally, a controversial frontier of privatization receives attention in Chapter 8. This is the extension of privatization to the lives of the urban poor. It explores whether the poor should be asked to pay their own way out of poverty.

In the book's conclusion, we explore the lessons learned from our five case studies with a particular policy goal in mind. We scope the feasibility and desirability of a Human Rights Unit under the umbrella of the United Nations. Such a Unit would be charged with ensuring that diverse privatized infrastructure projects deliver on their human rights promises.