

# 1. Sustainable public procurement of infrastructure and human rights: linkages and gaps

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## 1. INTRODUCTION

The need for processes to develop infrastructure and its purposes is approached differently by different disciplines. Among the most comprehensive of such definitions understands infrastructure as ‘all physical assets, equipment and facilities of interrelated systems and their necessary service providers offering related commodities and services’ to a wide public, with the objective of enabling, supporting or improving people’s living conditions in a given society.<sup>1</sup> This implies that the welfare of individuals is at the core of infrastructure; the main reason that justifies its existence.

Recently, sustainability has become part of the concept of infrastructure, leading to the notion of sustainable infrastructure. Sustainable infrastructure, as we use it in this book, is infrastructure ‘planned, designed, constructed, operated and decommissioned in a manner that ensures economic and financial, social, environmental (including climate resilience) and institutional sustainability over the entire life cycle of the project’.<sup>2</sup> Other concepts that refer to specific aspects of sustainable infrastructure, such as natural infrastructure, have emerged, which, while not the main focus of this book, challenge the need to build in order to deliver on infrastructure services and pose the alterna-

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<sup>1</sup> Barbara Weber, Mirjam Staub-Bisang and Hans Wilhelm Alfen, *Infrastructure As an Asset Class: Investment Strategy, Sustainability, Project Finance and PPP* (2nd edn, John Wiley & Sons 2016) 13.

<sup>2</sup> Amar Bhattacharya and others “Attributes and Framework for Sustainable Infrastructure” (Interamerican Development Bank, Climate Change Division, 2019) p.7 <https://publications.iadb.org/en/attributes-and-framework-sustainable-infrastructure> accessed 21 May 2022.

tive of active management of natural lands and open spaces networks to obtain benefits for human populations and the environment.<sup>3</sup>

Typically, infrastructure is classified either as economic or social. Economic infrastructure generally refers to systems that underpin the economy, including in the transport and communications sector, such as roads, airports, ports and railways; in the energy sector, such as windfarms, oil and gas networks or dams; and in water and sanitation, such as water supply and waste disposal. In contrast, social infrastructure is often referred to as those systems on which the well-being of societies depends: in the education sector, such as schools and libraries; in healthcare, such as hospitals and other health facilities. Other infrastructure often classified as social are prisons, the security industry, museums, parks and stadiums and culture and entertainment sector infrastructure. This book analyses the interlinkages and gaps between sustainable public procurement (SPP) of infrastructure and human rights through the case studies of hospitals and infrastructure for mega-sporting events, focused mostly on stadium building. When classifying the latter, however, we are proposing to consider stadiums and other facilities developed in the context of mega-sporting events as a separate classification from social infrastructure. This is because of the specific context in which they are developed, which features artificial deadlines and direct intervention from authorities other than the commissioning public, such as the sporting body of the sport in question, and which involves issues other than public service, such as reputation on the global stage. But in particular, they are different from other social infrastructure projects due to their high developmental impacts and massive public investment, by which countries are bound for decades in order to deliver just a few weeks of activity, as the case studies in Part III demonstrate.

Both economic and social infrastructure can be developed by public and private entities. However, spending is dominated by the public sector, which accounts for 87 to 91 per cent of infrastructure investments, with significant differences across and between regions.<sup>4</sup> While South Asia's public investment in infrastructure ranges from 53 to 64 per cent, East Asia's accounts for 98 per cent.<sup>5</sup> Likewise, 95 per cent of investments in Sub-Saharan Africa were by public or state-owned enterprises.<sup>6</sup> Conversely, Latin America and the

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<sup>3</sup> Mark A Benedict and Edward McMahon, *Green Infrastructure: Linking Landscapes and Communities* (Island Press 2006).

<sup>4</sup> Marianne Fay and others, 'Hitting the Trillion Mark: A Look at How Much Countries Are Spending on Infrastructure' (World Bank 2019) Working Paper <https://openknowledge.worldbank.org/handle/10986/31234> accessed 19 May 2022.

<sup>5</sup> *ibid.*

<sup>6</sup> Deblina Saha and others, 'Who Sponsors Infrastructure Projects? Disentangling Public and Private Contributions' (World Bank 2017) 5 <https://ppi.worldbank.org/>

Caribbean have the highest share of private investment in infrastructure with 40 per cent.<sup>7</sup> Notwithstanding, public spending controls the majority of infrastructure projects, in 2017 it accounted for 83 per cent compared to 17 per cent of private investment.<sup>8</sup> Total global infrastructure investment requirements by 2030 will come to USD 90 trillion. A financing gap in developing countries is estimated for up to USD 1.5 trillion, amounting to 3.5 per cent of the annual world GDP from 2007 to 2030.<sup>9</sup>

The way in which public sector delivers on infrastructure is through public procurement, the process whereby governments buy goods, services and works to cover their functions and needs.<sup>10</sup> Infrastructure is a major aspect in the delivery of public services. Public buying therefore involves anything from simple transactions such as the acquisition of computers and coffee to complex contracts to develop large infrastructure projects such as transport systems, hospitals or sport facilities. Given the significant amount of global public spending on infrastructure, public procurement plays a crucial role in the planning and delivery of sustainable infrastructure and services.

## 2. PUBLIC PROCUREMENT, PPPS AND PRIVATISATION

Different procurement models can be used in infrastructure, ranging from traditional models of procurement to public–private partnerships (PPPs) and privatisation. Their differences lie, among other features, in the amount of risk transferred from the public to the private sector. The private contractor assumes little or no risk in traditional public procurement which mostly remains with the contracting authority. On the contrary, in PPPs the private sector assumes a significant risk, while in full privatisation models it adopts most or the totality of the risk. Through some public procurement schemes to develop infrastructure, private businesses may play a role not only as suppliers but also as financial partners, as is the case in PPPs.

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content/dam/PPI/documents/SPIReport\_2017\_small\_interactive.pdf accessed 19 May 2022.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> Office of the United Nations High Commissioner for Human Rights, *The Other Infrastructure Gap: Sustainability* (2018) [www.ohchr.org/sites/default/files/Documents/Publications/TheOtherInfrastructureGap\\_FullLength.pdf](http://www.ohchr.org/sites/default/files/Documents/Publications/TheOtherInfrastructureGap_FullLength.pdf) accessed 19 May 2022.

<sup>10</sup> Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press 2009).

There is no single accepted definition of PPPs. Each definition highlights an aspect in terms of risk allocation, the finance model or the nature and duration of the contractual relationship between the contracting authority and the private contractor. For example, multilateral development banks define them as ‘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’.<sup>11</sup> PPPs are long-term contractual relationships between the public and the private sector where the latter undertakes a combination of design, construction, operation and financing of an infrastructure asset, for example a road, a park or a hospital. They involve a type of procurement scheme with a life cycle approach and a ‘real risk transfer to the private sector with balanced risk allocation’,<sup>12</sup> as well as mutual trust and equity between parties and conditions of greater efficiency and quality than those the public sector would achieve if it undertook the work itself.<sup>13</sup>

PPP are complex contracts that exist in a range of varieties and differ in their regulation by domestic law.<sup>14</sup> Several countries in Latin America have special laws applicable to PPPs, such as Mexico, Colombia and Guatemala, whereas in European countries such as Germany, France and Italy PPPs are governed by general procurement rules. Some consider concessions a kind of PPP,<sup>15</sup> but at EU law level, for example, only the former has separate and special regulation through Directive 2014/23/EU.<sup>16</sup>

Under a traditional public procurement scheme, a public entity might enter into a design-build contract with a private business, where the former ‘buys’ and pays the latter public funds to undertake the design and construction of an infrastructure facility, for example a public office building. Once built, the public actor operates and maintains it. In contrast, under a PPP scheme these activities could be merged; for example, in a single design-build-finance

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<sup>11</sup> World Bank, Asian Development Bank and Inter-American Development Bank, ‘Public-Private Partnerships: Reference Guide Version 2.0’ (2014) 90384 14 <https://documents1.worldbank.org/curated/en/600511468336720455/pdf/903840PPP0Refef0Box385311B000PUBLIC0.pdf> accessed 19 May 2022.

<sup>12</sup> Weber, Staub-Bisang and Wilhelm Alfen (n 2) 89.

<sup>13</sup> Francisco Javier Treviño-Moreno, *Asociaciones Público Privadas* (2nd edn, Porrua 2020).

<sup>14</sup> Christoph Kronke, ‘PPP and Concessions in Germany’ in Piotr Bogdanowicz, Roberto Caranta and Pedro Telles (eds), *Public-Private Partnerships and Concessions in the EU: An Unfinished Legislative Framework* (Edward Elgar Publishing 2020).

<sup>15</sup> Christopher Bovis, *The Law of EU Public Procurement* (2nd edn, Oxford University Press 2015).

<sup>16</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

e-operate-maintain contract, the business partner would undertake all of these tasks.<sup>17</sup> In PPPs, ‘the government instead becomes a purchaser of asset-based infrastructure services that are paid for against performance’.<sup>18</sup> When the contract terminates, the facility is transferred to the public authority, which never loses its ownership over the infrastructure. PPP therefore can be characterised as an alternative method of procurement for the public sector, which ‘in contrast to conventional methods, is based not on the batch procurement of individual elements in the value chain of a public function, including the in-house provision of certain components, but rather on the performance of integrated cross-lifecycle services’.<sup>19</sup>

PPPs are often referred to as privatisation models, yet there are some differences between them. Privatisation is a model ‘under which private providers operate an asset on a permanent and independent basis in competition with other private sector or, in some cases, public-sector providers’.<sup>20</sup> Full privatisations are different from PPPs because in the former the public sector loses control and ownership, whereas in the latter it does not.<sup>21</sup> While both are structured in long-term contractual arrangements, PPPs are not permanent. However, in some partial privatisations the government can hold stock in the privatised enterprise and retain some influence and control.<sup>22</sup> Besides, certain sectors are not compatible with privatisation models like the road sector, where ‘there are practically no examples of full privatization anywhere in the world’, but rather a common contractual relationship through PPPs or concession grants between public and the private actors.<sup>23</sup> Yet, in some countries in Europe like Germany, PPPs are governed by general rules applicable to privatisations and public contracts, together with other specific rules such as the Act on Private Financing of Federal Highways.<sup>24</sup>

### 3. PPPS: FRIENDS OR FOES?

Private sector participation in infrastructure development has always been present. The size of the role taken has fluctuated over the years. However, in

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<sup>17</sup> Darrin Grimsey and Mervyn Lewis, ‘Public Private Partnerships and Public Procurement’ (2007) 14 *A Journal of Policy Analysis and Reform* 171.

<sup>18</sup> *ibid* 174.

<sup>19</sup> Weber, Staub-Bisang and Wilhelm Alfen (n 2) 90.

<sup>20</sup> *ibid* 18.

<sup>21</sup> John Forrer and others, ‘Public–Private Partnerships and the Public Accountability Question’ (2010) 70 *Public Administration Review* 475.

<sup>22</sup> *ibid*.

<sup>23</sup> Weber, Staub-Bisang and Wilhelm Alfen (n 2) 18.

<sup>24</sup> Kronke (n 14).

the past decades, involvement of non-state actors in delivering public services has been actively promoted. In the early 1980s privatisation of public service delivery was an international development trend, and during the 1990s more ‘balanced’ approaches between the public and private participation were undertaken through PPP models.<sup>25</sup> Indeed, during these years development aid and infrastructure finance have been oriented to obtain investments and funds from the private sector and many multiple donor-led programmes, particularly from multilateral development banks, have encouraged PPPs.<sup>26</sup> Indeed, the World Bank has conditioned financial aid to infrastructure being carried out under PPP schemes, promoted changes in the legal frameworks to allow them and offered capacity-building tools such as training and guidelines. It has further encouraged funding loans in infrastructure and public service sectors such as water, energy and healthcare to private companies through the International Finance Corporation (IFC).

Despite strong expectations, the outcomes of PPPs have not always been positive, and their utilisation remains controversial. Arguments for resorting to PPPs as procurement schemes have revolved around gaining innovation and risk transfer to the private sector, allowing more transparency, and enabling construction methodologies, technology and new sources of financing that governments lack.<sup>27</sup> Infrastructure built in the past needs to be operated, maintained, revamped and sometimes even dismantled to meet today’s needs, including environmental and social standards.<sup>28</sup> The costs and risks of developing new infrastructure assets and maintaining those already existing are a big burden for public budgets. By leveraging infrastructure investments from the private sector, governments’ budget burdens can be lightened and consequently allocated to other priorities.<sup>29</sup> In such light, PPPs have prom-

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<sup>25</sup> Kate Bayliss and Elisa Van Waeyenberge, ‘Unpacking the Public Private Partnership Revival’ (2018) 54 *The Journal of Development Studies* 577.

<sup>26</sup> *ibid.*

<sup>27</sup> Energy and Infrastructure Unit and Finance and Private Sector Development Unit South Asia Region, ‘India: Building Capacities for Public Private Partnerships’ (World Bank 2006) 36875 <https://openknowledge.worldbank.org/bitstream/handle/10986/19446/368750IN0white1Partnership01PUBLIC1.pdf?sequence=1&isAllowed=y> accessed 19 May 2022.

<sup>28</sup> Weber, Staub-Bisang and Wilhelm Alfen (n 2).

<sup>29</sup> Independent Expert Group, ‘World Bank Group Support to Public Private Partnerships: Lessons from Experience in Client Countries, FY02-12’ (World Bank 2015) <https://openknowledge.worldbank.org/handle/10986/22908> accessed 22 April 2022.

ised to cover increasing infrastructure gap demand and remaining budgetary limitations.<sup>30</sup>

Numerous infrastructure projects would not be possible without private investment; governments would simply not have the possibility to finance them with their own resources. In terms of the main focus of this book, this is problematic for human rights because a lack of infrastructure ultimately undermines individuals' capacity to enjoy it. In road projects, risk allocation to private partners such as cost overruns has signified a further incentive for meaningful inclusion of social sustainability by business developers.<sup>31</sup> In the healthcare sector, PPPs involving construction and management of hospitals have promised cost control and service improvement.<sup>32</sup> In others, PPPs have solved traditional procurement scheme limitations and problems such as overruns and delays.<sup>33</sup> One of the first studies addressing such limitations revealed that 30 per cent of PPP infrastructure projects had delays and cost overruns (covered by the private partner), whereas 60 per cent of traditional procurement was delayed by more than 12 months.<sup>34</sup> PPP models serve as filters to prevent the construction of 'white elephant' infrastructure, yet 'still too many have slipped through the net'.<sup>35</sup> In some countries, like the UK, PPPs have been promoted as transparent contracting schemes, because for example the Freedom of Information Act (2005) gives citizens the possibility to access PPP contracts including payment terms, performance standards and dispute resolution mechanisms, among others.<sup>36</sup>

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<sup>30</sup> Romero, Maria José, *What Lies beneath? A Critical Assessment of PPPs and Their Impact on Sustainable Development* (European Network on Debt and Development 2015) [https://assets.nationbuilder.com/eurodad/pages/167/attachments/original/1587578891/A\\_critical\\_assessment\\_of\\_PPPs\\_and\\_their\\_impact\\_on\\_sustainable\\_development.pdf?1587578891](https://assets.nationbuilder.com/eurodad/pages/167/attachments/original/1587578891/A_critical_assessment_of_PPPs_and_their_impact_on_sustainable_development.pdf?1587578891).

<sup>31</sup> Laura Treviño-Lozano, 'Sustainable Public Procurement and Human Rights: Barriers to Deliver on Socially Sustainable Road Infrastructure Projects in Mexico' (2021) 13 *Sustainability* 9605.

<sup>32</sup> Darrin Grimsey and Mervyn K Lewis, *Global Developments in Public Infrastructure Procurement: Evaluating Public-Private Partnerships and Other Procurement Options* (Edward Elgar Publishing 2017).

<sup>33</sup> GJ Hodgson, 'Design and Build: Effects of Contractor Design on Highway Schemes' (Proceedings of the Institution of Civil Engineers 1995); Peter Mackie and John Preston, 'Twenty-One Sources of Error and Bias in Transport Project Appraisal' (1998) 5 *Transport Policy* 1.

<sup>34</sup> Campbell C Thomson, 'Private-Public Partnerships: Prerequisites for Prime Performance' (2005) 10 *EIB Papers* 113.

<sup>35</sup> Grimsey and Lewis (n 32) 103.

<sup>36</sup> Energy and Infrastructure Unit and Finance and Private Sector Development Unit South Asia Region (n 27) 31.

In contrast, cases of PPPs with poor outcomes have raised concerns around risk transfer, human rights impacts and the responsibility of each party when things go wrong, particularly when human rights are violated, as well as the ways in which both public and private partners are accountable for those violations. Some scholars argue that private cost funds involved in PPPs end up being more expensive than government cost of debt.<sup>37</sup> Others say the structures that underpin PPPs tend to abuse user fees and limit access to services, as well as to encourage private interests' governance of public services. In addition, these models are not always transparent and available to civil scrutiny. Examples of private involvement in projects that went wrong include the Queen Mamohato Memorial Hospital in Lesotho, run by a private healthcare company, Netcare, funded by the World Bank and the IFC, where the government paid double the annual budget of the old hospital. Moreover, the hospital was persistently understaffed, paying lower salaries and offering fewer health services.<sup>38</sup> Civil society has exposed human rights abuses and worsening living conditions in the context of IFC-funded projects like the Addax Bioenergy project in Sierra Leone.<sup>39</sup> As a response to these claims, the IFC created the Office of the Compliance Advisor Ombudsman in 1999, with the mandate to serve as an accountability mechanism to address environmental and social complaints of affected communities deriving from projects financed by the IFC. Yet, access to grievance mechanisms for victims when their human rights are abused as a result of the execution of a PPP contract is still a challenge. Other cases have compromised PPP transparency by uncovering linkages to corruption, such as a PPP sports stadium promoted by the municipality of Farum in Denmark, in which the Mayor illegally awarded contracts without competition and used council money to subsidise his football team.<sup>40</sup>

These challenges and opportunities regarding PPPs are crosscutting issues in many of the chapters of this book, which intends to contribute to the debate providing further evidence and reflection on PPPs, and in particular on the ways in which the design, planning, execution and operation of PPPs, as well as the legal frameworks that underpin them, work for or against the enjoyment and fulfilment of the human rights of all those involved in and affected by infrastructure.

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<sup>37</sup> Bayliss and Van Waeyenberge (n 25).

<sup>38</sup> David Hall, 'Why Public Private Partnerships Don't Work: The Many Advantages of the Public Alternative' (Public Services International Research Unit 2014) [www.world-psi.org/sites/default/files/documents/research/rapport\\_eng\\_56pages\\_a4\\_lr\\_0.pdf](http://www.world-psi.org/sites/default/files/documents/research/rapport_eng_56pages_a4_lr_0.pdf) accessed 19 April 2022.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*



#### 4. UNPACKING THE STATE–BUSINESS NEXUS: PUBLIC PROCUREMENT AND HUMAN RIGHTS

Public procurement is a means through which states meet their duties to respect, protect and fulfil human rights.<sup>41</sup> The Guiding Principles on Business and Human Rights (UNGPs) adopted in 2011 lead on the ways in which public procurement can use this tool to enforce respect for human rights by public contractors.<sup>42</sup> Guiding Principle 5 sets ‘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’. PPPs are great examples of this provision, in which states contract with businesses to develop infrastructure and deliver public services such as health, transport or education. The ways in which companies deliver on such infrastructure and services directly impact the extent to which individuals can enjoy access to health, adequate living conditions, non-discrimination and education, to mention only a few. Contracts governing delivery of services should therefore ‘clarify State’s expectations that these enterprises respect human rights’, as set out in the Commentary to Guiding Principle 5.

Likewise, Guiding Principle 6 of the UNGPs establishes that states ‘should promote respect for human rights by business entities with which they conduct commercial transactions’. Besides, it highlights that procurement activities provide states with ‘unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to State’s relevant obligations under national and international law’. UNGP6 fails to provide clarity on which state duties are ‘relevant’ or required in contractual relationships between contracting authorities and businesses contractors. Certainly, states’ core obligations under international human rights law are to respect, protect and fulfil human rights. The United Nations Working Group on Business and Human Rights has unpacked each of these obligations in the context of public procurement. It has upheld that the duty to ‘respect’ ‘implies that states must refrain from interfering with or

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<sup>41</sup> Claire Methven O’Brien and Olga Martin-Ortega, ‘The Role of State as Buyer under UN Guiding Principle 6’ (2017) BHRE Research Series, Policy Paper No.4 <https://static1.squarespace.com/static/56e9723a40261dbb18ccd338/t/5a1be556f9619afa6a6a6d08/1511777629220/UNWG+PP+submission+-+The+Role+of+the+State+as+Buyer+under+Guiding+Principle+6+-+OBrien+Martin-Ortega+03.10+3.pd> accessed 19 May 2022.

<sup>42</sup> Olga Martin-Ortega, ‘Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry’ (2018) 3 *Business and Human Rights Journal* 75.

curtailing the enjoyment of human rights through their procurement activities and establishing contract conditions with suppliers oriented to prevent future human rights abuses'.<sup>43</sup> Examples of the duty to protect are prohibiting exploitative practices for workers in public contracts and abstaining from contractual requirements of suppliers, such as short delivery dates, that can be reflected in increased and probably illegal forced overworking hours on supplier's workers.

The duty to 'protect' entails 'preventing and redressing adverse impacts involving public procurement supply chains on rights-holders'.<sup>44</sup> Therefore, it includes a positive obligation of states to prevent human rights violations that can occur during or as a result of the execution of a public contract by businesses involved in the process, including global supply chains.<sup>45</sup> Besides, when these transgressions occur, a state's duty to protect also involves ensuring accountability of business enterprises and access to effective remedy to victims. Protecting human rights involves considering the ways in which public procurement can prevent and redress human rights abuses of people's rights deriving from business contractors' operations. The Committee on the Rights of the Child framed the state's duty to 'protect' through procurement as something which can be implemented by taking measures to ensure public contracts are awarded to bidders that are committed to respecting children's rights while not investing public funds in businesses activities that violate them.<sup>46</sup>

In addition to the duty to protect, as set out in the UNGPs, states can also use public procurement to 'fulfil' human rights to meet their international human rights obligations. The obligation to fulfil requires states to adopt the necessary measures towards the full realisation of human rights, which can be disaggre-

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<sup>43</sup> 'Integrating Human Rights in Public Procurement: A Focus on Latin America and the Caribbean: Information of the United Nations Working Group on Business and Human Rights' (UN Working Group on Business and Human Rights 2022) para 5 [https://empresasyderechoshumanos.org/wp-content/uploads/2022/04/INFORMATION-NOTE-on-PP\\_LAC\\_EN.pdf](https://empresasyderechoshumanos.org/wp-content/uploads/2022/04/INFORMATION-NOTE-on-PP_LAC_EN.pdf) accessed 25 April 2022.

<sup>44</sup> *ibid.*

<sup>45</sup> Claire Methven O'Brien, Nicole Vander Meulen and Amol Mehra, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (International Learning Lab on Public Procurement and Human Rights 2016) <https://globalnaps.org/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.pdf> accessed 19 May 2022.

<sup>46</sup> Committee on the Rights of the Child, 'General Comment No. 16 on the State obligations regarding the impact of the business sector on children's rights' (17 April 2013) UN Doc CRC/C/GC/16 para 27.

gated into obligations to facilitate, promote and provide.<sup>47</sup> States are obliged to take the necessary steps ‘to the maximum of its available resources’ to progressively achieve the full realisation of economic, social and cultural rights, and public procurement is clearly one key available resource under states’ control.<sup>48</sup> In the context of procurement, fulfilling human rights involves considering the ways in which public buying can have positive impacts on people, individually and collectively.<sup>49</sup>

The full realisation of rights needs to consider rights-holders involved in public purchasing. The core rights-holders are service users of purchased goods and services, which in the context of infrastructure are of particular relevance. For example, through procuring hospital infrastructure, health services and medicine public buyers meet their duty to fulfil the right to health of patients.<sup>50</sup> Yet, procurement has also been used to facilitate human rights enjoyment of individuals from other groups besides service users, who in principle are not directly linked to the suppliers or the purchase. Indeed, practical implementation of the latter has focused on fulfilling the right to decent work and to equality and non-discrimination, mainly through facilitating creation of jobs and economic opportunities for vulnerable groups such as women, youth and unemployed and disabled people.<sup>51</sup> This may be done, for example, through assessment criteria that favour businesses which support, employ or are owned by these groups. Historically, procurement has been used as a means for social policy and social inclusion of underprivileged and

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<sup>47</sup> Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 461–512. See further Committee on Economic, Social and Cultural Rights, ‘General Comment No.15: The right to water Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights’ (20 January 2003) UN Doc E/C.12/2002/22 paras 25–29.

<sup>48</sup> Committee on Economic, Social and Cultural Rights ‘General Comment 3: The Nature of States Parties’ Obligations Art. 2, para.1, of the Covenant’ (14 December 1990) UN Doc E/1991/23 paras 9–10.

<sup>49</sup> ‘Integrating Human Rights in Public Procurement: A Focus on Latin America and the Caribbean: Information of the United Nations Working Group on Business and Human Rights’ (n 43) para 5.

<sup>50</sup> Methven O’Brien and Martin-Ortega (n 41).

<sup>51</sup> General Assembly ‘Fourth Regional Consultation for Latin America and the Caribbean looking into the future: actions to foster responsible business conduct’ (8 June 2020) UN Doc A/HRC/44/43/Add.4, para. 20. Some national courts have stressed that public interest is the ultimate and most important aim of public procurement. In such context, public interest can “lead to enforce rights of a certain group of people that requires State’s special attention”. See Colombian Constitutional Court, Ruling 932-2007 Judicial Review, (8 November 2007), para. 13.

marginalised groups.<sup>52</sup> However, the lack of direct connection between these groups and the purchase itself has challenged the mandatory nature of rights fulfilment by public buyers. Notwithstanding that fulfilling the human rights of other groups besides service users is not directly linked to the contract, and therefore cannot be made mandatory, assessing the ways in which public procurement could fulfil their human rights should be part of the procurement process. Procedures should be in place to evaluate the options available to do so as part of every feasibility study of any infrastructure project or service.

## 5. LINKING SUSTAINABLE PUBLIC PROCUREMENT AND INFRASTRUCTURE

As is well known, the concept of sustainability emerged in the late 1980s in the context of international development as a response to economic growth threatening the environment. It was understood as the ability to meet present needs without compromising future generations' ability to fulfil their own.<sup>53</sup> This notion has been integrated into different arenas, including public procurement and infrastructure. The Earth Summit in 1992 and the World Summit for Sustainable Development in 2002 included sustainability's application in infrastructure through Agenda 21 for Sustainable Construction in Developing Countries.<sup>54</sup> At an EU level, the first references to public procurement in connection with sustainable outcomes are found in the Green Paper, which called to promote environmental and social labels in the context of fiscal incentives.<sup>55</sup>

While SPP and infrastructure have been both considered in sustainable development policy, they have also received separate treatment. The 10 Year Framework of Programmes on Sustainable Consumption and Production Patterns of 2012 included within its core six programmes one on SPP and another on sustainable buildings and construction. This trend was replicated

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<sup>52</sup> Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press 2007); Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 *Natural Resources Forum* 257.

<sup>53</sup> World Commission on Environment and Development, 'Our Common Future (The Brundtland Report)' (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 19 May 2022.

<sup>54</sup> Chrisna Du Plessis, 'Agenda 21 for Sustainable Construction in Developing Countries' (International Council for Research and Innovation in Building Construction and United Nations Environment Programme, International Environmental Technology Centre 2002).

<sup>55</sup> Opi Outhwaite and Olga Martin-Ortega, 'Human Rights in Global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union' (2016) *Human Rights and International Legal Discourse*.

in Agenda 2030, adopted in 2015.<sup>56</sup> Public procurement and infrastructure were explicitly recognised within separate sustainable development goals (SDGs). SDG12 includes promoting SPP as a target in fulfilment of the goal to ensure sustainable consumption and production patterns. On the other hand, SDG9 establishes the goal to build reliable, sustainable, resilient, affordable and equitable infrastructure that supports economic development and human well-being. In addition to SDG9, Agenda 2030 includes explicit references to infrastructure in the gender and energy contexts. In particular, SDG5 sets out infrastructure and public services as means through which unpaid care and domestic work can be recognised and valued. Yet, SDG5 fails to target the inclusion of a women and gender lens in infrastructure design, construction, operation and maintenance. SDG7 aims for the promotion of investment in energy infrastructure, and the expansion of infrastructure for supplying modern and sustainable energy services for all developing countries. Agenda 2030 misses the link between sustainable infrastructure and SPP. It fails to connect that gender-based infrastructure and sustainable-resilient infrastructure, including that on clean energy, should be key outcomes to be delivered by public procurement, because they are part of sustainable consumption and production patterns of assets and services.

Traditionally, the aims pursued by public procurement were fair competitiveness, integrity and efficiency.<sup>57</sup> Procurement decision-making was governed by a neo-classical contracting theory based solely on the best price criteria.<sup>58</sup> International trends on SPP and sustainable infrastructure pressed for a shift to ‘procurement as usual’, so that public buying would no longer aim to just obtain the cheapest goods and services to fulfil a state’s needs, but also to deliver on social and environmental goals.<sup>59</sup>

While progress has been made and sustainability has been globally recognised to be underpinned by the economic, social and environmental dimensions, it remains a fashionable concept with no global common understanding

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<sup>56</sup> General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (21 October 2015) UN Doc A/RES/70/1.

<sup>57</sup> Shelena Keulemans and Steven Van de Walle, ‘Cost-Effectiveness, Domestic Favouritism and Sustainability in Public Procurement: A Comparative Study of Public Preferences’ (2017) 30 *International Journal of Public Sector Management* 328.

<sup>58</sup> *ibid.*

<sup>59</sup> Outhwaite and Martin-Ortega (n 55); Marta Andrecka and Kateřina Peterková Mitkidis, ‘Sustainability Requirements in EU Public and Private Procurement – A Right or an Obligation?’ (2017) *Nordic Journal of Commercial Law* 56; Olga Martin-Ortega and Claire Methven O’Brien, ‘Advancing Respect for Labour Rights Globally through Public Procurement’ (2017) 5 *Politics and Governance* 69.

or definition.<sup>60</sup> Different terms are used to refer to ‘sustainable developments in the context of procurement’, which leads to uncertainty as to which aspects of sustainability they are covering and the role that human rights play in sustainability<sup>61</sup> – in particular, because there is a tension between often voluntary approaches to sustainability and the binding nature of human rights abuses and the enforceable consequences in case of non-compliance.<sup>62</sup>

SPP vagueness has been problematic for human rights because it has led to their subsumption under environmental sustainability, or in best case scenarios to their narrowed inclusion in the form of labour rights.<sup>63</sup> Theory and practice continue to understand and apply SPP as a synonym for ‘green procurement’.<sup>64</sup> Indeed, the admission of green tools and practices as equivalent to SPP is generalised not only in the procurement of goods and services,<sup>65</sup> but also in procuring works and construction to develop infrastructure.<sup>66</sup> Certainly sustainability has been a key element of development in the past decade through

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<sup>60</sup> Michael Jacobs, ‘Sustainable Development as a Contested Concept’ in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999); David D’Hollander and Axel Marx, ‘Strengthening Private Certification Systems through Public Regulation: The Case of Sustainable Public Procurement’ (2014) 5 *Sustainability Accounting, Management and Policy Journal* 2; Andrecka and Mitkidis (n 59).

<sup>61</sup> Jolien Grandia and Peter Kruyen, ‘Assessing the Implementation of Sustainable Public Procurement Using Quantitative Text-Analysis Tools: A Large-Scale Analysis of Belgian Public Procurement Notices’ (2020) 26 *Journal of Purchasing and Supply Management* 2.

<sup>62</sup> Olga Martin-Ortega and Muzaffer Eroglu, ‘The European Corporate Social Responsibility Strategy: A Pole of Excellence?’ in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU Influences the World* (Routledge 2009).

<sup>63</sup> Olga Martin-Ortega and Claire Methven O’Brien, *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar Publishing 2019); Laura Treviño-Lozano ‘Is Latin America Missing the Links Between Procurement, Sustainability and Human Rights?’ (2022) 7(3) *Business and Human Rights Journal* 461–467.

<sup>64</sup> Mariana Aparecida Euflausino and Gilmar Ribeiro De Mello, ‘Where the Legitimation of Sustainable Public Procurement Finds Conflict: An Analysis of Public Procurement Agents’ Perceptions on Sustainable Procurements’ (2016) 12 *Brazilian Journal of Management* 741; D’Hollander and Marx (n 60); Joanne Meehan and David Bryde, ‘Sustainable Procurement Practice’ (2011) 20 *Business Strategy and the Environment* 94.

<sup>65</sup> Frans Melissen and Harry Reinders, ‘A Reflection on the Dutch Sustainable Public Procurement Programme’ (2012) 9 *Journal of Integrative Environmental Sciences* 27.

<sup>66</sup> Wai Kiong Chong and others, ‘Understanding and Interpreting Baseline Perceptions of Sustainability in Construction among Civil Engineers in the United States’ (2009) 25 *Journal of Management in Engineering* 143; Nicola Dempsey and

‘green infrastructure’, which has become a common feature of large development projects. However, sustainable procurement of infrastructure has focused nearly exclusively on the environmental dimension of the negative impact new projects will have and how these can be mitigated.

Notwithstanding SPP green-only approaches, literature has made progress by explicitly including environmental and social responsibility within SPP.<sup>67</sup> Beate Sjøfjell and Anja Wiesbrock offer the following definition of SPP: ‘procurement rules and practices that contribute to global sustainability: a balancing of social and economic development, ensuring the fundamentals of quality of life for all people, within the economical boundaries of the planet we lie on.’<sup>68</sup> Walker and Brammer define SPP as a concept that ‘embodies concern for social, environmental and economic aspects of procurement decisions’.<sup>69</sup> Sustainable state consumption has also been understood as an activity that involves not only buying what they need, but selecting goods, services and works that ‘use fewer natural resources in their production, which provided decent jobs to those involved in the production process and which may be reused or recycled’.<sup>70</sup>

Despite acknowledgement of the multidimensional nature of sustainability, regulatory frameworks continue to provide separate approaches. While the EU Commission defines SPP as ‘a process by which public authorities seek to achieve the appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, ser-

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others, ‘The Social Dimension of Sustainable Development: Defining Urban Social Sustainability’ (2011) 19 *Sustainable Development* 289.

<sup>67</sup> Markus Amann and others, ‘Driving Sustainable Supply Chain Management in the Public Sector: The Importance of Public Procurement in the European Union’ (2014) 19 *Supply Chain Management* 351; Stephen Brammer and Helen Walker, ‘Sustainable Procurement in the Public Sector: An International Comparative Study’ (2011) 31 *International Journal of Operations and Production Management* 452; Craig Furneaux and Jo Barraket, ‘Purchasing Social Good(s): A Definition and Typology of Social Procurement’ (2014) 34 *Public Money and Management* 265; Jolien Grandia and Dylan Voncken, ‘Sustainable Public Procurement: The Impact of Ability, Motivation, and Opportunity on the Implementation of Different Types of Sustainable Public Procurement’ (2019) 11 *Sustainability* 5215; Tarik El Haddadi, Taoufik Mourabit and Anass El Haddadi, ‘Sustainable Public Procurement in Morocco: An Investigative Survey Regarding Tender Preparation’ (2021) 26 *Sustainable Production and Consumption* 33; Keulemans and Van de Walle (n 57); Meehan and Bryde (n 64).

<sup>68</sup> Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 3.

<sup>69</sup> Brammer and Walker (n 67) 454.

<sup>70</sup> Aparecida Euflausino and Ribeiro De Mello (n 64) 747.

vices or works at all stages of the project',<sup>71</sup> it has continued to treat the social and environmental aspects differently. In particular, it understands socially responsible public procurement as the extent to which it achieves 'positive social outcomes in public contracts',<sup>72</sup> whereas it defines green procurement as 'a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured'.<sup>73</sup>

Other approaches argue that there are various types of SPP.<sup>74</sup> Grandia and Kruyen hold that SPP in policy and practice covers seven different categories: 'environmentally friendly public procurement'; 'circular economy'; 'social return on investment' (involving labour opportunities for the less privileged, such as disabled or long-term unemployed people); 'ethical trade' (ensuring that workers in supply chains are treated in an ethical manner with no child labour, unfair wages or inadequate working conditions); 'local and SEMs-oriented' (creating opportunities for these firms); 'innovation-oriented public procurement' (using procurement to drive innovation) and 'list of labels' (use of certificates and standards to determine compliance with certain sustainable criteria).<sup>75</sup> Yet, the latter is just a means through which sustainable aspects of goods or services can be demonstrated.

In this context, the 'social' aspect of sustainability remains underdeveloped, and therefore the question of what a procurement scheme needs to cover to be labelled as social remains without a clear, comprehensive and operationalisable answer. Infrastructure is no exception. Furneaux and Barraket refer to social procurement as that which covers 'the acquisition of a range of assets and services with the aim of intentionally creating social outcomes (both directly and indirectly)'.<sup>76</sup> In the context of infrastructure, the social dimension of SPP has been considered to entail both positive and negative social impacts. Indicators of the former include improvement of working conditions, enhance-

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<sup>71</sup> European Commission, 'Green and Sustainable Public Procurement' (*Environment*) [https://ec.europa.eu/environment/gpp/versus\\_en.htm](https://ec.europa.eu/environment/gpp/versus_en.htm) accessed 2 February 2022.

<sup>72</sup> European Commission 'Making socially responsible public procurement work: 71 good practice cases' (May 2020) p.4 <https://op.europa.eu/en/publication-detail/-/publication/69fc6007-a970-11ea-bb7a-01aa75ed71a1> accessed 25 April 2022.

<sup>73</sup> European Commission, 'Green Public Procurement' (*About the EU Ecolabel: Understand how the EU Ecolabel works and how stakeholders can strengthen the reach of the label*) [https://ec.europa.eu/environment/topics/circular-economy/eu-ecolabel-home/about-eu-ecolabel\\_en](https://ec.europa.eu/environment/topics/circular-economy/eu-ecolabel-home/about-eu-ecolabel_en) accessed 19 May 2022.

<sup>74</sup> Grandia and Voncken (n 67) 2.

<sup>75</sup> Grandia and Kruyen (n 61).

<sup>76</sup> Furneaux and Barraket (n 67) 269.



ment of living standards, creation of local supply, job creation and social inclusion, as well as enhancement of health and education, whereas the latter consider prevention and redress of human rights abuses.<sup>77</sup>

Often, developments on the ‘social’ dimension of SPP are restricted to labour rights standards in the delivery of goods, services and works.<sup>78</sup> Historical use of public procurement for equity and social justice purposes focused on addressing equal remuneration for men and women and tackling unemployment explains the orientation of sustainability’s ‘social’ dimension.<sup>79</sup> Literature involves references to social or responsible procurement as that which ensures the right to work of supplier’s workers and avoids child and forced labour in government supply chains, with references that range from ensuring ‘safe working conditions’,<sup>80</sup> such as occupational health and safety, working hours, wages and fair trade standards,<sup>81</sup> to ‘decent jobs’<sup>82</sup> and ‘compliance with social and labour rights’,<sup>83</sup> to prevention of child and forced labour.<sup>84</sup> For example, CSR has been considered a type of social procurement that ‘involves the management of supply chains to ensure that they do not harm in relation to social indicators such as labour conditions and human rights of workers’.<sup>85</sup> These approaches are limited because often attempts at improvement of labour conditions or compliance with labour standards in supply chains have overlooked workers’ voices and participation.<sup>86</sup> Besides, an exclusive labour rights focus is not comprehensive given the range of human rights and right holders at risk of abuse in procurement life cycles, particularly

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<sup>77</sup> Laura Treviño-Lozano, ‘Framing Social Sustainability in Infrastructure Theory and Practice: A Review of Two Road Projects in Mexico from a Business and Human Rights Lens’ (2022) 14 *Sustainability* 2369.

<sup>78</sup> Outhwaite and Martin-Ortega (n 55).

<sup>79</sup> McCrudden, ‘Using Public Procurement to Achieve Social Outcomes’ (n 52); McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (n 51); Laurie Kaye Nijaki and Gabriela Worrel, ‘Procurement for Sustainable Local Economic Development’ (2012) 25 *International Journal of Public Sector Management* 133.

<sup>80</sup> Brammer and Walker (n 67); D’Hollander and Marx (n 60).

<sup>81</sup> Melissen and Reinders (n 65).

<sup>82</sup> Aparecida Euflausino and Ribeiro De Mello (n 64).

<sup>83</sup> Ramon Bernal, Leire San-Jose and Jose Luis Retolaza, ‘Improvement Actions for a More Social and Sustainable Public Procurement: A Delphi Analysis’ (2019) 11 *Sustainability* 2.

<sup>84</sup> Brammer and Walker (n 67); Furneaux and Barraket (n 67).

<sup>85</sup> Furneaux and Barraket (n 67) 259.

<sup>86</sup> Opi Outhwaite and Olga Martin-Ortega, ‘Worker-Driven Monitoring – Redefining Supply Chain Monitoring to Improve Labour Rights in Global Supply Chains’ (2019) 23 *Competition & Change* 378.

long and complex ones such as those developing infrastructure and delivering services.

Methven O'Brien and Martin-Ortega have attempted a definition of socially responsible public procurement in previous work which includes both social and environmental considerations but places emphasis on the respect and protection of human rights: that is, responsible public procurement as 'operations where human rights are respected and which promote sustainable development and responsible business conduct through the practice of risk-based supply chain due diligence to identify, prevent, mitigate and remedy potential and actual adverse impacts on human rights as well as environmental and social concerns'.<sup>87</sup>

In this book we follow this definition and aim to propose alternative ways of approaching SPP as the process whereby a public entity contracts from a private entity goods, services or works it needs to cover its functions and needs in a way that considers protection of human rights, including prevention and redress of abuses in the supply chain and the environment, as a core element in its lifecycle, from early design and planning to its disposal or decommission, and where such protection is transparent and accountable.

## 6. THE HUMAN RIGHTS AND INFRASTRUCTURE IN DEVELOPMENT: GAPS AND LINKAGES

Both the existence and the absence of infrastructure have direct impacts on individuals' human rights and sustainable development. Lack of infrastructure limits the enjoyment of human rights, such as the right to water and sanitation by having no pipelines that can enable access to drinking water, or the right to health when there are no hospitals to receive medical attention. In addition, without infrastructure, the majority of Agenda 2030's SDGs would be jeopardised given that 70 per cent of them are directly or indirectly linked to it.<sup>88</sup> Moreover, sustainability and infrastructure share the common goal of meeting current and future needs of societies, and, clearly, the realisation of human rights is a primary and fundamental need of individuals within the latter.

Well designed and used infrastructure, on the other hand, can contribute to increasing GDP and create jobs. More infrastructure has been reflected in a lower proportion of poverty because it stimulates economic growth through

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<sup>87</sup> Claire Methven O'Brien and Olga Martin-Ortega, 'Guidance on Socially Responsible Public Procurement: Response to Consultation of the European Commission by the International Lab on Procurement and Human Rights' 1, 3.

<sup>88</sup> Scott Thacker and others 'Infrastructure for sustainable development' (2019) 2 *Nature Sustainability* 324–331.

human resources and capital efficiency.<sup>89</sup> Ultimately, poverty alleviation is mirrored in human rights enjoyment. Mitigation and adaptation to climate change is possible through infrastructure.<sup>90</sup> Besides, infrastructure enhances people's living standards by providing essential services such as energy, water and sanitation, transport and telecommunications.<sup>91</sup> In particular, development of infrastructure has been linked to an increase in women's education and literacy and a reduction in health expenses, which promote female empowerment and gender equality.<sup>92</sup> During the Covid-19 crisis the importance of infrastructure for human rights enjoyment was stressed, for example, as a means to stop the spread of the virus through disruption of public transportation, and as an enabler of healthcare through the creation of hospitals.

However, poorly planned and delivered infrastructure can have disastrous impacts on the environment and people. Harms to individuals and communities at different stages across the lifecycle of projects are a reality.<sup>93</sup> Among them, land grabbing, involuntary displacements and restrictions to free, prior and informed consultation of indigenous peoples have been linked to the ways in which resources are exploited and land is obtained to physically install infrastructure facilities.<sup>94</sup> Local communities have often been disregarded in infrastructure decision-making, undermining their participation in deciding and choosing development pathways to meet their own needs. Defenders of human rights and the environment have placed being at risk and harassed as a result

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<sup>89</sup> Guangning Tian and Juncheng Li, 'How Does Infrastructure Construction Affect Economic Development along the "Belt and Road": By Promoting Growth or Improving Distribution?' (2019) 55 *Emerging Markets Finance and Trade* 3332.

<sup>90</sup> Wendy Y. Chen, 'The Role of Urban Green Infrastructure in Offsetting Carbon Emissions in 35 Major Chinese Cities: A Nationwide Estimate' (2015) 44 *Cities* 112; Perrine Hamel and others, 'Blending Ecosystem Service and Resilience Perspectives in Planning of Natural Infrastructure: Lessons from the San Francisco Bay Area' (2021) 9 *Frontiers in Environmental Science* [www.frontiersin.org/article/10.3389/fenvs.2021.601136](http://www.frontiersin.org/article/10.3389/fenvs.2021.601136) accessed 27 April 2022; Futoshi Nakamura and others, 'Adaptation to Climate Change and Conservation of Biodiversity Using Green Infrastructure' (2020) 36 *River Research and Applications* 921.

<sup>91</sup> Grimsey and Lewis (n 32).

<sup>92</sup> Priti Parikh and others, 'Infrastructure Provision, Gender, and Poverty in Indian Slums' (2015) 66 *World Development* 468.

<sup>93</sup> Michael Likosky, 'Human Rights Risk, Infrastructure Projects and Developing Countries: Global Jurist Advances' (2002) 2 *Global Jurist* [i]; Weber, Staub-Bisang and Wilhelm Alfen (n 2).

<sup>94</sup> Annelies Zoomers, 'Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab' (2010) 37 *Journal of Peasant Studies* 429; Martha Pskowski, 'In Mexico, Cheap Gas Wins: Promises of Consultation Are Not Enough for Indigenous Communities in the Path of Pipeline Construction in Mexico, an Important Market for the Texas Shale Fields' (2020) 52 *NACLA report on the Americas* (1993) 131.

of their opposition to major infrastructure projects.<sup>95</sup> Also, inadequate working conditions, including forced labour of migrant workers and child labour in sourcing of construction materials and delivery of services on construction sites and in the operation of infrastructure, have been well-documented.<sup>96</sup>

Assessing, preventing, mitigating and redressing human rights abuses of workers, service users and communities in procurement of infrastructure has not been a focus until recently. This is mostly true for high-income countries and for developing economies. In both, though, attention to social sustainability and human rights is at best limited and at worst bluntly disregarded. It is only in recent years that public buyers, mostly from developed countries, have taken into account how their procurement activities impact the human rights of those who produce the goods and provide the services they procure. Procurement of major infrastructure for development is no exception with regard to the absence of consideration of the human rights risks which the procurement process has attached to it.

Human rights abuses are very clearly highlighted in the context of mega-sporting events, which have uncovered abusive conditions, including forced labour, in which workers are made to work.<sup>97</sup> Lack of human rights considerations at the core of public procurement of infrastructure planning and delivery of service has been a reality in the healthcare sector too.<sup>98</sup> During the Covid-19 crisis, countries' responses to infrastructure needs involved ensuring

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<sup>95</sup> Moira Birss, 'Criminalizing Environmental Activism' (2017) 49 *NACLA Report on the Americas* 315; Kate Hallam, 'Environmental Defenders: Murdered, Missing and at Risk' [2017] *Socialist Lawyer* 40; General Assembly 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on adverse impacts of business-related activities on the rights of indigenous peoples' (6 August 2013) UN Doc A/68/279.

<sup>96</sup> International Labour Organisation ILO, *Young Workers in the Construction Industry: Their Situation and Prospects* (Geneva 1959); U Kiran and Shalini Singh, 'Body Discomfort Analysis among Child Labour Working in Various Unorganized Sectors' (2013) 2 *International Journal of Humanities and Social Science Invention* 20; Abdul-Rashid and Abdul-Aziz, 'Bangladeshi Migrant Workers in Malaysia's Construction Sector' (2001) 16 *Asia-Pacific Population Journal* 3.

<sup>97</sup> Lucy Amis, 'Mega-Sporting Events and Human Rights – A Time for More Teamwork?' (2017) 2 *Business and Human Rights Journal* 135.

<sup>98</sup> Recently, the negative effects of giving little attention to workers' human rights in supply chains of medical goods were exacerbated during emergency procurement to respond to the Covid-19 emergency, see Olga Martin-Ortega and Laura Treviño-Lozano, 'Public Procurement during Covid-19 in Latin America: Challenges, Responses and Next Steps Forward' (International Learning Lab on Public Procurement and Human Rights, November 2020) <https://www.humanrightsprocurementlab.org/blog-1/public-procurement-during-covid-19-in-latin-america-challenges-responses-and-next-steps-forward-laura-trevio-lozano-and-olga-martin-ortega-november-2020> accessed 12 July 2022.

continuity of critical infrastructure services such as healthcare, adaptation of existing infrastructure assets such as temporary hospitals and management of ongoing infrastructure contracts to ensure the least disruption in a range of sectors, not only the medical.<sup>99</sup> Their responses highlighted the need to continue with critical services while securing employers' protection, even when that continuity came at the expense of environmental protection, as was seen in the temporary suspension of notification and request of environmental permits for the construction of hospitals in Belgium.<sup>100</sup> Besides, these measures emphasised the relevance of stakeholder partnership as part of infrastructure adaptation, as seen with the Australian government's partnership with a private hospital that resulted in the availability of more than 30,000 hospital beds and over 100,000 skilled workers to ensure provision of healthcare services.<sup>101</sup> Colombian and Mexican public bodies also built partnerships with private businesses to turn convention and conference venues into temporary hospitals.<sup>102</sup> The pandemic further stressed the need to cover the infrastructure gap in the health sector. It disclosed, in very dramatic ways, inequality within and among countries in the enjoyment of the right to health of service users.<sup>103</sup> One among the multiple lessons to learn from Covid-19 is that we need to place our efforts in building resilient, innovative and sustainable social infrastructure

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<sup>99</sup> OECD, 'Public Procurement and Infrastructure Governance: Initial Policy Responses to Coronavirus (Covid-19) Crisis' (OECD 2020) [www.oecd.org/coronavirus/policy-responses/public-procurement-and-infrastructure-governance-initial-policy-responses-to-the-coronavirus-covid-19-crisis-c0ab0a96/](http://www.oecd.org/coronavirus/policy-responses/public-procurement-and-infrastructure-governance-initial-policy-responses-to-the-coronavirus-covid-19-crisis-c0ab0a96/) accessed 19 May 2022.

<sup>100</sup> *ibid.*

<sup>101</sup> Ministry for Health and Aged Care, 'Australian Government Partnership with Private Health Sector Secures 30,000 Hospital Beds and 105,000 Nurses and Staff, to Help Fight COVID-19 Pandemic' *Press release* (31 March 2020) [www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/australian-government-partnership-with-private-health-sector-secures-30000-hospital-beds-and-105000-nurses-and-staff-to-help-fight-covid-19-pandemic#:~:text=Australian%20Government%20partnership%20with%20private,19%20pandemic%20%7C%20Health%20Portfolio%20Ministers](http://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/australian-government-partnership-with-private-health-sector-secures-30000-hospital-beds-and-105000-nurses-and-staff-to-help-fight-covid-19-pandemic#:~:text=Australian%20Government%20partnership%20with%20private,19%20pandemic%20%7C%20Health%20Portfolio%20Ministers) accessed 27 March 2022.

<sup>102</sup> Daniel Villanueva, 'Citibanamex Habilita Su Centro de Convenciones Como Hospital Covid-19', *Lider Empresarial* (16 April 2020) [www.minsalud.gov.co/Paginas/Expansion-hospitalaria-una-estrategia-para-atencion-de-la-covid-19-.aspx](http://www.minsalud.gov.co/Paginas/Expansion-hospitalaria-una-estrategia-para-atencion-de-la-covid-19-.aspx) accessed 27 May 2022; Ministry of Health of Colombia, 'Expansión Hospitalaria, Una Estrategia Para Atención de La Covid-19' *Press release 123* (Bogota, 3 April 2020) [www.minsalud.gov.co/Paginas/Expansion-hospitalaria-una-estrategia-para-atencion-de-la-covid-19-.aspx](http://www.minsalud.gov.co/Paginas/Expansion-hospitalaria-una-estrategia-para-atencion-de-la-covid-19-.aspx) accessed 27 May 2022.

<sup>103</sup> Cristina Contreras Casado, 'Sustainable Infrastructure in a Post Covid Era' (*Instituto Per Gli Studi Di Politica Internazionale*, 2020); Aruna Kashyap, Kyle Knight and Margaret Wurth, 'COVID-19 Exposes Warped Global Health Power: The System Needs a Course Correction' (2021) 6 *Business and Human Rights Journal* 584.

that can satisfy public needs in both normal conditions and times of crisis. To that end, human rights need to be at its core.

## 7. ABOUT THIS BOOK

This book addresses the linkages between sustainability and human rights in the context of infrastructure and uncovers the human rights gap at every stage of the public procurement process to deliver on infrastructure assets or services. It brings together contributions from scholars and practitioners from diverse backgrounds including law, engineering and architecture, bringing new voices to the debate. This collection further addresses a literature gap regarding the role of human rights in highly complex contracts like PPPs and in infrastructure financed by multilateral development banks. To this end, authors analyse key human rights issues across the lifecycle of projects, in particular through the use of case studies. They develop more inclusive approaches to infrastructure that address right holders and stakeholders such as communities, workers and service users, and particularly women. Besides uncovering human rights problems, this book proposes solutions and new ways to advance the SPP agenda in both developed and developing countries, to deliver on infrastructure that brings a social return and does not harm human rights.

The remainder of this volume is divided into three parts. Part I, 'Linking Human Rights and Sustainability in Public Procurement of Infrastructure', explores crosscutting relevant issues for all types of infrastructure. George Nwangwu's chapter explores the links between infrastructure and human rights through navigating the cyclical conundrum in which infrastructure is needed to fight poverty and to allow the enjoyment of economic, social and cultural human rights. In parallel, that same condition prevents governments from having sufficient resources to finance and cover the infrastructure gap, which PPPs promise to solve. It uncovers the ways in which people's human rights are affected by PPP procurement models, mainly through governance malfunctioning structures, lack of affordability and subsidies for service users, and onerous contractual clauses. As part of the solution, Nwangwu's chapter argues that inclusion and participation of stakeholders need to be part of PPPs' decision-making across every stage of PPPs. It goes further by arguing that infrastructure is not only a human rights enabler, but also that access to it should be recognised as a fundamental human right on its own merit to hold governments accountable for infrastructure-related harm to people.

Cristina Contreras' chapter provides a 360-degree approach to women's inclusion in infrastructure by disclosing a range of challenges women have in accessing public and essential services without discrimination. These obstacles range from lack of women's representation in project planning and procuring, design, execution and operation, to their physical and economical acces-

sibility, safety and well-being. Contreras highlights that women should be recognised in comprehensive ways, as a heterogeneous group and as multi-role players such as decision-makers, workers, service users and suppliers of infrastructure. Together with highlighting the problems, this chapter puts forward ways in which infrastructure can contribute to tackle them through case studies in developing countries across different types of infrastructure, namely roads, public transportation networks and water and sanitation. It particularly proposes a gender analysis that can identify specific needs of women throughout the entire lifecycle of a project, demanding that gender mainstreaming is present at both institutional and project level.

Miriam Amanze and Ama Eyo's chapter targets Asian and African Development Banks procurement frameworks for financing, as a commonly adopted solution to address the infrastructure gap derived, in a large extent, to lacking financial resources of borrower countries. It explores the relationship between labour rights, acknowledged as social rights in international human rights instruments and treated as such, and public procurement from the perspective of borrowing state's obligations to promote and protect them. Further on, Amanze and Eyo identify the gaps in the promotion and protection from abuse of workers' rights in public procurement frameworks used in those finance contracts. Focusing on procurement principles, planning, tendering, and contract management, the authors provide recommendations to cover such loopholes.

The following two parts of this book have a particular focus on hospitals (Part II) and infrastructure in the context of mega-sporting events (Part III). Hospitals are part of social infrastructure whose main aim is to deliver health-care services to end-users. Recently, during Covid-19, the role that this type of infrastructure plays in our societies acquired an additional value. Besides, the pressing need of infrastructure and the current infrastructure gap have given rise in the involvement of the private sector in the entire process of development projects. Businesses have increased their participation in the planning, execution and operation of infrastructure and service delivery of public services such as healthcare through PPPs. Human rights has not been at the centre of these procurement schemes and, frequently, transparency and accountability has been compromised. This context raises the need of a particular focus on hospitals and on PPPs. This need involves not only an approach regarding patients' human right to health, but also about participation of stakeholders such as local communities and potential service users.

In addition, developing countries have hosted multiple mega-events under the promise that this will boost their economies. Examples are many: South Africa and the FIFA World Cup in 2010; India and the Commonwealth Games in 2010; and Brazil in the FIFA World Cup 2014. This book raises the question whether infrastructure for major sporting events, such as stadiums, are eco-

nomic enablers or rather poverty straighteners. Uncovered abusive conditions, including forced labour and debt bondage in construction sites of stadiums for the recent FIFA World Cup in Qatar 2022 suggest that whenever foreseeable human rights risks are disregarded in these events' developments, infrastructure can be an active promoter of human rights abuse.<sup>104</sup>

Moreover, major sporting events infrastructure entails unique tensions that are not present in other projects that deserve particular attention in this book. Such pressures involve short-term, massive public spending, immediate and artificial deadlines, spiralling costs and long-term developmental impacts. Stadiums reflect trade-offs that involve a driving infrastructure agenda with large-scale impacts by a private agency, such as FIFA, and current developmental needs of individuals within a society. Frequently the interests of the latter are disregarded and not aligned to those of the former. The cost-benefit of this infrastructure is not always clear. Often, it involves a big price tag with little social return or ends up worsening already existing deprivation. These particularities indicate that stadiums in the context of mega-sporting events should be clustered separately from social infrastructure in this book, whereas 'regular' stadiums or sports facilities would normally be included.

In such light, Part II, 'Building Hospitals for People', is focused on PPPs as frequently used procurement schemes to develop hospital facilities and provide health care services. Josua Loots' chapter explores intersections between development, infrastructure and human rights. It also addresses human rights risks and concerns in PPPs and in a particular case study of a hospital in Lesotho. To address human rights risks comprehensively, this chapter proposes the use of human rights impact assessments as a solution. A wide explanation of the latter is given by stressing its differences from the environmental and social impact assessments often used in infrastructure projects. Also, it enlightens understanding by drawing on the ways in which human rights impact assessments can be implemented throughout the entire procurement process. The life cycle goes from the project's identification and preparation to its implementation, construction, operation and management. This chapter provides another angle, from the perspective of service users' rights, that complements Miriam Amanze and Ama Eyo's chapter in the previous section through the example of the Queen Mamohato Memorial Hospital financed by World Bank through the IFC. This perspective articulates the need to look not only at workers' rights in supply chains but also at end-users' rights

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<sup>104</sup> Paula Renkiewicz, 'Sweat Makes the Green Grass Grow: The Precarious Future of Qatar's Migrant Workers in the Run Up to the 2022 Fifa World Cup Under the Kafala System and Recommendations for Effective Reform' (2016) 65 *American University Law Review* 721.



in the development of infrastructure financed by multilateral development banks.

Annabel Elise Short's chapter highlights a contradiction in procurement for hospital infrastructure. Given the purpose of hospitals, they should be a model for sustainable and rights-respecting procurement; however, they are particularly vulnerable to obstacles at the earliest stages of their project lifecycle which prevent this from being the case. These include corruption, political expediency and location and siting issues. Embedding a human rights approach from the very outset of hospital planning can unlock opportunities to expand the realisation of the right to health and other rights throughout later stages of the lifecycle, including the design stage, construction and while in use. Short's chapter also elevates linkages between climate/environmental and social outcomes in the procurement of hospital infrastructure, in the areas of energy efficiency and resilience (including the importance of resilient energy supplies); retrofits of existing facilities; and local sourcing of materials, which can boost local economies while also reducing human rights risks through the materials supply chain.

Johanna Hoekstra and Luis Felipe Yanes' chapter unpacks the right to health and bridges its connection with the contractual framework underpinning PPPs in the UK. The analysis of the latter focuses on accountability gaps in contractual negotiations and contract management that hinder the enjoyment of the right to health. Namely, these gaps involve transparency of PPP-related information to citizens; privity related to the impossibility of establishing obligations or granting rights to claim the contract execution to third parties that are not part of the agreement; and access to remedy for victims when harm derives from a PPP contract. As part of the proposals, the authors stress that if PPP is to be used for health services, then PPP contractual legal framework must be reconciled with international human rights law. To that end, there should be a different approach to how PPPs are negotiated, drafted and implemented. This new approach should entail the elimination of 'value for money' and the adoption of 'value for people' to give individuals' human rights a central role in PPP contracts, as already suggested by the UN Economic Commission for Europe within the Guiding Principles on People-first PPP. Second, the protection of service users' interests should be included in contract law, and a human rights lens in contract interpretation. Third, PPPs should integrate appropriate safeguards within the private provider's contractual obligations to ensure the realisation of the right to health in delivering health services.

Part III, entitled 'For the Game: Infrastructure for Mega-Sporting Events' includes two chapters. William Rook and Daniela Heerdt's chapter considers the general framework to address the human rights and opportunities in the context of mega-sporting events procurement in South Africa, while Geo Quinot's chapter zooms in on the human rights and development considera-

tions and multidimensional interlinkages in procuring for Africa's first World Cup.

Rook and Heerdt define the scope of mega-sporting events infrastructure in procurement, setting out the human rights risks of abuse involved and recommendations to mitigate them. In their lessons learnt and ways forward proposal Rook and Heerdt lay out a series of innovative points, including: adopting an extensive approach to event infrastructure, which allows for the consideration of human rights abuses which occur not only specifically in the development of the multi-sporting event but also in its supporting infrastructure. These innovative points also cover taking a cooperative and shared approach to responsibility, which is applied in preventive, remedial and promotive ways and committing to a human rights-based approach. This approach means having as the starting point for all event organising bodies the recognition of core principles related to implementing a human rights culture that involves participation, accountability, non-discrimination and equality, empowerment and legality. Finally, the authors point to undertaking due diligence and ensuring access to remedy in alignment with the UNGPs.

Quinot presents the 2010 FIFA World Cup in South Africa, and in particular the procurement of the new Cape Town stadium. This case study is a clear expression of the tensions between a privately driven development agenda and social development needs in major sporting events. In his chapter he shows linkages and challenges of human rights and developmental considerations into the procurement cycle, from decision-making of where to physically instal infrastructure to which social criteria should be included in tenders. Importantly, this chapter provides insight into redress deriving from integrity failures and the legacy of hosting a large-scale football event at a community and national level.

In the final chapter we bring together the scholarly insights put forward by all the authors and provide an analysis of the crosscutting themes that underpin their analyses. We hope to provide some of the foundations for a comprehensive and sound framework through which to enable states to provide infrastructure while fulfilling their human rights and environmental obligations, and to advance the debate as to what it is to build sustainably with individuals and communities as the core of infrastructure development.