

§Law in Context

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Toward a human rights unit

The aim of this book has been to chart and to describe the relationship between transnational public-private partnerships (PPPs) and human rights. An understanding of the human rights implications of these PPPs emerges through an exploration of the concrete practices – human rights risk strategies – of human rights advocates, their allies, and their opponents. Nongovernmental organizations (NGOs), community groups, insurgents, terrorists, project planners, and others target these PPPs to achieve social change. Some aim to promote human rights, whereas others actively undermine them. At times, strategies are replicated across country, sector, and project. For example, local populations are incorporated into transnational projects as workers in Africa and in Latin America, in water projects and in natural gas pipelines, in Iraqi reconstruction, and in the Camisea project in Peru. At other times, strategies appear as apples and oranges. Can terrorists bombing buildings really be equated with indigenous communities peacefully negotiating with project planners? Governments and compound companies may at times have stronger human rights credentials than those opposing PPP projects. This conclusion makes the case for the establishment of an institution under the auspices of the United Nations (UN) to handle human rights issues arising in the context of PPPs – a Human Rights Unit (HRU). Presently, human rights are not handled in a uniform way by diverse projects. Regardless of the merits of discrete strategies of social change, a need exists for an institution that is able to think systematically about how varied projects should handle human rights. Furthermore, a policy-oriented institution is necessary given the frustration expressed by state and nonstate actors with how projects presently treat human rights.

A movement is underway in international law to have human rights universally recognized with remedies transnationally available. As we saw in the introductory chapter to this book, notable examples of advocacy for this trend may be found in the work of Anne-Marie Slaughter and David Bosco and also of Harold Koh. Slaughter and Bosco, for example, advocate the pursuit of “plaintiff’s diplomacy” as a means of using the courts to have human rights abuses committed abroad recognized domestically.¹ Koh refers to the broader trend of which “plaintiff’s diplomacy”

1 A-M Slaughter and D Bosco “Plaintiff’s Diplomacy” (2000) 79 Foreign Affairs 102.

is a part as “transnational public law litigation” or “attempts to vindicate public rights and values through judicial remedies.”² Although “plaintiff’s diplomacy” and “transnational public law litigation” focus on the use of courts to spur transnational corporations to respect the human rights of project-affected communities, this conclusion focuses instead on an extrajudicial, institutional solution to the problem of a real world gap between stated commitment to human rights and actual respect for them. Specifically, it offers an institutional solution, a HRU, to the problem of an alleged lack of respect for human rights by major infrastructure projects globally. It is in line with the proposal by Richard A. Falk and Andrew Strauss to create an independent and democratically accountable extrastate, nonjudicial institution of global governance in the United Nations.³

The Unit would join the “panoply of decisional fora that have emerged in other areas of international law: the International Criminal Court, the WTO panel mechanism, the UN Compensation Commission, the Basle Committee of Central Bankers, and the Internet Corporation for Assigned Network Names, just to name a few.”⁴ These fora cover a range of subject matters “address[ing] the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.”⁵ Harold Koh describes the functions of these fora:

Such standing decisional fora can help enforce national obedience with international norms by creating a broader interpretive community which shares knowledge, and fosters mutual compliance with particular legal terms by determining their particular meaning. Such interpretive communities function in what Robert Cover called a “jurisgenerative” fashion – not simply by reducing the kinds of ambiguities . . . but also giving rise to a transnational network of individuals and organisations that can debate particular legal concepts, share ideas and promote global development of national jurisprudence to support international norms.⁶

2 H H Koh “Transnational Public Law Litigation” (1991) 100 *Yale Law Journal* 2347.

3 R A Falk and A Strauss “Globalization Needs a Dose of Democracy” (5/10/99) *International Herald Tribune* 8; R Falk and A Strauss “On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty” (2000) 36 *Stanford Journal of International Law* 191; A L Strauss “SYMPOSIUM: Re-Framing International Law For the 21st Century: Overcoming the Dysfunction of the Bifurcated Global System: The Promise of A Peoples Assembly” (1999) 9 *Transnational Law and Contemporary Problems* 489.

4 H H Koh “Opening Remarks: Transnational Legal Process Illuminated” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 327, 329. For a survey of international organizations see P Sands and P Klein, *Bowett: Law of International Organizations* (Sweet and Maxwell London 2001).

5 B Kingsbury, N Krisch, and R B Stewart “The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15, 16.

6 Koh 329.

It would contribute to the growing body of global administrative law, to use Benedict Kingsbury, Nico Krisch, and Richard B. Stewart's terminology.⁷

Kingsbury, Krisch, and Stewart provide a theoretical underpinning and a taxonomy for this emerging body of global administrative law. They term the bodies that produce this law as "transnational administrative bodies". They include:

International organizations and informal groups of officials – that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty. These regulatory decisions may be implemented against private parties by the global regime or, more commonly, through implementing measures at the national level. Also increasingly important are regulation by private international standard-setting bodies and by hybrid public-private organizations that may include, variously, representatives of businesses, NGOs, national governments, and intergovernmental organizations.⁸

These agencies take a number of forms, including:

formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordinating arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some regulatory bodies exercising transnational governance functions of particular public significance.⁹

The Human Rights Unit would thus fit within a growing international institutional environment. In fact, many of these agencies are economically-oriented.¹⁰ Further, they take on the oversight of private sector actors as well as states.¹¹

Projects discussed throughout this book suggest the need for an independent HRU to set standards for international infrastructure projects in the area of human rights and then to monitor compliance by projects with these standards. This task is not an entirely straightforward one as standard-setting and compliance are often processes and it is difficult to assess their adequacy. For example, project planners might seek to respect the human rights of indigenous groups by including representatives of a group in the decision-making processes of a project. If so, the next question would be what constitutes "inclusion." Also, do indigenous group representatives participate in all or select meetings and which ones? Does the indigenous group hold voting rights at important planning meetings? In other words, what type of involvement rises to the level of "respect for human rights"? Furthermore, does a broadening of participants necessarily result in the advancing of human rights of project-affected communities? What is the relationship between process

7 Kingsbury, Krisch and Stewart.

8 *Id.* 16.

9 *Id.* 17.

10 *Id.* 18.

11 *Id.* 23–25.

and outcome? As we saw in the Camisea and EU cases, in the practice field, process and outcome are often collapsed.

At present, through human rights risk strategies, NGOs and community groups are increasingly adept at targeting project planners, driving reform, and setting new benchmarks for the human rights behavior of projects. However, although written commitment to high human rights aspirations by project planners is increasingly the norm, far too little attention is paid to translating commitments into actual respect for human rights on the ground.

To remedy this deficiency, the conclusion argues for the establishment of a HRU under the auspices of the UN. The UN parentage would capitalize on the UN's ability to act as a moral force for companies wishing to pursue human rights-respecting projects. Such a role for the UN can be seen in the work of its International Labour Organization and UN Centre on Transnational Corporations and also in the UN Global Compact. It is also present in the work of the World Bank Group. At the same time, with the notable exception of the inclusion of resettlement programs in World Bank-financed projects¹² and several other Bank initiatives, these international efforts remain largely aspirational. This character has led commentators to criticize the UN's inability to institute compliance with codes of conduct. Responding to this criticism of the UN efforts to ensure that TNCs implement human rights, the HRU would not only set standards for human rights respecting infrastructure projects, it also would include an institutional apparatus capable of monitoring compliance. In effect, standards would be scrutinized and also processes and outcomes assessed.

The establishment of a UN HRU would centralize what is at present an often disorganized and motley means of setting and monitoring compliance with human rights standards. For example, the Camisea case study demonstrates how a uniform human rights standard set by major international investment banks is being implemented in individualized ways by investment banks. What results are parallel and overlapping efforts that are not always mutually reinforcing. Furthermore, this lack of centralization overstretches the capacities of community groups and NGOs, which are often *de facto* monitors of the human rights standard-setting and implementation of projects.

Oftentimes, the motley nature of international law is one of its highlights; the fact that grievances might be adjudicated in multiple institutions and in different ways. It is one of the attributes that transnational corporations like most. However, the case studies in this book demonstrate how diverse human rights standards and varied monitoring mechanisms result in an uneven system in which outcomes are often suboptimal. Thus, an argument is made here for a centralization and rationalization of authority to manage human rights arising in the context of transnational PPPs.

12 M M Cernea and C McDowell, eds, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank Washington, DC 2000).

The case study findings in Part II highlight the shortcomings of decentralization. For example, in the Camisea case, decentralization resulted in a “race to the bottom.” The Export-Import Bank of the United States has the highest human rights standards of export credit agencies. When project planners sought financing from the Bank, NGOs successfully blocked the financing. However, in practice, when this Bank denied funding for the project, the United States sanctioned funding by other means through the Inter-American Development Bank of which it is a member. Furthermore, the project planners imported goods from other countries whose export credit agencies would offer subsidies without commensurate human rights scrutiny. So, lobbying the U.S. institution succeeded in the short term, but, in the long term, advances were eclipsed as the strategic project planners garnered public subsidies in other forums. Thus, an international unevenness of human rights standards coupled with the possibility of forum shopping resulted in human rights problems for the project. A HRU here could regularize the human rights standards internationally, so that planners would submit projects to the HRU, which would in turn carry out a uniform human rights risk assessment.

Similarly, in the field of antiterrorism, governments and companies are pursuing country- and sector-specific strategies for safeguarding infrastructure from public attack even though attacks on infrastructures recur in many societies. In fact, infrastructures themselves are often transnational either in their ownership-control composition or else physically. These national PPP-based solutions impact differentially on human rights. Although some international coordination does occur, oftentimes decentralization means that human rights are unevenly protected. A HRU would look cross-nationally and systematically at terrorist threats to critical national infrastructures, sharing lessons internationally. In instituting transnational strategies, it would assess risks to human rights and pursue mitigation strategies. It could act as a repository of information on responses that governments could draw from in their policy making.

Also, in the case of Iraq reconstruction and in the implementation of Millennium Development Goals, large-scale infrastructure projects are being constructed or rehabilitated under the auspices of UN resolutions and declarations. These projects are being carried out by planners of different nationalities, in diverse settings, and in various sectors of the economy. Although the projects all are rationalized as part of UN efforts, there is little UN oversight of the human rights practices of the projects. A need exists for internationally based accountability of projects. A UN HRU here would ensure that projects that bear the UN imprimatur abide by high human rights standards.

As the European Union recognizes, related privatized transportation projects in Central and Eastern Europe handle human rights unevenly. A movement exists to have projects submit themselves to EU institutions. A UN-based HRU would ensure that projects not only pursue similar human rights assessments but also that the public good promises of projects are delivered on in practice.

A central institution, working across countries, sectors, and projects would help regularize how human rights are handled in these varied contexts. Presently, human rights standards are diverse and their implementation irregular. A HRU would preside over projects across economic sector, ranging from roads to airports to pipelines. The HRU also would be involved at every stage from planning to building and operation. A tendency might exist to broaden the remit to include noninfrastructure-based commercial activity such as the retail sector; however, the infrastructure project specialty is already a large challenge. In concerning itself with private sector corporate activity, the HRU would build on the experience of the UN Global Compact.¹³

As is the case with the UN Global Compact, if a project is submitted to the HRU, then on the necessary scrutiny, if successful, the company would receive a retractable UN Seal of Compliance. This Seal would be modeled on the Global Compact's logo, which is available under certain circumstances to companies that, among other things, "promote the principles of the Global Compact."¹⁴ However, it would require the submission of specific projects to the monitoring arm of the HRU. In many cases, this submission might present a substantial commitment. Importantly, unlike the logo of the Global Compact, it would be a project-based evaluation of corporate commitments.

Like retail companies, many of the major players in the infrastructure field face problems of reputational risk.¹⁵ Oftentimes, in major infrastructure projects, elite banks such as Chase, Citigroup, and Morgan Stanley are involved in financing infrastructure projects. Similarly, infrastructure companies such as Bechtel, Shell, and Mobil also are increasingly recognizable to the average consumer. Furthermore, some of these companies not only are involved in extraction, but they are at times involved in retail. The Seal from the HRU would be important in diminishing reputational risk. Increasingly, banks and larger companies are acknowledging the need to respect human rights in the course of an infrastructure project. In many ways, these companies are most vulnerable to questions concerning their commitment to human rights, because they have large reputational risk as their brand names are global. Even projects without brand name companies involved as prime contractors

13 See <http://www.unglobalcompact.org/Portal/Default.asp>; Ambassador B King "SYMPOSIUM: The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations" (2001) 34 *Cornell International Law Journal* 481; W H Meyer and B Stefanova "SYMPOSIUM: Human Rights, the UN Global Compact, and Global Governance" (2001) 34 *Cornell International Law Journal* 501; M Shaughnessy "Human Rights and the Environment: The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct" [2000] *Colorado Journal of International Environmental Law and Policy* 159; L A Tavis "Novartis and the U.N. Global Compact Initiative" (2003) 36 *Vanderbilt Journal of Transnational Law* 735; A M Taylor "UN REPORTS: The UN and the Global Compact" (2001) 17 *New York Law School Journal of Human Rights* 975; A Voiculescu "Privatising Human Rights: Corporate Codes of Conduct between Standards, Guidelines and the Global Compact" in L Williams, ed, *Poverty and Law: Towards an International Law on Poverty* (Zed Books London 2003).

14 unglobalcompact.org/aboutTheGC/gc_logo_policy.html.

15 T Nelthorpe "Principled Finance?" (June 2003) *Project Finance* 20.

may include high profile private companies as financiers. At the same time, infrastructure projects come in various shapes and sizes and often do not involve companies that are household names.

The carrying-out of infrastructure projects almost always involves numerous medium- and small-sized companies. This is true whether a brand name infrastructure company takes the lead or else if such a company is not involved in the project at all. With regard to the former, infrastructure projects typically have a large number of subcontractors, as we saw with the Iraq and Camisea case studies. Making sure that these subcontractors abide by human rights commitments might usefully fall on the lead prime contracting party or the lead bank providing financing. This would ensure a point of contact and also the involvement of a party with reputational risk. However, infrastructure projects may be carried out by a consortium of companies that do not have retail arms and are thus not brand name companies. The involvement of a UN institution in monitoring such projects would draw attention to the human rights practices of an otherwise low profile project.

A centralized authority could play a coordinating role among diverse sets of actors involved in single projects. For example, many of the projects in this book involve supranational, international, regional, national, local public, and private institutions. Oftentimes, institutions such as export credit agencies will coordinate among themselves. Projects differ in the degree of coordination among parties. A HRU could coordinate the diverse impact reports emanating from institutions at different levels. It also could coordinate information sharing.

Centralization of authority would also engender greater project accountability when it comes to human rights by countering the present dispersal of accountability among multiple parties. Different human rights standards emanate from these parties. Overlapping competencies result. On the positive side, human rights problems that one party overlooks may be handled by another. At the same time, the chain of command for human rights is not clear. The creation of a HRU would centralize authority and thus responsibility, promoting accountability.

Although the HRU would centralize authority over human rights decision making, it also would work in conjunction with the growing number of dispute resolution panels at the regional and international levels. These panels adopt differing approaches from problem solving to dispute resolution. They include panels created by the Asian Development Bank and also the Compliance Advisor Ombudsman of the World Bank Group. Some of these panels are charged with hearing claims arising from privatized projects, whereas others focus primarily on public projects. The aim of the HRU would be to complement these existing efforts and also to pursue a general policy of subsidiarity.

In centralizing authority, the HRU also would respect the importance of the participation of multiple stakeholders in human rights oversight. PPPs generally suffer from a democracy deficit. A HRU would address this deficit both in its own institutional composition and also in its policy capacity.

The HRU itself would be composed of several classes of actors. The goal is to have its membership reflect roughly the stakeholders in a typical infrastructure project. Thus, the HRU would draw its membership from NGOs, transnational corporations, international banks, community groups, governments of industrialized and developing countries, as well as from less interested parties such as UN bureaucrats and academics. At present, these groups are unevenly represented within projects. For example, NGOs and community groups are generally invited only at late stages of projects, excluding them from official project planning. So, they are not insider participants throughout. As a result, decisions affecting their interests are made without meaningful participation and consultation. This involvement of members of the public in administrative decision-making “is one of the classical elements of administrative law” and is “increasingly applied in global administrative governance.”¹⁶ Kingsbury, Krisch, and Stewart argue that groups affected by transnational decision-making should be more included in global administrative decision-making: “In this non-ideal situation, global administrative law might take pragmatic steps towards a stronger inclusion of affected social and economic interests through mechanisms of participation and review open to NGOs, business firms, and other civil society actors, as well as states and international organizations.”¹⁷ To ensure that the HRU does not come to represent a set political perspective, membership would rotate over time. Furthermore, if the organization to which a member of the HRU becomes involved in a project under evaluation, then that member must recuse her- or himself.

The HRU also would promote more inclusive and participatory projects. Most projects do not incorporate NGOs and community groups into the project planning after tendering. Instead they may be invited to participate occasionally during the construction and operation phases. This is the case in Camisea and the EU projects. Alan Dabbs and Matthew Bateson have argued for a need to involve these groups throughout the project:

stakeholders must have a clear understanding of all potential impacts and an opportunity to suggest mitigation measures before they can be expected to support a project. . . . Effective management of social issues requires a process to identify and incorporate those issues into the project. This is an iterative process of consultation with key stakeholders so that the design, construction and operation of facilities are managed for the mutual benefit of the business and of the local society.¹⁸

A HRU would require that projects be submitted for scrutiny at the tender stage. This would ensure processes of inclusion at the onset of a project. Inclusivity at an early stage would mitigate against the common practice in infrastructure projects

16 B Kingsbury, N Krisch, and R B Stewart “The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15, 37.

17 *Id.* 50.

18 A Dabbs and M Bateson “The Corporate Impact of Addressing Social Issues: A Financial Case Study of a Project in Peru” (2002) 76 *Environmental Monitoring and Assessment* 135, 137.

identified by Dabbs and Bateson wherein, the “practice is to employ people to ‘sell the project’ or ‘clear the way’ for development without iterative consultation. Then the company concentrates on ‘fire fighting’ any negative social consequences.”¹⁹ Thus, in the cases in which indigenous groups are involved, the requirement of consultation by International Labor Organization Convention 169 would be met.²⁰

Project-affected groups often are not included in project decision making and also the extent to which they have been able to monitor the effect of decisions on their lives and natural environment is unclear. In the European context, the EU hopes that NGOs will monitor projects. However, it has for the most part persisted in viewing NGOs as antagonistic outsiders. Related, in the Camisea project, planners have selectively incorporated certain NGOs and community groups, excluding others. As a part of its monitoring mechanism, the HRU would ensure training of project-affected communities. Also, process-rights of these groups would be central to the functioning of the HRU. Furthermore, having an objective outside party working to this end would help to provide companies and communities with an idea of practices elsewhere.

More inclusive processes would mean that human rights risks could be distributed by the HRU onto the shoulders of the participants best able to mitigate them. If an NGO or community group is made responsible, then other project planners must provide adequate support. Attention should be paid to what mix of public and private actors is best suited to handling human rights risks. Further research is necessary to determine whether a correlation exists between the relative importance of public, private, domestic, foreign, and international participation in a project, on the one hand, and respect for human rights, on the other.

As has been discussed, NGO and community group campaigns often focus on detailing the political connections of companies with financiers and also putting forth the human rights problems incurred by company projects and lawsuits against companies.²¹ The campaigns against the major Iraq reconstruction companies and the Camisea companies are examples here. Although this is an important first step, project planners and potential financiers have responded with denials of funding or the setting of human rights standards at the aspirational level, rather than with implementating of human rights norms in the context of the project itself. The HRU would move the discourse toward the next level, from reputation of companies toward concrete project-based results.

As the case studies show, human rights principles may be set forth in a broad array of legal instruments including insurance policies, contracts, and regulations. A HRU could look crossnationally at how the particular issues arising from each type of instrument operate in practice. Are certain insurance or contractual arrangements

19 *Id.*

20 J Kimerling “International Oil Standards in Ecuador’s Amazon Oil Fields: The Privatization of Environmental Law” (2001) 26 *Columbia Journal of Environmental Law* 289, 308–309.

21 See e.g. A Gray “BIC Letter to the IDB Board of Executive Directors, Camisea Project” (7/24/03) archived at www.bicusa.org/lac/camisea_amy_letter.htm.

more conducive to respect for human rights? How are subcontracting arrangements being carried out? In the Iraq situation, for example, are potential local subcontractors being properly trained? Are certain types of regulatory subsidies more effective than others?

Questions persist as to what is the appropriate human rights standard and also how should a human rights standard be implemented in the context of a specific project. This conclusion has proposed an institutional solution as an answer to these outstanding questions – the creation of a United Nations HRU for infrastructure projects that will set standards for projects and monitor compliance with those standards. This Unit would devise common standards, which would in turn be applied in varied contexts. Uniformity in principle and in monitoring would counter the trend toward uneven application of human rights across projects. At the same time, the Unit would recognize the need to tailor solutions to the needs of specific projects.

Although social movements excel at pointing out the shortcomings of projects and spurring policy changes by project sponsors, oftentimes questions persist as to whether the measures adopted by project planners actually alleviate the human rights problems. This leads to ongoing and often very public tug-of-wars between social movements, on the one hand, and companies and governments, on the other. These tug-of-wars are often antagonistic and involve the reputations of all parties involved. At the end of the day, quite often all parties are frustrated. Some community groups and nongovernmental organizations claim that project planners have not gone far enough to safeguard human rights, while certain project planners complain that they continue to be targets for human rights groups even after making a good faith effort to incorporate demands into the project matrix. Social movements feel that their policy recommendations are poorly implemented and project planners wonder what more they could do to satisfy demands.

In conclusion, in a world in which infrastructure projects are increasingly privatized, it is necessary to retain some level of public oversight of their human rights practices. The HRU would work with governments, companies, NGOs, and community groups to ensure that human rights standards are set forth at the level of aspiration and also are translated into real world practices.

