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"Defense and attack"

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

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

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

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

II Litigation-based approaches

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

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


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


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


6 Id. 122–125.

7 Id. 125–127.

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

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

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

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


13 Slaughter and Bosco, 103.

14 Id. 107.

15 Alien Tort Claims Act, 28 USC. § 1350 (2001). The statute reads in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The literature on ATCA is extensive. For a useful article on ATCA and labor rights see S H Cleveland “BOOK REVIEW: Global Labor Rights and the Alien Tort Claims Act” (1998) 76 Texas Law Review 1533. The adaptation of the U.S. tort-based approach has proponents within the European Parliament. However, cases arise largely in the criminal rather than the civil context. And, these primarily concern politicians not companies being brought to court. E A Engle “Alien Torts in Europe? Human Rights and Tort in European Law” (Zentrum fur Europaische Rechtspolitik an der Universitat Bremen ZERP-Diskussionspapier 1/05).


17 Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).

18 Bowoto v. Chevron Corp., Case No. C99–2506 (N.D. Cal.).


20 For similar cases, see Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998) (discussing the Amazon oil spills); Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y. 2000) (discussing the Bhopal disaster).
Although Koh provides an unqualified endorsement of this litigation, Slaughter and Bosco argue that this trend toward holding U.S. companies accountable for human rights abuses and environmental damage caused abroad leads to ambiguous results. On the positive side, the suits cause companies to pay greater attention to the impact of their actions. According to Slaughter and Bosco, however, the suits have three principal shortcomings. First, the nongovernmental organizations (NGOs) responsible for bringing suits are not necessarily democratically accountable institutions and may allow decisions that should be made through the democratic process instead to be made by the courts. Second, not all countries value human rights and the environment equally, and thus to impose U.S. human rights and environmental standards on all countries is undemocratic. Third, threatened corporations may lobby their home state governments to curtail the scope of allowable suits under ATCA. For these reasons, Slaughter and Bosco argue that the use of ATCA should be limited to cases involving egregious human rights abuses.

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

22 Id. Additionally, Catherine A. MacKinnon argues that these claims also discourage close relationships between the attorneys and affected communities. See C A MacKinnon, “Collective Harms Under the Alien Tort Statute: A Cautionary Note on Class Actions” (2000) 6 ILSA Journal of International and Comparative Law 567, 573.
informed ones. A democratic deficit often exists in emerging markets in which gov-
ernments are semidemocratic or, at times, authoritarian. Governments may depart
from democratic principles when tendering large-scale privatized projects.26

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

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

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

26 S Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform (Cambridge
27 See e.g. R Shamir “Between Self-Regulation and the Alien Tort Claims Act: On the Contested
Concept of Corporate Social Responsibility” (2004) 38 Law and Society Review 635.
29 M Galanter “Law’s Elusive Promise: Learning from Bhopal” in M B Likosky, ed, Transnational
172. See e.g. Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y. 2000) (brought under the
Alien Tort Claims Act). See also U. Baxi and A Dhanda, Valiant Victims and Lethal Litigation: The
Bhopal Case (N M. Tripathi Pvt. Ltd. Bombay 1990); J Cassells, The Uncertain Promise of
Law: Lessons from Bhopal (University of Toronto Press Toronto 1993); P Muchlinski “The Bhopal
Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors” (1987)
50 Modern Law Review 545.
30 See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2d Cir. 1987).
On forum non conveniens and the Alien Tort Claims Act see A K Short “Is the Alien Tort Statute
New York University Journal of International Law and Policy 1001; M R Skolnik “Forum Non

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

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

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

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

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

III Non-litigation-based approaches

This book seeks to understand the relationship between human rights and transnational privatized infrastructure projects by looking closely at the legal records of
projects which reveal “the tracks left by combatants and their allies.” Infrastructural projects are “all too apparently a process organized through law and legal techniques.” Projects emerge out of a molten mass of public and private, domestic, foreign, and international laws. Thus, contests over human rights are evident in public and private contracts, regulations, executive documents such as presidential directives, treaties, loan agreements, guidelines, white papers, and many other legal forms. Twining sets out the main levels involved in legal globalization. These levels include global, international, regional, transnational, intercommunal, territorial state, substate, and nonstate. Most of the infrastructure projects described in this book draw on several of these levels. That is, the composite legal nature of projects reflects how, as Twining explains, “different geographical levels of legal phenomena are not neatly nestled in a single hierarchy of larger and smaller spaces. Rather, they cut across each other, overlap, and interact in many complex ways.”

Employing Boaventura de Sousa Santos’s terms, the “legal life” of an infrastructure project is constituted at an intersection of different legal orders, that is by “inter-legality.”

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

39 Twining, 253.
40 Santos, 437. For a discussion of Santos’ concept of inter-legality see W Twining, Globalisation and Legal Theory (Butterworths London 2000).
41 This list was compiled from S L Hoffman, Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants (Kluwer Law International Leiden 2001) 28–29. Scott L. Hoffman, however, does not focus on or identify the human rights dimensions of project finance law.
More often than not, the details of how human rights will be translated into practice are woven into contract clauses. For example, human rights concerns are memorialized in loan agreements and contracts between governments and companies governing tariffs. The centrality of contract should not come as a surprise, as Scott L. Hoffman reminds us, because “contracts form the framework for project viability and control the allocation of risks.”43 Benjamin Esty tells us the “project companies” that are responsible for carrying out projects “are founded upon a series of contracts.”44 He estimates that a “typical project has forty or more contracts uniting fifteen parties in a vertical chain from input supplier to output purchaser.”45 At the same time, although contracts play an enormous role in carrying out projects and in mediating human rights claims, other legal forms are also significant.

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

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

43 Hoffman 7.
45 Id.
49 W Twining, Globalisation and Legal Theory (Butterworths London 2000) 139.
which legal sites and issues “have flourished and developed, and which have withered and even died for lack of clients.”50

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

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

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

52 Id. 108.
53 Id. 107.
war, what does this mean in practice? Are the deliverables promised under the U.S. government–financed power and water projects being realized? It may be that for some the promises are made good, whereas for others they are not.

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

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

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

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

57 Santos 186. For an evaluating of the presentation of globalization as a battle between companies and powerful governments, on the one hand, and NGOs and community groups, on the other see M B Likosky “Editor’s Introduction: Transnational Law in the Context of Power Disparities” in M B Likosky, ed, Transnational Legal Processes: Globalisation and Power Disparities (Cambridge University Press Cambridge 2002) xvii.
58 Santos 89.