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**Permanent Peoples' Tribunal on Global Corporations and Human
Wrongs**

Warwick University, 22 – 25 March, 2000

Findings and Recommended Action

The Permanent Peoples' Tribunal, Lelio Basso International Foundation, Via della Dogana Vecchia, 5, 00186
Rome, ITALY, Tel: 0039-06-68801468, Fax: 0039-06-6877774, Filb@iol.it, <http://www.grisnet.it/filb>

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PART I

INTRODUCTORY

Table of Proceedings

Tribunal Sessions on Global Corporations and Human Wrongs at Warwick March 2000.

1. The Tribunal was opened by Dr. Gianni Tognoni, the Secretary General of the PPT and the proceedings were commenced.
2. The proceedings before the Tribunal was initiated by a general introductory session where the general terms of reference of the Session were presented and discussed.
3. The introductory session also deliberated upon the findings and results of the IRENE Workshop.
4. The members of the jury heard depositions made by the witnesses on four Transnational Corporations (**Freeport MacMoRan, Rio Tinto, Monsanto and Union Carbide**). The witnesses through technical reports, oral and video presentations made the presentations. The depositions were interrogated in the open forum and documentary and other evidence produced was considered. The members of the jury also examined a number of technical and non-technical documents produced by the witnesses before the Tribunal (Annex B);
5. The proceedings were concluded after a reflexive session dedicated to the explorations of issues such as peoples' jurisprudence, activism and new patterns for legal action (Annex C).

Acknowledgements

The organisers of the Tribunal Session gratefully acknowledges the assistance of the members of the jury and the sponsors. Also to gratefully acknowledge the substantial assistance of the following people towards the preparatory tasks and smooth functioning of the functioning of the proceedings.

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8. Shermit Lamba (*School of Law, University of Warwick*)
9. Regina Rauxloh (*School of Law, University of Warwick*)
10. Ekuru Aukot (*School of Law, University of Warwick*)
11. Dana Sugarman (*School of Law, University of Warwick*)
12. Elyssa Santos Abrams (*National Lawyers Guild*)
13. Eric Palmar (*National Lawyers Guild*)
14. Maria Augusta Anelli (*Lelio Basso Foundation*)

Summary

Findings and Conclusions

Permanent Peoples' Tribunal on Global Corporations and Human Wrongs

The Warwick Sessions had their genesis in reconsideration of Human Rights on the occasions of the 50th Anniversary of the Universal Declaration of Human Rights and the 2nd Christian Millennium. We believe that these historic occasions provided an opportunity to locate the normal case based 'inquisitorial' format of the PPT within a wider context of discourses on the issue of human rights and human wrongs. Therefore, the Warwick Sessions commenced with a Roundtable in 1998 which involved a gathering of activists, academics and lawyers to consider wider issues about theory and practice in relation to the Right to Food and Livelihood (with due attention to Gender Justice) in an era dominated by global corporations. The process of the wider understanding of issues was carried further forward by the International Restructuring Education Network Europe (IRENE) workshop at Warwick which took place immediately before the Tribunal Sessions. The workshop explored the legal possibilities, initiatives and strategies on controlling corporate wrongs and the liabilities of Multinational Corporations. The results of the workshop were communicated to the Tribunal hearing and also formed a backdrop to the innovative 'Reflexive' Session of the Tribunal in which presentations were made on wider issues by activists, academics and media representatives on issues of theory and practice.

The Permenant Peoples' Tribunal on Global Corporations and Human Wrongs was convened at the University of Warwick from the 22nd to the 25th of March 2000 with the support of the Council on International and Public Affairs based in New York, the Lelio Basso International Foundation in Rome, the School of Law, University of Warwick and the financial support of the New York Community Trust.

This session of the Tribunal was different from other sessions in one other respect. The proceedings were not intended to arrive at a final judgement of the issue but to determine whether there was sufficient evidence provided by the witnesses to draw up indictments against the corporations concerned. If such indictment, could be made, then it was intended that full proceedings would be brought subsequently against the corporations at which detailed evidence would be presented on the issues and full opportunity would be provided for the corporations to defend themselves in accordance with the usual procedures followed by the Peoples' Permanent Tribunal. In all other respects Tribunal procedures were followed. The weight of evidence - probable cause to believe that significant violations of human rights had occurred - was therefore less than that before a full Tribunal.

The Issues of Jurisdiction

The Permanent Peoples' Tribunal has its roots in the experience of the Bertrand Russell War Crimes Tribunal and the anti-imperialist movement which found articulation in the Algiers Declaration on the Rights of Peoples, 1976. The aim of the Tribunal is to challenge the persistence of the 'crime of silence'. The following words of Bertrand Russell during the first meeting of the Vietnam War Crimes Tribunal provide the philosophical inspiration for our work:

“We must pass judgement on what we find to be the truth. We must warn of the consequences of this truth. We must, moreover, reject the view that only indifferent men are impartial men. We must repudiate the degenerate conception of individual intelligence, which confuses open minds with empty ones. ...May this Tribunal prevent the crime of silence.”¹

The crime of silence is the silence which refuses to name the violence that is inflicted upon marginalised populations as a crime. In keeping with the established practice of the PPT this session of the Tribunal aims to contribute to peoples' struggle to find the words to name this violence.

“Wherever men struggle against suffering we must be their voice. Whenever they are cruelly attacked for their self-sacrifice we must find our voices. It is easy to pay lip service to these ideals. We will be judged not by our reputations or our pretences but by our will to act. Against this standard we too will be judged by better men.”²

And with this power of powerlessness, the Tribunal attempts to reach the public conscience of humanity to speak truth to the violence of wrongs all too often unrecognized and unnamed. As such, it seeks to construct an alternative discourse of human rights around wrongs not simply as 'acute' events of violence but as 'chronic' conditions of systematic, structural violence resulting in the creation of communities of suffering³.

The Cases against Corporations

¹ B. Russell, “Speech to the First Meeting of Members of the War Crimes Tribunal, London, 13 November 1966”, in P. Limqueco and P. Weiss (eds.), *Prevent the Crime of Silence: Reports from the sessions of the International War Crimes Tribunal founded by Bertrand Russell - LONDON · STOCKHOLM · ROSKILDE*, Bertrand Russell Peace Foundation, 1971, at <http://www.homeusers.prestel.co.uk/littleton/v1!!cho1.htm>, pp. 1-2.

² B. Russell's closing address to the Second Session of the Tribunal in Stockholm, in Limqueco and Weiss, *ibid*, at <http://www.homeusers.prestel.co.uk/littleton/v1120rus>, p. 2

³ This is reflected in the nature and extent of the Tribunal's engagement in the politics of resistance. From the sessions on the regime of suppression in Philippines against the Bangsa-Moro people during the rule of Marcos (1980), the role of the Soviet military in Afghanistan (1981/82), the use of force by Indonesia in East Timor (1981), the allegations of genocide committed by Turkey on the Armenian people (1984), the imperialism of US intervention in Nicaragua (1984), and the impunity of neo-liberal dictatorial regimes in Latin America (1991) to the sessions on the human wrongs committed by the IMF and the World Bank (1988/1994), the 'accident' that was the Bhopal industrial atrocity (1992), the wrongs resulting from industrial hazards (1994), the Chernobyl nuclear 'accident' (1996), the violations committed by the international garment industries (1998), and the systemic violence of Elf-Aquitaine corporation in collusion with the French state in the former territories of French colonial rule (1999), the Tribunal has sought to expose both the truth of violations and the inadequacies if not the complicity of dominant structures of legality in responding to the resulting suffering.

The Tribunal's deliberations on wrongs by specific corporations in specific 'Case Presentations' are framed in the wider context indicated above and further elaborated upon in the reflexive presentation in Section III. The Tribunal heard, interrogated and considered the oral, documentary and video depositions made by the witnesses against four global corporations. The accused global corporations were:

- 1. Freeport MacMoRan and the Rio Tinto Corporations**
- 2. Monsanto Corporation**
- 3. Union Carbide Corporation**

The Indictment

The Jury finds that Freeport McMoran and Monsanto (under whatever name it does business) and the Union Carbide corporations and their subsidiaries and affiliates should be indicted and asked to show cause in relation to the violations indicated below. The Jury heard insufficient evidence to indict Rio Tinto Corporation.

The Jury noted in its deliberations that the purpose of the Tribunal was not to make a final determination on the matter but to decide whether there was sufficient evidence to issue indictments against the corporations for significant violations of internationally recognized human rights and ask them to show cause before a formal session of the Tribunal that they did not commit the violations cited in the indictments. The indictment against Union Carbide Corporation must be considered with the findings made by the Tribunal in 1992.

Freeport McMoran

1. That they have deprived the Amungme and Komoro peoples of lands traditionally occupied by peoples and have been carrying out mining operations without adequate compensation.
2. That they have abused the cultural and religious rights of the traditional owners.
3. That they have been complicit in the actions of the military forces which carried out human rights violations extending to personal injury, ill-treatment and torture.
4. That they have operated the mine in West Papua in a manner which caused serious environmental damage and degradation; in particular pollution of the main water sources and the land in a way which undermined the sustainable livelihoods of the population.

Monsanto

1. That Monsanto has developed technologies which can cause irreversible harm and has deliberately and illegally released such technologies without due regard to the impacts on health, the environment and livelihoods.

2. That it has promoted its ends through misrepresentation, including false advertising and unreasonable repression of informed debate.
3. That it has attempted to subvert regulatory bodies and public institutions charged with protecting citizens under national or international laws, policies or orders.
4. In the case of the Indian farmers the PPT also recommends that legal action be taken under national laws on the charge of aiding and abetting suicides of adversely affected farmers.

Union Carbide

1. (In confirmation of the finding of the 1992 Tribunal) that Union Carbide has committed acts of gross negligence and environmental degradation resulting in continuing deaths, illness and sufferings of the people and that these harms have continued unabated since 1992.
2. That UCC has deliberately evaded due process and other stipulations of the Indian courts. Those accused of criminal negligence in respect of the Bhopal disaster continue to defy the summons issued by the Indian courts.

The Jury also finds that in view of the enormity of the scale of the impact of its action affecting the lives of hundreds of thousands of people, and its systematic callous behaviour towards its obligations, Union Carbide should be held accountable before a court which addresses International Corporate Criminal Responsibility.

Directions for Future Action

After consideration of the specific cases against the corporations concerned and after reflexive deliberations on wider issues concerning TNCs, Nation States and International Agencies' involvement in perpetrating human wrongs the Jury determines:

1. The findings at this session of the PPT on Freeport McMoran, Monsanto and Union Carbide shall after rigorous verification of all facts, be transmitted to the indicted parties and disseminated widely to affected communities, concerned NGO's and social movements, relevant international and regional agencies, such as the UN Commission on Human Rights, and other interested bodies.
2. The PPT shall maintain continuing jurisdiction over these corporations, by encouraging NGO's and social movements to undertake ongoing monitoring and surveillance until the PPT on Human Wrongs and Global Corporations can be reconvened to conduct trials of the accused corporations which must be given timely notice in accordance with the PPT Statute.
3. The PPT shall seek the collaboration of NGO's, activist groups, and academic institutions in establishing web sites where data on corporations causing substantial human wrongs can be collected and disseminated. Concerned NGO's and social movements should be encouraged to organise people's tribunals on whatever scale seems relevant, including the local or community, national or international levels to consider whether to frame charges against the corporations. An objective over time is to bring together such compelling evidence of the harms caused by global

corporations as to sustain challenges to corporate domination of the global political economy.

4. Through workshops, different forms of dialogue and other appropriate means, the PPT shall encourage the further conceptualisation of people's legality or jurisprudence and its application through such manifestations as tribunals, citizen juries and petitions, and charters of peoples' rights. It shall also encourage challenges to dominant legalities which are patently unjust or protect corporations when they cause human wrongs. It shall work with activist groups, NGO's and peoples' movements in undertaking these actions.
5. The PPT shall also encourage activists and researchers to explore the foundations of corporate power, such as the practices of creating corporations in perpetuity for any "lawful" purpose, allowing one corporation to own others, protecting the mobility of capital as a private property right, and granting corporations the constitutional rights of natural persons, and to devise and advocate strategies to diminish or eliminate these practices. There should also be an attempt to formulate and advocate alternatives to the contemporary global corporations.
6. The PPT considered the pressures exerted by private financial institutions (banks, funds, insurance companies, etc.) on indebted parties, be they public institutions, private corporations or individual citizens. In the financial crises of the 1990's and in future crises the livelihoods of millions of people, have been or will be adversely affected without giving them the opportunity to take the responsibility back to single causes of the evil of financial crises. Therefore the PPT is aware of the necessity of establishing new "rules of the game" which set up a framework for tracking the behaviours of private institutions, preventing overspeculation and overexploitation of people in the world for the sake of owners of who are growing even richer monetary wealth.
7. In pursuing the foregoing and other initiatives, the PPT shall establish the widest possible linkages with activists and research groups to identify and demonstrate effective strategies of resistance to corporate power.

PART II

THE CASE AND FINDINGS AGAINST FREEPORT MACMORAN, RIO TINTO, MONSANTO AND UNION CARBIDE

Submission against Corporations

The Tribunal's deliberations on wrongs by specific corporations in specific 'Case Presentations' framed in the wider context indicated above and further elaborated upon

in the reflexive presentation in Section III. The Tribunal heard and considered the oral, documentary and video presentations made by the witnesses against four global corporations. The accused global corporations were:

- 1. Freeport MacMoRan and the Rio Tinto Group of Corporations**
- 2. Monsanto Corporation**
- 3. Union Carbide Corporation**

Allegations and Depositions against Freeport McMoran Copper & Gold Inc. and Rio Tinto

Freeport McMoran and Rio Tinto were accused of:

1. Undermining the rights of the peoples of West Papua to self-determination through by-passing people's claim on their land and by entering into an alliance with the government of Indonesia whose occupation was illegal and whose legitimacy is not recognised by the ~~which is not recognised as a legitimate authority by the~~ indigenous people of West Papua.
2. Occupation of lands traditionally occupied by peoples and carrying out mining operations without adequate compensation and with disregard for cultural and religious rights of the traditional owners.
3. Complicity in the actions of the military forces which carried out human rights violations extending to personal injury, ill-treatment and torture.
4. Operating the mine in West Papua in a manner which caused serious environmental damage and degradation; in particular pollution of the main water sources and the land in a way which undermined the sustainable livelihood of the population.

Evidence Produced before the Members of the Jury

Evidence was provided of a series of violations involving Freeport particularly through the operations of its 84.9% owned Indonesian subsidiary company Freeport-McMoran Indonesia Inc. and through its operations in West Papua/Irian Jaya in particular in relation to the Grasberg mine which has affected in particular the Amungme and Komoro people. West Papua as it is called by the indigenous people has been occupied by Indonesia (as the province of Irian Jaya) since 1960. It was submitted to the Tribunal that the 1969 "Act of Free Choice" under which the Papuan people agreed to become part of Indonesia was fraudulent in that it involved no genuine participation of the Papuan people and that as a consequence the Indonesian occupation is illegal. Freeport's involvement in West Papua took place after 1969 and the events which took place need to be seen in the context of West Papuan resistance to Indonesian occupation.

Undermining the right to self-determination

We were not asked to determine the validity of Indonesian occupation, but to determine the complicity of Freeport in denying the right to self-determination against an illegal occupation. Evidence was also provided of the failure of Freeport to consult with the local communities in a transparent and honest manner. As indicated below, evidence was provided of complicity of Freeport in the activities of the Indonesian government military forces. Evidence was also provided that Freeport dealt with the Indonesian Government as the legitimate authority also West Papua. However, Freeport involvement occurred after the UN sponsored "Act of Free Choice" in 1969.

Right to land and compensation

Evidence was given to the Tribunal that the Amungme and Komoro people were the traditional owners of land in the area of the mine and that they had been deprived of at least 10,000 acres of land without compensation and mineral resources have been exploited and serious environmental damage has been caused. The West Papuan people have had no or inadequate compensation for the loss of their land on the assumption that the land does not belong to them. The evidence for this was presented

in video testimony by John Ondwane, a West Papuan political leader and in the Report of the Australian Council for Overseas Aid (ACFOA Report 1995: pg 3-7). Evidence was also provided on the erosion and destruction of the religious and cultural edifices of the Amungme people living in the mountains, which is being destroyed by the mine. Mr. J. O. Ondawame stated that the degradation of land and religious and cultural edifices threatens the very survival of the Amungme culture and people (cited in the West Papua Information Kit Revised 1998: pg 12).

Death, injury and torture

Allegations were made of indiscriminate killings, torture and inhumane/degrading treatment, unlawful arrest, arbitrary detention, disappearance and destruction of property by the Indonesian Military Forces (ABRI) through personal testimony and by citing various reports such as the ACFOA Report, the Munninghoff Report, the KOMNAS Report of the Indonesian Commission on Human Rights. It was also suggested to the Jury that an Australian Government delegation came to similar conclusions. Specific incidents described included:

- During a peaceful anti-government demonstration in Tembagapura on 25 December 1994, during which the West Papuan flag was raised, ABRI and Freeport security shot dead three civilians. 5 Dani people were 'disappeared' and 13 Waa and Banti civilians were arrested and tortured.
- Uprisings in Tsinga valley from June to December 1994 as well as the above demonstration on 25 December resulted in the killing and/or disappearance of 22 civilians and 15 rebels.

It is further alleged in the submissions by the witnesses, that while direct involvement of Freeport is reported only in the first mentioned case, and the company denies any links to the military, there are various ways in which it can be proven that Freeport was complicit in ABRI activities:

- Extensive ABRI military presence in the mining area serves to protect the Grasberg mine as the most important 'vital enterprise' in Indonesia worth \$50 billion.
- The 'Contract of Work' between the Indonesian Government and Freeport states that *"The company is contractually obliged to provide logistical support for any government official, including the army"* (Rio Tinto – Behind the Façade: pg 12f).
- The Munninghoff Report states that the Indonesian military forces used Freeport equipment, premises and vehicles to carry out human rights abuses and Freeport security personnel co-operated in the perpetration.
- Freeport facilitates military operations in the region by building military barracks for 6,000 soldiers (for US \$ 35 million). It further plans to build a naval base at Timika (Video testimony of O.J.Ondawame, West Papuan Information Kit, Revised 1998: pg 11).
- A Freeport security employee is reported to have said that terrorising tribespeople by shooting randomly is a common habit. ("Freeport McMoran at Home and Abroad", The Nation, July 31/August 1, 1995: pg 127).
- Freeport security employees and the military collaborated in guarding an unauthorised visitor. ("Freeport McMoran at Home and Abroad" (see above)).

- PT Freeport McMoran Indonesia Inc is owned 10% by the Government of Indonesia and 5.1% by PT Nusamba Mineral Industry, the latter company being at operative times controlled by the Suharto family.

Environmental damage

The mine workings have involved clearing of rain forest for mining operations, roads and towns. Evidence was given of the effects of dumping of mined material (40 million tonnes in 1996) into the Otomona-Ajkwa river system and on to the Arafura sea as waste rock which included a high concentration of material which is toxic to aquatic organisms. This resulted in the continued pollution of the river and prevented it from being used for drinking water, fishing, washing and transport. The extent of pollution is such that the Komoro people in the lowlands Koperopake area have been ordered to stop drinking river water and consuming sago, their staple food. Freeport has distributed 44 gallon drums for families to collect rainwater. The Environmental Impact Assessment Agency (Bapedal) of Indonesia has stated that some 133,000 hectares of land in PT Freeport Indonesia's mining concession in Irian Jaya have been seriously damaged and nearby rivers polluted. "Of that figure, only 124 hectares have been rehabilitated by the company" (*Indonesian Observer*, 25 February 2000). Evidence was also given that the OPIC Insurance Company withdrew its political risk insurance cover because of environmental and safety hazards in West Papua.

Other Activities of Freeport McMoran

While evidence concentrated on the specific case of West Papua, evidence was also provided of other activities of Freeport as a global corporation, which involved environmental damage and harm to local cultures.

Freeport McMoran Copper and Gold Inc.

Its operations included release of 193.6 million pounds of toxic material into air water and soil in 1993 and leakages of phosphoric acid and heavy metals in Louisiana and Florida. These leaks were reported by the EPA, and Freeport was required to take action. While leaks have been reduced by 87%, they still occur. (citing "Freeport McMoran at Home and Abroad", *The Nation*, July 31/August 1, 1995: pg 128).

In 1987 Freeport attempted to dump 12 million tonnes of radiocarbon gypsum waste into the Mississippi river which supplies drinking water to 1.5 million people. The authorisation was refused. (West Papua Information Kit, Revised 1998: pg 11)

Freeport in Eppawala – Sri Lanka

Testimony was given to us by Mr. Bala Tempoe, the Secretary General of the Ceylon General Workers' Union to the widespread public agitation against the impact of phosphate mining at Eppawala because of the fear of massive environmental damage, the early exhaustion of a valuable natural resource, the desecration of religious sites and the cultural impact of a large mining operation covering 56 Sq Kilometres.

The Involvement of Rio Tinto

- Rio Tinto is the largest mining company in the world. Evidence was provided of its involvement in Freeport operations in West Papua as a shareholder of 12% share in Freeport McMoran Gold & Copper Inc. Rio Tinto directly invested US \$850 million in West Papua projects. Evidence was given that such involvement was subsequent to the revelation of a considerable amount of human rights and environmental abuse in West Papua. The company obtained a 12% share in Freeport-McMoran Gold and Copper Inc. (FCX) since 1995 with 2 executive members of the Board of Directors.

Documentary information was also provided as to other alleged violations by Rio Tinto in a worldwide context. However, the Jury considered that in the absence of full testimony which could be provided at a later tribunal hearing, this could not be formally considered in this tribunal session.

Freeport and Rio Tinto Position on the Issues

The jury took into account documentary evidence available before the members of the jury in defence of the corporations in order to determine whether there was probable cause to believe that serious human rights and environmental wrongs had been caused by the corporation. This limited consideration is without prejudice to the right of the corporations concerned to make a full presentation of their defence at a subsequent Tribunal hearing.

Both Freeport and Indonesian Government have denied the findings of the ACFOA Report mentioned above. Freeport has also denied OPIC's allegations of serious environmental damage in West Papua and have claimed that "the damage caused was virtually non-existent over time". Freeport acted after OPIC withdrew the insurance cover by commissioning a US \$2 million environmental impact study to monitor toxicity and pledged US \$ 100 million for cleaning up of a project area when the mine closes. Freeport threatened OPIC with a law suit and OPIC renewed the insurance. However, it subsequently cancelled policies with OPIC and the World Bank's Multilateral Investment Guarantee Agency. It is alleged that this was done in order to prevent investigations into its mining operations. Freeport does not accept responsibility for the actions of the Indonesian Government.

Mr. John Hughes on behalf of the Rio Tinto group has denied allegations made by the Partisans NGO in relation to the Report of Bishop Munninghoff and the OPIC cancellation of insurance. He has suggested that the Indonesian National Commission on Human Rights report of 6 October 1994 has stated that Freeport (PTFI) were not directly involved in human rights violations in Irian Jaya and suggests that "RTZ only undertakes operations where we believe on the evidence that we can make a contribution to the local community".

Rio Tinto also claims in the document *The Way We Work* a code of practice which has regard for human rights.

The Jury's Findings and Conclusions

The Jury in its findings emphasised that the purpose of the Tribunal was not to make a final determination on the matter but to decide whether there was sufficient evidence to issue an indictment against Freeport McMoran for human and environmental wrongs and ask them to show cause before a formal session of the Tribunal that it had not committed these wrongs. The jury finds that an indictment should be issued against Freeport McMoran in respect of the following violations:

1. That they have deprived the Amungme and Komoro peoples of lands traditionally occupied by peoples and are carrying out mining operations without adequate compensation.
2. That they have abused the cultural and religious rights of the traditional owners.
3. That they have been complicit in the actions of the military forces which carried out human rights violations extending to personal injury, ill-treatment and torture.
4. That they have operated the mine in West Papua in a manner which caused serious environmental damage and degradation; in particular pollution of the main water sources and the land in a way which undermined the sustainable livelihood of the population.

Direct Freeport actions are alleged contrary to Articles 18 and 23.1 of the Universal Declaration of Human Rights and complicit activities are contrary to Articles 3,5,9,13.1, 18, 20.1, 21.1, 21.3 and 28 of the Declaration. In addition, they are contrary to the International Covenant on Civil and Political Rights Article 27 and the International Covenant on Economic Social and Cultural Rights Article 1(1).

In addition, its activities are contrary to Articles 11, 12, 15 and 16 of the Algiers Universal Declaration on the Rights of Peoples of 1976 and complicit activities are contrary to Articles 2-8 and 13-14 of the Algiers Declaration. We also point to Art 26 of the Charter of Health, Safety and Environmental Rights of Workers and Communities of 1994 which was proposed by the Permanent Peoples Tribunal.

The Jury is particularly concerned to note the close involvement of the Indonesian government and Freeport in the facilitation of processes and activities which cause harm. However, the Jury was not in a position to make a finding on the legality of the alleged illegal occupation of West Papua/Irian Jaya by the Indonesian government or on Freeport's complicity in this alleged illegality; therefore it makes no indictment on this count.

There is strong evidence of damage to the environment inspite of Freeport and Rio Tinto claims to the contrary. There is clear evidence of personal human rights violations including death, injury and torture on the part of the Indonesian authorities. There is strong evidence of Freeport complicity in these activities through the provision of transportation and other facilities to ABRI forces. There is also some evidence of direct involvement of Freeport employees in acts of personal violation.

There is a growing body of case law (including developed countries such as Australia, New Zealand, the US and Canada) that land rights of the aboriginal peoples must be respected. Such rights are also increasingly recognized in agreements between indigenous peoples and governments and are part of the Draft UN Declaration of the Rights of Indigenous Peoples.

The Jury also believes that the Freeport parent company should not be able to hide behind the corporate veil in relation to activities in West Papua of the Indonesian subsidiary. We quote in this regard the decision of the Fourth and Final Session of the Tribunal on Industrial Hazards and Human Rights in London 1994:

In accordance with the international practice providing for the piercing of the corporate veil, when it results in abusive consequences, the TNCs must in such a case assume responsibility for the acts of their subsidiaries which were ordered by the TNCs or which constitute implementing measures of TNCs decisions and policies.

The Jury urges future sessions of the Tribunal to examine evidence of violations by the corporations in other jurisdictions. First it will reveal and expose the overriding ethics of the corporation's strategies, and second it can be held responsible for its actions on a global scale. This is particularly relevant in cases where corporations have closed down their operations in the parent country and have shifted environmentally and labour standards to more friendly country. It would also be relevant to explore the exploitation of the relevant policy gaps in the global arena.

In the case of Rio Tinto, because of its small stake in Freeport, the issue is less clear, and we are not prepared at this time to issue an indictment against the corporation. We note that codes of practice by themselves should not constitute protection against human rights violations. Nevertheless the above cited letter from Mr. Hughes and the RTZ document the Way We Work appears to suggest that RTZ made its decisions in full knowledge of the circumstances in West Papua.

We are also not in a position to issue an indictment in relation to activities of Freeport and Rio Tinto other than those specifically alleged in West Papua. This is because they were less fully investigated, although we believe there is serious cause for concern in relation to the activities of both corporations, in particular in relation to Sri Lanka.

We note with interest the decision in *Beanal & others v Freeport-McMoran Inc and Freeport McMoran Copper and Gold Inc* (30 Env'tl. L. Rep. 20, 231) in the US Court of Appeals 5th District under the Alien Tort Claims Act and Torture Victims Protection Act. We note that the claim was dismissed on procedural grounds without the full hearing of evidence. We believe that it is necessary to have a full alternative hearing of the indictment against the accused corporation.

~~The Jury decided not to make a finding on the implications for
Freeport of the alleged illegal occupat~~ **Allegations and Deposititons
against Monsanto Corporation**

Monsanto Corporation has been accused of:

1. Development of technologies which can cause irreversible harm and the deliberate and illegal release of such technologies without due regard to the impacts on health, the environment and people's livelihoods.
2. Faliure to consult and to test fully products released into the environment in the interests of disclosing information to the public of the impacts of technology owned and controlled by the company.
3. The privatisation of public goods through undue use of power; failure to recognise legitimate rights of farmers and communities who have developed and acted as

guardians of plant genetic resources; and entering into alliances to accumulate monopoly control to the company over key aspects of agricultural production.

4. Promotion of its interests through misrepresentation, including false advertising and repression of informed debate.
5. Subversion of regulatory bodies and public institutions charged with protecting citizens under national laws or international regulation, policies or orders.

Evidence Produced before the Jury

The witnesses submitted documentary and oral evidence before the members of the jury.

The Case of Farmers in Andhara Pradesh (India)

The jury heard the case of farmers in Andhra Pradesh, India, who were provided with cotton seeds genetically engineered with *Bacillus thuringiensis* without their knowledge or consent. The corporation is alleged to have knowingly and deliberately released into the environment untested genetically engineered crops without complying with laws controlling the release of seeds by an agreement with the seed supplier Mahyco. The necessary governmental consent for commercial production had not been obtained. Evidence was provided which indicated that serious crop losses occurred to those farmers who planted these seeds. Many of the farmers, already in debt and from low cotton prices and high use of pesticides to which insects had developed resistance, became bankrupt and committed suicide.

The technology of genetic engineering processes which cross species has been presented by the corporation as precise, predictable and under scientific control. The Tribunal heard evidence that indicated that this technology is inadequately tested; that its release into the environment may lead to genetic pollution; and that once released it cannot be recalled. Monsanto has taken over a substantial number of seed companies to make it the third largest company in this sector. Patents have been taken out on genetically engineered seeds and processes of genetic engineering which invest in the company ownership of the seeds, while failing to recognise the intellectual property of farmers who bred seeds over centuries, or to compensate for the genetic resources freely extracted from other nations or communities. The PPT heard evidence that Monsanto an active interest in the 'terminator technology' which would ensure that seeds do not reproduce in the second generation in order to protect their commercial interests in developing countries where patent rights might be difficult to enforce, although it is recognised that the use of this technology has been suspended for the time being.

Evidence was given that the corporation promotes genetically engineered crops as being 'substantially equivalent' to natural crops in order to discourage governments and international trading regimes from requiring additional testing and safeguards which are required to protect human health or the environment. In introducing this technology the corporation is seeking monopoly control over agricultural production and through joint ventures with other corporations seeking to control production from provision of seeds through to harvest and processing.

The Tribunal also heard that undue influence had been exercised over national regulatory bodies and public institutions to encourage collusion in the release of technology before adequate safeguards have been developed. Evidence was presented in the case of Bulgaria which indicated that the company would knowingly take advantage of markets where regulation does not exist to release technology which would not meet standards elsewhere.

Evidence was given that the corporation has promoted advertising to encourage the public to believe that this technology would provide the best, and potentially the only, means of providing global food security. The corporation was found in the UK to have made misrepresentations in its advertising campaign. At the same time that the corporation called for reasonable debate, it used legal strategies under civil law to silence its critics, taking out a civil action against an activist of conscience which amounts to a lifetime injunction preventing her from pulling up genetically engineered crops or encouraging others to do likewise.

The product glyphosate has been used by the Colombian government, with US government support, to destroy the coca and opium crops of farmers which provide their only income. Some farmers in these regions have diversified to grow other crops, including rubber which takes seven years to mature and become financially viable. Glyphosate is a herbicide originally developed by Monsanto and the company is thought to be the supplier of the product for these anti-drug spraying regimes. The Tribunal heard that spraying has been carried out in a manner which destroys these crops and farmers livelihoods, without ensuring alternatives are available and with complete disregard to the impact on non-target crops. Furthermore the spraying has had an adverse effect on people's health and their environment. It was suggested in evidence that Monsanto has supplied this product formulation for application by an imprecise and uncontrolled method with the knowledge that it would have these impacts. As the manufacturer and vendor of this product, with full knowledge of the chemistry and its consequences, the corporation failed to exercise reasonable control over the uses of this product in a manner which would ensure safe use and prevent the adverse effects.

The Jury's Findings and Conclusions

The Jury finds that there is strong evidence of violations by Monsanto, and it should be indicted in relation to the following:

1. That Monsanto has developed technologies which can cause irreversible harm and has deliberately and illegally released such technologies without due regard to the impacts on health, the environment and livelihoods.
2. That it has promoted its ends through misrepresentation, including false advertising and repression of informed debate.
3. That it has attempted to subvert regulatory bodies and public institutions charged with protecting citizens under national or international laws, policies or orders.
4. In the case of the Indian farmers the PPT finds sufficient evidence to recommend that legal action be taken under national laws on the charge of aiding and abetting suicide.

Each of these findings constitute violations under current national and international laws. We consider that the technologies involved pose high risk of damage to health, the environment and peoples' livelihoods and thus constitute a hazardous activity in terms of the decisions of the Tribunal on Industrial Hazards and Human Rights of 1994 and of the Charter on Industrial Hazards and Human Rights of 1996. The case raises moral and ethical issues which indicate that currently the procedural operation of national and international regulation is inadequate to safeguard health, the environment and livelihoods. We note the progress made recently in two cases before tribunals in the United Kingdom and the United States in facilitating claims under Tort Law in an international context. The jury therefore recommends that in the context of the powerful combination of the rise of global corporations and the development of extremely risky processes and products, jurisprudence is needed to restate traditional principles of liability in new ways. We propose two such principles.

- a. Corporations are responsible in national and international jurisdictions for breaches of international human rights and environmental law norms, including the rights to livelihood and self-governance; and
- b. Corporations with close information and knowledge of high-risk products and processes and with strong power and influence over subsidiary organisations, governments and users are responsible for the harms caused by such products and processes, without transferring liability to third parties.

We elaborate on these principles in our concluding remarks to our decision in relation to the three corporations involved.

Allegations and Depositions against Union Carbide Corporation

The jury was informed of and confirmed the accusations against Union Carbide, which were considered by the 1992 Permanent Peoples' Tribunal which found:

1. That there was criminal negligence of the health and safety of the people living in the areas surrounding the factory in Bhopal, and the workers in the factory firstly by installing unsound technology to produce the pesticides in the plant and secondly by failure to maintain minimum safety standards in the plant.
2. That in the aftermath of the release of lethal toxic gases from the plant, Union Carbide failed to provide information to enable those affected to be treated.
3. That Union Carbide failed to respond to the need for adequate compensation to the victims of the company's negligence, avoiding legitimate claims.

This hearing related to the following additional accusations based on findings since 1992:

4. That Union Carbide had persisted in ignoring legitimate claims for adequate compensation and persisted in avoiding the jurisdiction of courts which could hear these claims.
5. That Union Carbide had failed to respond to new evidence of the impact on the health of over 120,000 children, women and men who suffer acutely from a large number of illnesses related to exposure.
6. That Union Carbide had failed to respond to environmental degradation arising from its activities in and around the Bhopal site.

Facts

Bhopal is considered to be the worst industrial disaster in the world. The gas leakage at the Bhopal plant of the Union Carbide Corporation on 2-3 December 1984 caused the death of thousands of people and injuries to hundreds of thousands. The plight of the victims has shocked the conscience of mankind. Despite a long period of 15 years having elapsed, very little relief has been provided to the victims, most of it grossly inadequate to meet their health care and other needs.

The PPT held a session on Industrial and Environmental Hazards and Human Rights in Bhopal between 19-24 October 1992. This was followed by the Fourth and Final Session in London in 1994. The conclusions and judgement of the Tribunal have been presented to this tribunal. The 1992 Tribunal found the Government of India and the Government of Madhya Pradesh “clearly guilty of violating the rights of the victims”. The 1992 Tribunal found UCC and its Indian subsidiary “guilty of having caused the world’s worst industrial disaster through the design and operation of the carbide factory in Bhopal”, by failing to provide sound technology; failing to maintain minimal safeguards at the plant; failing to provide information following the disaster to ensure people could be treated for the effects of the toxic gases released; and by avoiding their responsibility to provide compensation for the pain, suffering and loss of livelihoods which victims have experienced.

Evidence was produced before this Tribunal which reinforces the findings of the 1992 Tribunal. Fresh evidence was also produced of the developments since 1992 on the long term impact of the Bhopal disaster on the life and the health of the victims and environmental degradation that is being caused to the entire region. Evidence included the Report of the International Medical Commission in 1994, comprising of 15 professionals from 12 countries which considered the continuing severe health problems and recommended that “a substantial reorganisation of the health care delivery system is required to recognise that the current needs of the affected population are different from those in the initial phase of the tragedy” and that “a controlled evaluation of carefully planned intervention including rehabilitation and pharmacological strategies is needed”. The Commission also recommended that “the disease categories recognised as related to the gas release should be broadened to specifically include neurotoxic injury and post-traumatic stress disorders.”

Evidence was given that the Government of India had not acted on any of the recommendations of the International Medical Commission. Even after 15 years of the disaster 10-15 persons continue to die each month from exposure related diseases and their complications. The Government agency for recording disaster related deaths was closed down at the end of 1992. However, several autopsy reports clearly establish

that due to exposure to gas, deaths continue to occur. Even after 15 years, there are over 120,000 children, women and men who continue to suffer acutely from a number of exposure-related illnesses and their complications. The environmental degradation has become more and more clear and continues to strike the people there. Various subsoil tests in and around Bhopal indicate that environmental degradation of the region commenced even prior to the 1984 disaster for which UCC is directly responsible.

Evidence was given to the effect that Union Carbide had continued to resist actions in courts in the United States on the ground that jurisdiction should properly lie with Indian courts. Yet it has failed to submit itself to the jurisdiction of Indian courts.

The attention of the Tribunal has also been drawn to the complaint filed in November 1999 against the UCC before the US District Court, New York for grave violations of international law and fundamental human rights, under the provisions of the Alien Tort Claims Act.⁴

The Jury's Findings

The Jury noted that the purpose of the Tribunal was not to make a final determination on the matter but to decide whether there was sufficient evidence to indict the alleged violators and ask them to show cause why they were not guilty of committing the violations concerned. In relation to this case, however, there has been a full determination of the main issues in Tribunal hearings in 1992 and 1994. This tribunal confirms:

1. That there was criminal negligence of the health and safety of the people living in the areas surrounding the factory in Bhopal, and the workers in the factory firstly by installing unsound technology to produce the pesticides in the plant and secondly by failure to maintain minimum safety standards in the plant.
- * The complaint is now under appeal to the court with appellate jurisdiction
2. That in the aftermath of the release of lethal toxic gases from the plant, Union Carbide failed to provide information to enable those affected to be treated.
3. That Union Carbide failed to respond to the need for adequate compensation to the victims of the company's negligence and ought to avoid many legitimate claims.

This hearing considered to the following additional accusations since 1992.

1. Union Carbide has persisted in ignoring legitimate claims for adequate compensation and persisted in avoiding the jurisdiction of courts which could hear these claims.
2. Union Carbide has failed to respond to new evidence of the impact on the health of over 120,000 children, women and men who suffer acutely from a large number of illnesses related to exposure.
3. Union Carbide has failed to respond to environmental degradation arising from its activities in and around the Bhopal site.

⁴ That complaint is now under appeal to the court of appellate jurisdiction.

In consideration of the evidence produced, the Tribunal indicts Union Carbide in respect of the following wrongs:

1. That (in confirmation of the finding of the 1992 Tribunal) Union Carbide has committed acts of gross negligence and environmental degradation resulting in continuing deaths, illness and sufferings of the people and has failed to deal with these harms which have continued unabated since 1992.
1. That UCC has deliberately evaded due process and jurisdiction of the Indian courts. Those accused of criminal negligence in respect of the Bhopal disaster continue to defy the summons issued by the Indian courts.

The Jury also finds that in view of the enormous impact of its action affecting the lives of hundreds of thousands of people, and its systematic callous behaviour towards its obligations, Union Carbide should be made responsible before a court which recognises International Corporate Criminal Responsibility.

Jury's Findings on General Principles of Corporate Responsibility

The Tribunal was greatly assisted by the deliberations of the IRENE seminar (see Appendix I) on controlling Corporate Wrongs: The liability of Multinational Corporations, and the discussions in the Reflexive sessions (see Part III of this Report). We suggest the following principles for determination of corporate responsibility:

- a. Corporations are responsible in national and international jurisdictions for breaches of international human rights and environmental law norms, including the rights to livelihood. This is a principle of the jurisprudence of the Peoples Permanent Tribunal established in particular in the Findings of the Third and Fourth Sessions of the Tribunal on Industrial and Environmental Hazards and Human Rights in Bhopal in 1992 and London in 1994. We note that significant though not sufficient progress has been made since then in the application of this principle by courts in the United States under the Alien Tort Claims Act. In particular, we approve of the statement in the *Filartiga* Case from a federal court in New York

“In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognise that respect for fundamental human rights is in their individual and collective interest...Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence”. (630 F. 2d at 890).

We call on governments and international organisations to ensure that the principle enunciated in the Tribunal is implemented.

b. Corporations which have detailed knowledge of products and processes and have strong power and influence over subsidiary companies, governments, local suppliers and users in relation to those products and processes, are responsible for -

- i. Breach of personal human rights;
- ii. Injury to people and their livelihoods;
- iii. Damage and risk to the environment;

caused by those products and processes without being able to deny responsibility by claiming that governments, local suppliers or users were solely responsible for the activity concerned.

This principle extends the principle known in Tort and Delict laws which deals with inherently dangerous products and processes.

In particular, the Tribunal urges that corporations should not be able to hide behind the corporate veil in such circumstances. The principle is whether the corporation concerned has a real and substantial connection in practice as indicated by its actual power and influence over other parts of the corporate structure as indicated above.

c. Corporations which have a real and substantial connection as noted above should not be able to escape liability on the basis that the jurisdiction in which the action is brought is not the most convenient forum unless it is clearly established that equivalent principles and standards of liability apply in the other court.

d. We also support the principle in accordance with Article 8 of the Charter on Industrial Hazards and Human Rights of 1996 which proposes the following:

5. All persons have the right to a living environment free from hazards. In particular, this right applies where hazards arise from:
 - a. the manufacture, sale, transport, distribution, use and disposal of hazardous materials;
 - b. any military or weapons application, regardless of national security.
6. Any person has the right to raise a bona fide complaint to the owner or occupier of an economic enterprise regarding activities of the enterprise which he or she believes are hazardous to the living environment.
7. Any person living in an environment from which it is impossible to eliminate a hazard shall have the right to protective safety systems necessary to eliminate any such hazard as far as possible. The owners or occupiers of the concerned hazardous enterprises may not refuse to provide the most effective systems available on the grounds of cost or inconvenience.

Members of the Jury

President: **Freda Meissner-Blau (Sociologist)**
President of ECO Europe
Braunerstrasse, 10/a
1010 Vienna, Austria

Secretary General: **Gianni Tognoni**
Italy
Permanent Peoples' Tribunal

Elmar Altvater
Germany
Professor of Political Science and Economy
Free University Berlin - Germany
President of Lelio Basso International Foundation

Peter Custers
The Netherlands
Director, Bangladesh Peoples Solidarity Centre
Member of European Clean Clothes

Barbara Dinham

England

Programme Director Pesticide Action Network – UK

Miren Etxezarreta**Spain**

Professor of Applied Economy

Universidad Autonoma de Barcelona, Spain

François Houtart**Belgium**

Sociologist

Director Centre Tricontinental, Louvain Secretary

Of the World Forum of Alternatives

Abul Paliwala**UK****Tanzania**

Professor of Law

Member of the Law in Development Programme

University of Warwick - England

Jitendra Sharma**India**

Senior Advocate at the Supreme Court Secretary

General International Association of Democratic Lawyers

Case Presenters

- | | |
|---|---|
| <ul style="list-style-type: none"> • Freeport McMoran Copper & Gold Inc.
and Rio Tinto | <p>Richard Solly</p> |
| <ul style="list-style-type: none"> • Monsanto | <p>Ward Morehouse
Elyssa Santos- Abrams
Eric Palmer</p> |
| <ul style="list-style-type: none"> • Union Carbide Corporation | <p>Ward Morehouse
Elyssa Santos- Abrams
Eric Palmer</p> |

PART III

REFLEXIVE SESSION

Reflexive Sessions: Presenters

1. Panel on Global Corporations and the Subversion of Democratic Control. –
Convenor – **Jayan Nayar**

Agency Relationships Between Corporations and Home Country Governments -
Patricia McKenna, MEP, Ireland.

Corporate Penetration, Public Secrecy and Corruption in Host Countries - **Pushpa Bhargava**, Anveshna Consultancy Services, India or **Bala Tampoe**, Ceylon
Mercantile, Industrial & General Workers' Union (CMU)

Global Corporations and the Media - **John Madely**, Journalist and Editor of UK Food
Group Report, "Hungry for Power: The Impact of TNCs on Food Security", UKFG,
London.

Global Corporations and the Appropriation of the United Nations –**Ward Morehouse**,
International Centre for Law and Development, New York.

Global Corporations and Public Misinformation – **David Ransom**

Strategic Legal Action Against Public Participation (SLAPPS) and the Silencing of
Dissent - Debbie Ripley, Legal Team of Greepeace, London and/or representative of
genetiX snowball group Oxford, - **Jarman Melanie** Corporate Watch

2. Panel on Corporate Wrongs and Strategies of Resistance.

Convenor **Gianni Tognoni**

NGO Action and Strategies of Resistance to Corporate Rule - **Mike Brady**, Baby Milk Action, UK.

A Peoples' Media Against Corporate Violence - **Laurie Flynn**, Freelance Journalist, London and/or **Barbara Stapleton**, Freelance Producer, London

The International Regulation of Corporate Activities: Prospects and Pitfalls - **Peter Muchlinski**, Queen Mary and Westfield College, London

Social Movements and Solidarity Actions: Seattle and Beyond - **Ward Morehouse**, Elyssa Santos-Abrams and Eric Palmer, Council on International and Public Affairs, New York. **Hugh Warwick**

The Prize and Price of Direct Action - **Leo Saldhana**, India and/or representative of genetiX snowball group, Oxford

Women Demanding Justice: Experiences of the Rural and Indigenous Women's Group in Thailand - **Anchalee Phonklieng**, Inter-Mountain Peoples' Education and Culture in Thailand Association (IMPECT), Thailand.

Between Mass Torts and Corporate Manslaughter: Prospects for Legal Action Against Corporate Impunity – **Elyssa Santos-Abrams**

Voices Against the Crime of Silence: An Agenda of Peoples' Legality for the Permanent Peoples' Tribunal - **Jayan Nayar**, University of Warwick.

Reflexive Sessions: The Power of Transnational Corporations in the Global Political Economy

Jury's Deliberations

The objective of the tribunal was not merely to consider the specific cases against the corporations concerned but also to consider wider issues in relation to the nature, role and power of transnational corporations in the global economy, and the role played by state and international governmental and non-governmental organisations. Submissions were made by a number of experts from activist groups, media

representatives, lawyers and academics. In this section we present our conclusions from the reflexive deliberations.

The Permanent Peoples Tribunal on Global Corporations and Human Wrongs was convened as a result of a realisation that the workings of what can be regarded as 'dominant law' inflict a second violation on communities of suffering. The first is the original violence which imposed upon them the condition of being the violated. The second, through a judgement of denial,⁵ results in the apparent negation of their experiential suffering from the violation that instead is the consequence of mere misfortune. Law has the power and authority, it seems, to 'categorise' suffering, its determination and 'judgement', inscribing upon the social memory the thin, but crucial, line between 'violation' and 'misfortune'.

But this power of law to silence and erase from public memory truths of violation can only prevail if suffering humanity consists of nothing more than mere automatons whose own judgements become suspended, even erased, by the pronouncements of dominant law. Docile resignation to dominant law's judgement and constructions of reality, however, is not the propensity of living human persons and communities. The power of judgements on truths of suffering resulting from violation is such that the refusal to be subjugated by dominant law's judgements of misfortune or total denial of the realities of suffering is only fuelled by the greater protestations of law to objective truth and final judgement. The Tribunal, therefore, seeks to reinvigorate the struggle to reclaim the right of the violated peoples to demand judgement.

Our approach in this matter is indicated by that of the Third Session of the Tribunal on Industrial and Environmental Hazards at Bhopal in 1992:

Traditional human rights law is not inclined to address industrial and environmental hazards. Human rights standards have too often been narrowly interpreted to exclude from their purview the anti-humanitarian effects of industrialisation and environmental damage. Yet the injustice postulates for our approach are clear. It is of little difference if the death which comes to the sleeping victim in the middle of the night is caused by a politically-motivated

⁵ The 'judgement of denial' may take two forms. First, the denial of access to a legal forum of judgement wherein the truths of suffering may be voiced through a diversity of means. These range from the simple impediment of the lack of resources to bring an effective legal claim to the more sophisticated, yet increasingly utilised mechanism of exclusion through doctrines such as 'forum non conveniens' which provide legal justification for the silencing of voice through the claim of jurisdictional inappropriateness.

Second, through the determination made by and in law that the truths of suffering fail to satisfy the strict evidentiary and causal tests imposed by law in order to transform the assumption of misfortune into the naming of violation. Both these methods of denial render the truths of suffering of the victimised officially invalid within the law-constructed public memory. For a context specific discussion of the violence of the doctrine and application of 'forum non conveniens', as the historic legacy of dominant law to the struggle for the judgement of violation for the victims of the Bhopal 'disaster', see, U. Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, The Indian Law Institute, Delhi, 1986. For a recent case in which rules of procedure have been used to deny claims in relation to Freeport McMoran in a claim related to the case before this Tribunal, see *Beanal v Freeport –McMoran Inc.* 197 F.3d 161, 30 Env'tl. L. Rep. 20,231 (5th Cir. (La.), Nov 29, 1999 (No. 98-30325). However, this has to be set against the significant but limited progress against the 'forum non conveniens' doctrine in the recent case of *Ken Wiwa v Royal Dutch Petroleum Co.* 226 F. 3d 88 (2d Cir.) (Sept 14, 2000).

death squad or by a cloud of poisonous gas. In either case, the right to life of an innocent person is violated in an inexcusable manner. In either case, the basic moral impulse of humanity is brutally transgressed, and in either case the international community has a profound interest in taking steps to ameliorate the effects of the violation and to prevent its repetition. (p14).

The aims of this session of the Tribunal on Global Corporations and Human Wrongs were as follows:

- to provide a forum for the voicing of truths of violation and through the findings of the Tribunal the formation of judgement on corporate wrongs in specific cases before the tribunal in accordance with international legal norms;
- to challenge the silence of dominant legality where it falls short of providing effective relief against corporate wrongs and to create instead a public memory of people's struggles against these wrongs;
- to consider reflexively the responsibility of states, international organisations and global corporations in relation to the structural and systemic wrongs inflicted by corporate globalisation in order that the resulting exploitation in all its forms is denied the status of normalcy in human relations.

In addition, the tribunal benefited considerably from the deliberations of the IRENE workshop. We also append, with the organisers' consent, extracts from the Report of the IRENE workshop. We believe that the appended report provides many practical strategies.

Background data

The cases we have studied involve only three out of a universe of 39,000 transnational corporations with 270,000 affiliates according to the UN. Out of the 200 largest among those, 175 have their headquarters located in only five countries: USA, Japan, Germany, UK and France. This is clear indication of the unevenness of distribution of wealth, income and private corporate power in the world. The top 20% of the world's population have 86% of global GDP while the bottom 20% have only one percent. The combined assets of the 200 largest corporations were 17% of world GDP in the mid-sixties. By 1982 they had grown to 24% and by 1995 to over 32%.

Moreover, the importance of financial institutions and financial flows has increased remarkably during the final decades of the 20th Century. Not only did the annual flows of long term foreign direct investment (fdi) increase during the nineties from around

\$25 billion to around \$130 billion, but the portfolio and short term capital flows have grown much faster than fdi. Official public flows however have diminished and only grew temporarily due to the severe financial crises in Mexico in 1994/95 and in Asia in 1997. The short term orientation of private flows is responsible for the higher volatility of prices, interest and exchange rates, the increased vulnerability of indebted countries, the crisis- riddenness of the system and the orientation for short term shareholder value in the developed countries which has triggered a speculative mania even in social strata which traditionally have been insulated against it.

Furthermore, in the last decades new financial institutions (pension-, mutual-, hedge-funds) trying to capture the saving capacity of the upper and middle classes of the world have appeared in the market offering a whole set of new financial products (e.g. derivatives). The funds have invaded with these new financial instruments so called "emerging markets" in Asia and Latin America; their investments overseas had been until the outbreak of the Asian crisis at the rate of 30 per cent a year. Short-term goals led investors to repatriate invested funds very suddenly and by doing so triggered a devastating devaluation of impacted currencies. Real incomes of peoples declined, in some cases pushing them into poverty. Financial flows have divided the people of the world into debtors and creditors and are one of the main reasons for the great transfers of profits from the debtors to the creditors. The same phenomenon is reflected in a value transfer from the poor to the rich people of the world.

Both phenomenon, direct investments and financial flows, have widened and deepened in inequalities between economic actors on the world stage, have concentrated wealth to levels not even envisaged a few years ago and contributed enormously to the power of the transnational corporations that control all this movement. Therefore we can conclude that the behaviour of the three corporations studied during this session of the PPT in Warwick is not exceptional. Everywhere when there is little possibility of organised resistance, the logic of the dominant economic system, based on the hegemony of capital, leads to the exploitation of human work and the destructive utilisation of natural resources. Self-determination of peoples is undermined and democratic legitimisation is undermined. The increasing drift for private profit, its maximisation and the accumulation of capital are as always in the history of capitalism the basis of growing inequalities and unevenness of human development. But never in history have capital revenues been growing so fast on a world scale, concentrating more and more power in fewer and fewer hands, paving the way for financial speculation and enriching a minority of people in a scale unknown in times before corporate-driven globalisation.

The unconstitutional power of private corporations

As a consequence, private institutions - both transnational corporations active in extraction and production and financial institutions - have extended tremendously their power vis-à-vis the sphere of public interest in recent decades. The political systems have lost part of their sovereignty and with it their capacity to limit and regulate market forces. The latter are supported by a whole system of private credit rating

agencies, huge international law firms, and colluding mass media which ideologize the private system of corporate power as the only guarantee of individual freedom. Private foundations public-section and scientific institutions are co-opted so that a private-public system has grown up which serves the demands of the TNCs. This tendency originated in the 70s with the deliberate policy of deregulation in the G7-states, which was exported to most countries of the global South. International organisations such as the IMF and the World Bank played a decisive role in promoting and enforcing greater openness of national economies to the powers of the world market, i.e. to private TNCs. All the countries of the world are now integrated in greater or lesser measure into a single world market system, even if very asymmetrically but not all can participate equally in the pressured benefits offered by the world market.

The policy of deregulation has enlarged the space of private, politically and socially unregulated valuation and accumulation of capital. Market laws thus are the only laws which private firms in the global system follow. The TNCs strive to mould national and international policy and build up the international organisations in ways that suit their interests. The proposed but now abandoned Multilateral Agreement on Investment (MAI) negotiated in the OECD and the WTO are good examples of creating institutions to foster private and powerful interests. Postulating that free trade is beneficial for all (after the rule of comparative cost advantages), they create a space that is less and less accountable to politically legitimised authorities. In consequence the benefits of free trade are extremely unevenly distributed among participants of the global trading system and, moreover, there is no political institution capable of correcting the inequalities which the world market has produced.

The use of legal means by corporations to escape social responsibilities has become a general practice, including complex systems of subcontracting, the blurring between public and private sphere and the establishment of very powerful organisations for corporate lobbying to influence international legislation and decision making procedures of political bodies. The weakness of the political arena thus opens room for the intrusion of organisations serving the private corporate world.

TNCs try very hard and have many opportunities to negate state law and to establish their own law. Many TNCs set up their own 'soft law', i.e. codes of conduct, to which this document refers elsewhere, with the intention of avoiding "wild" exaggerations of capitalist behaviour and in order to convince the public that their conduct is proper and that they are observing the norms of democracy, good corporate governance, social responsibility and ecological sustainability.

Because TNCs are operating in a largely de-regulated sphere, they are able to play different national states off against one another. They also often avoid submission to national laws which must be obeyed by ordinary citizens, and exert an unconstitutional economic, and in many cases also political power, which provides them impunity for

their wrong doings. The three cases we have analysed have shown clearly this dismal state of affairs.

The Impact of TNC-power on the social, ecological, political system

The Jury of the PPT in its deliberations has identified – besides some positive effects stemming from the deepening of the international division of labour – many negative influences of corporate power on social life of people across the world, on the local and global environment, on the functioning of political and economic democracy. Some of these impacts are mentioned below:

(a) Because of influence and control of TNCs, scientific research is more and more becoming a means of enhancing corporate profit rather than serving human kind. The spectacular development of the so-called ‘life sciences’ is being used to increase the power and the profitability of private corporations. Even public financing of scientific research is oriented to serve the interests of TNCs. More and more, life itself and its evolution are controlled by private companies, and international organisations, like the WTO are used to give them legal basis and legitimacy.

(b) All kinds of pressures are also exercised on individuals and on small producers to adopt new techniques of agriculture, favouring the corporations. Southern countries being less able to protect their populations are under heavy pressure, not to mention widespread corruption by TNCs.

(c) Irresponsible industrial risks are taken, especially in countries with lax standards and limited capacities to enforce them, resulting in death or permanent incapacity of thousands of people. In many instances, the accountability of the companies is never properly established and no adequate compensation is given to the victims. It also must be added that destruction of natural environment is not only endangering the survival of a great number of peoples but is irreversibly handicapping the future development of ecosystems and of social systems dependent on them.

(d) The control of new sectors of human activities in the field of communications and the life sciences is being concentrated in fewer and fewer hands, enhancing their monopolisation by TNCs. The effect is an impoverishment of diversity in public opinion as well as in the evolution of species.

(e) Such behaviour undermines democratic processes at all levels and in many arenas, weakening the decision powers of the states, altering the role of mass media and hindering citizens in their exercise of their rights to control their collective existence and their physical and cultural life.

(f) Since globally operating firms can move from one country to another to take advantage of lowest costs – wages, taxes, environmental regulations etc. – workers

and their organisations are weakened. This happens in the broader labour market and on the plant level. Moreover, because of the dismantling of the equilibrating capacities of the welfare state, labour is losing bargaining power against private corporations.

(g) Women in particular are disadvantaged. While deregulation is claimed to open the labour market, women are the first to lose their jobs or they are relegated to low-skill, low-pay insecure jobs. Governments aiming at attracting foreign investment by TNCs are supportive of lowering wages, worsening labour conditions and standards and cutting social programs towards more gender inequity. Even in developed industrialised countries social expenditure for women has dramatically been cut. Single mothers therefore have become a pauperised population group. In countries of Eastern Europe and of the South, TNCs very often subcontract with firms with lower labour standards than the TNCs based in industrialised countries, which are bound by stricter labour laws and contractual regimes. Many subcontractors use women as cheap labour, exploiting them even more than their male counterparts.

WTO agreements on trade-related investment measures and intellectual property already have severely damaged local food production (e.g. because of monopolisation of seeds as demonstrated in the case of Monsanto). Having to compete with subsidised imported food, subsistence farmers – in many countries a majority of them women – are forced to shut down. They then become part of the “reserve army” of migrants into urban shanty towns. At best they form part of the flourishing “informal sector” in many countries of the South.

Corporate control over the entire food chain is an impediment to women’s role in food production and consumption, i.e. food security, a central aspect of human security in general. WTO-guaranteed intellectual property rights undermine bio-safety and are threatening biodiversity, indigenous traditions of health care and local seeds and plants. It was primarily through the initiatives of women who campaigned against Monsanto’s terminator technology that it has for the time being been shelved.

We can conclude this part of the reflexive session with the words of the International Forum on Globalisation of March, 2000:

‘The interests of global corporations are in deep conflict with the interests of the world’s peoples who are paying a heavy price in terms of economic insecurity, environmental decay, social disintegration and growing polarisation and inequality. Large numbers of people are being politically and economically excluded by a system that caters only to corporate well being to the disregard of citizen well being’ (United States-India Citizens Declaration for a New Solidarity, New Delhi, 11.03.00).

Corporate powers dominating the world economy are not only wrong-doers which are illegally violating human and peoples rights, breaking national law, and destroying or degrading human and natural environments. It is the legal framework of the world

economy itself which allows legal, but harmful actions. Therefore the gap between the legal framework and that which is morally and ethically acceptable under internationally recognised human rights and environmental standards is widening. This failure in globalised capitalism can only be overcome through new forms of political regulation of private corporations.

But political regulation of private corporations is becoming more, not less, difficult at the international level with corporate penetration of the UN system. A telling example is the Global Sustainable Development Facility which is intended to foster "partnerships" between global corporations and the United Nations Development Programme⁶. This penetration must be vigorously opposed if global corporations are ever to be held accountable for their penetration of human wrongs.

Strategies to control the corporations

Codes of Conduct

The fact that globalisation has accentuated the lack of accountability of transnational corporations has intensified the debate on codes of conduct in which standards are set for the operation of transnational corporations, as have efforts by civil society organisations to get such codes accepted and implemented. At the same time as such corporations have further internationalised their production, relocating production facilities from one country to another, and farming out production to subcontractors, they have deprived both workers and consumers in countries of the North and of the South of the means of controlling TNC's decisions and behaviour.

The standards set in Codes of Conduct which have been formulated by organisations and institutions that are independent of transnational corporations, on such matters as transparency, working conditions and environmental protection, are generally based on internationally recognised legal documents, such as the Universal Declaration of Human Rights, the related covenants on economic, social and political rights and international conventions agreed on by national governments. For instance, the code of conduct formulated by the European Clean Clothes Campaign (CCC) is primarily based on ILO-Conventions. Hence, although independently formulated Codes do not have the status of international law, they do form an 'opening wedge' in the struggles waged by workers, environmental activists and others to make global corporations accountable.

The implementation of codes of conduct includes at least three major steps, namely: the dissemination of information regarding their contents towards those who are directly or indirectly affected by the behaviour of transnational corporations; the

⁶ After the Tribunal, UNDP announced that it was abandoning this initiative. However, the UN Secretary General has in the mean time launched a still more ambitious effort called the Global Compact. For a comprehensive review and a critical analysis of corporate penetration of the UN system, see Anthony Judge, "Globalization: the UN's "Safe Haven" for the World's Marginalized the Global Compact with multinational corporations as the UN's "Final Solution", Brussels: Union of International Associations, December 2000 <http://www.via.org>.

development of an independent monitoring mechanism which as the jury of the PPT noted in its 1998 judgement, is a 'minimum condition' for meaningful codes of conduct; and, thirdly, the building of structures capable of enforcing such codes, and of sanctioning transnational corporations violating the Code's provisions. Unfortunately, although codes of conduct which have been put forward through various international campaigns, have helped in building up pressure upon TNCs, and in a number of cases have contributed towards the formulation of new national laws, no independent code of conduct so far has been credibly implemented on all these three counts.

On the other hand, in many cases transnational corporations themselves have taken the initiative to formulate codes of conduct to help them enhance their image. In almost all cases, such company-codes are vaguely formulated, are voluntary in nature, and lack any specific provisions regarding independent monitoring. Thus, the Code of Conduct of the Freeport Corporation contains only a vague provision regarding the 'consultation' of people living in areas in which the mining corporation plans to operate. And the Charter of the Nestle company, which has been the target of a very prolonged international campaign, is silent on a number of clauses contained in the WHO/UNICEF international code on marketing infant formula.

This session of the Permanent People's Tribunal has heard elaborate evidence regarding three particularly grievous examples of the almost total lack of accountability of transnational corporations today. In recording the severe violations of basic human rights by Freeport, Monsanto and Union Carbide, the experience of this PPT session strongly underlines the enormous urgency of addressing the lack of unaccountability of TNCs. While the further development of global people's resistance is an absolute precondition for imposing meaningful accountability on TNCs in the future, and while the incorporation of provisions of international codes in national laws is also crucial, there are several possibilities at the level of international institutions that need to be pursued as well.

One is the resumption on the work of formulating a general code of conduct for Transnational Corporations. The now defunct United Nations Commission on Transnational Corporations (UNCTC) initiated this work in the past. The draft code of conduct of the UNCTC comprises both issues relating to consumers' rights and environmental issues, as well as workers' rights (with reference to the Tripartite Declaration of the ILO). The Working Group on TNCs constituted under the UN Human Rights Commission has resumed the task of drafting general a code of conduct on the obligations and behaviour of TNCs. It is important that an ultimate general code not be limited to civil rights alone, but also comprise other basic human rights standards, such as regarding working conditions and protection of the natural environment.

Further, while it is crucial that the work of independent monitoring carried out by trade union organisations, non-governmental organisations and other civil society groups

should be continued, - the work of concretely monitoring global corporations should also be undertaken by international institutions. Such an institution or institutions could either be an existing UN body, a revived UNCTC (as suggested in the European Parliament's resolution of January 1999), a new international agency or some combination of the foregoing. Yet whatever the institutional form ultimately chosen, it is essential that there be a sector-wise approach, i.e. that separate work be undertaken on, for instance, corporations manufacturing pesticides, corporations selling breastmilk substitutes, and retail trading and producer companies dominating the international garment sector.

Lastly, the constitution of the International Criminal Court of Justice signifies that henceforth the adjudication of crimes committed by private citizens is no longer the exclusive domain of national judicial institutions. A parallel judicial institution at the international level should be constituted, specifically entrusted with the task of adjudicating human rights violations committed by private transnational corporations as well as for the wrongs they commit in violation of internationally agreed Codes of Conduct, as articulated by Professor François Rigaux in a paper submitted to the Tribunal.

Treaties

Another mechanism that could be used to control the behaviour of TNCs is, of course, international treaties signed by the different countries. The most conspicuous one. Of an economic nature, signed in recent times is the conversion of the GATT into the World Trade Organisation. In principle these treaties could contain clauses directed to make TNCs accountable for their behaviour. However, as has already said above, these are precisely the types of institutions that have been established under the guidance and instigation of TNCs, namely, to foster a global policy directed at liberalising trade and eliminating most public regulations that existed in the past. This leaves the way open for the operation of the norms of disembedded markets. The nature of the treaties and other international agreements that have been negotiated in recent years go in the opposite direction and have been instrumental in allowing the operation of private interest unhindered by any sort of regulation. The role of enhancing de-regulation played by the international organisations as the IMF and the World Bank has also been commented upon previously.

In fact one of the main features of globalisation is the substitution of agreements between states for the unbridled operation of TNCs. Since they are private institutions, they are not submitted to international law, leading to a situation whereby:

“Transnational corporations which have the means to endanger the life, the health and the well-being of entire populations are not accountable before any courts for their wrongs... The gap within the international legal order is all the more blatant after the institution of a permanent criminal court which has no

jurisdiction at all on wrong doing alleged against corporations... The conclusion to which one is brought is the actual impunity of corporate wrongs and specially when long distance separates the decision maker from the victims, that geographical element being combined with the difference of territorial jurisdiction and the impotence of most states to curb corporate power” (François Rigaux: An International (Criminal) Court to Adjudicate Upon Corporate Wrongs: submission to the PPT 1999)

The recent litigation in US and British Courts to hold corporations liable for harms casued in other countries (under the Alien Tort Claims Act and common law doctrines on liability and negligence) are important efforts to confront corporate impunity but have had little significant impact on corporate behavior this far. The need for new insituational arrangements to deal with this grim reality is greater than ever.

Towards a perspective of peoples Jurisprudence

The Tribunal is aware of the broader challenges that confront the task of building a peoples’ law. These are indicated below.

The PPT stands as a deviant ‘institution’ within the institutional landscape of dominant law. For good reason, it would be anathema for dominant law to countenance the usurpation of its assumed role of public judgement by an institution and process of legality which does not abide by its strictures, scriptures and disciplines. But it is precisely this deviance which provides the PPT with the claim to an alternative legitimacy that may derive its sustenance from the communities that have been expelled from the embrace of dominant law’s ‘protection’. Here, therefore, lies the challenge: how might attempts to initiate a peoples’ legality move towards securing spaces for the voices of the victimised to emerge into the public conscience.

The PPT recognises that the following questions persist:

What are the most important contributions that can be made towards effecting a peoples’ legality that is derived from judgements of the victimised? In considering this question, it is critical that the dual challenge of provoking public attention to the realities of a global political-economy in which the violence of corporate wrongs is massive and pervasive, and reasserting solidarity, support and assistance to communities of resistance to these corporate activities, be constantly borne in mind.

How can this aim best be achieved in a sustained and inclusive manner so as to amplify the voices of the violated to the maximum extent possible so as to effect a peoples’ legality which transforms judgements of ‘rights’ and ‘wrongs’ and transforms the assumption of the ‘normality’ of corporate violence to the demand for the recognition of its criminality?

Appendix I

IRENE

International restructuring education network Europe

And

FONDATION DES DROITS DE L'HOMME AU TRAVAIL

Extracts from the Conclusions of the IRENE Workshop on Controlling Corporate
Wrongs

**CONTROLLING CORPORATE WRONGS: THE LIABILITY OF
MULTINATIONAL CORPORATIONS**

Legal possibilities, initiatives and strategies for civil society

Report of the international IRENE seminar on corporate liability and workers' rights held at the University of Warwick, Coventry, United Kingdom, 20 and 21 March 2000. We publish a brief extract indicating the conclusions and strategies for action of the above Workshop.

The seminar

In April 1999 the Department of Public International Law at the Erasmus University of Rotterdam organised a colloquium on corporate responsibility – one of the first seminars to address these issues (*see* brief report, ER 4.1). At the same time IRENE, during its work on codes of conduct, had noticed that lawyers were interested in NGO initiatives around corporate social responsibility, while NGOs were reluctant to undertake legal action against MNCs without first getting information and support from specialists in international law. The present seminar, therefore, was organised jointly by the Netherlands-based NGO network IRENE and the School of Law at the University of Warwick to enable practitioners of different kinds to build on the theoretical insights of the Rotterdam seminar and begin to discuss what can be done in practice to increase MNCs' accountability and ensure implementation of the international instruments for the protection of human and environmental rights.

The aims of the seminar were:

- to bring together different groups working to achieve corporate accountability: lawyers, trade unionists, academics/researchers, development NGOs (NGDOs) and campaigning organisations;
- to review legal initiatives aimed at controlling corporations and examine the legal and pseudo-legal issues raised by some key cases;
- to suggest future directions and initiatives for civil society in making corporations more accountable to states, citizens and the planet.

About 40 people, representing a very wide range of relevant experience and expertise, attended the seminar. Lawyers involved in specific cases of legal claims against MNCs, or with institutional initiatives such as the OECD Guidelines Multinational Enterprises or the UN Subcommission for the Promotion and Protection of Human Rights, were joined by academics and researchers from several countries, the international mining and chemical industry trade union ICEM, and members of NGDOs and advocacy and campaigning organisations from several European countries.

The seminar was held as a roundtable and used a number of short presentations to stimulate debate and brainstorming on strategies, together with exchange of practical experiences. This meant that the discussion was both wide-ranging and intense; occasionally diffuse, but rich in ideas coming from a wide spectrum of perspectives on this increasingly urgent issue of rights, justice and governance.

It is worth emphasising that this seminar did not pretend to arrive at definitive conclusions or strategies. Active collaboration between lawyers and concerned NGOs on these issues is still in its early stages, and this seminar should be viewed as work in progress.

‘Laws are created by and for the powerful, but once they are there, they can be used against them.’

V STRATEGIES AND METHODS TO IMPROVE CORPORATE LIABILITY

Sharing and comparing experiences at the seminar generated some key questions of strategy:

- Can MNCs contribute positively to development, and how can they be encouraged to do so?
- How can lawyers, trade unions, and NGOs work together with and for claimants?
- What are the advantages and disadvantages of different strategies?

1 Strategies

Continuing and intensifying direct legal challenges

However murky the corporate smokescreen is, it remains just a smokescreen. All corporations are obliged to have legal existence, so there must be a law-based way of challenging them. The state has the right to revoke a corporation’s licence or charter. A useful strategy is to find out what the criteria are for governments to grant corporate licences and then to challenge companies on their compliance with these criteria, while at the same time lobbying governments to sharpen those criteria if they allow companies to violate human rights or destroy the environment.

In the United States, as Ward Morehouse of the US Program on Corporations, Law and Democracy reported, such challenges are called **charter revocation actions**. Revocation of a corporation’s charter, its basic founding and enabling document, is a very serious sanction. There have been several attempts to pursue this strategy in individual US states, where the attorney-general or governor has the power to revoke a company’s charter, even though the power has been rarely used in recent decades. A petition to revoke UNOCAL’s charter has been prepared,⁷ and attempts to get the Attorney General of New York state to initiate charter revocation actions against Union Carbide and General Election corporations are being explored.

Another basis for claims is that of **false advertising**. It can be effective and shaming to show that a large and famous corporation is lying. These cases tend to be brought not by victims from the host country but by campaigners in the MNC’s home country. For instance, when Nike advertised the high quality of its factories in South-east Asia, a group of activists sued it on the grounds that this statement was misleading to consumers. On this basis it could be possible to sue Shell, which has bought a good deal of space in *National Geographic* magazine in order to boast of its care for the

⁷ Robert Benson et al., *Challenging corporate rule: the petition to revoke UNOCAL’s charter*. London: Carpenter, 2000.

environment, by bringing conclusive evidence of environmental damage caused by Shell's operations. This kind of argument, however, presupposes a common or consensual definition of a good factory or environmental care. Lack of internationally agreed standards in these respects makes it possible for corporations to make such claims even when it is all too obvious that they care neither for their workers nor the environment.

Several participants argued strongly for further research and testing on bringing **criminal charges** against MNC management. The law varies from country to country, and in most places criminal charges cannot be brought against a company as such, only against its managers. Some NGOs have tried to bring criminal charges against the directors of MNCs, but so far without success. Richard Meeran pointed out that it is hard to establish criminal responsibility where personal liability has to be proven.

However, the case of Gen. Pinochet, involving a number of countries, has excited interest among lawyers as a possible precedent, showing that an individual, even a former head of state, can be sued for abuses committed in another country. This case has had a big impact in international law, e.g. in the case of a former head of state being brought to trial in Senegal. If a key lawsuit could be brought successfully against a company in one country, e.g. on the basis of crimes against humanity, it would raise interest among lawyers outside those limits and countries, and would also serve as a deterrent against companies. A combination of criminal as well as civil action against the same MNC may be worth exploring.

Meanwhile, the campaign for an International Criminal Court, which would make companies as well as persons accountable under criminal law, continues, and the existing tribunals for trying war criminals in Rwanda or former Yugoslavia may point the way towards developing a similar mechanism applying to companies in relation to corporate violations of human rights.

The law continues to evolve, and fresh regulations are always appearing in the attempt to keep up with fresh abuses (e.g. new rules currently being established on jurisdiction in sex tourism). This makes the possibilities for legal action an ever-open book whose pages are constantly being inscribed with new cases and experiences. However, as Sam Zia-Zarifi warned, it is of the utmost importance to focus always on **what the claimants want**. As well as the dangers attaching to disclosure of information and its sources, there is the question of whether, if an MNC pulls out of a country under legal pressure, its successor may be even worse, or its departure may leave a disastrously gaping hole in the local economy.

FACTORS TO CONSIDER WHEN CONTEMPLATING BRINGING A SUIT AGAINST A COMPANY

- Evidence – must be solid, correct, watertight;
- an NGO bringing a case needs to show its own interest in the case, e.g. as part of an affected population or on the grounds of public interest;
- Confidentiality and disclosure of information – will the disclosure of sources put informants at risk?
- Corporate structures – the cases discussed illustrate clearly how the corporate veil or smokescreen obscures and obfuscates their activities;

- Proper legal advice – vital for NGOs and trade unions supporting complainants or contemplating action of their own;
- Money – taking legal action is not cheap! And NGOs will probably find that once they start a lawsuit, the corporation will promptly mount a counteroffensive, e.g. a libel case, putting a heavy strain on the NGO's capacity;
- Image – consider the credibility costs of losing – although even a failed case can bring good publicity, if the campaign has been good and the facts of the case well publicized;
- Constituency – NGOs and trade unions need to verify that their members agree with the proposed strategy.

Work with codes of conduct and standards

As we have noted above, the key aspect of codes of conduct on which to focus should be **implementation**. There is no longer much need to develop new codes; the key issues and standards have been defined. The important thing is to get them implemented and enforced.

Codes are only as good as their monitoring mechanisms, and if they lack these they are little more than public relations exercises. But companies can be called to account on their own promises, particularly if they themselves refer to recognized instruments. Even though the codes are not in themselves legally binding, they can be used in legal procedures, as a secondary source to binding conventions. If, for instance, a company has signed the voluntary industry code called 'Responsible Care', which contains a subcode on 'Product Stewardship', and then exports to Latin America a product banned in the USA and the EU, it cannot be legally challenged on the basis of breaking its own voluntary promises, but could arguably be challenged if the voluntary code referred to ILO Conventions or OECD Guidelines.

Vic Thorpe reported that ICEM, having become frustrated with the toothlessness of unilateral company codes of conduct, has begun to negotiate **contracts** between itself and some MNCs whereby the companies contract to fulfil certain responsibilities. Under one such contract with the Norwegian company Statoil, for instance, Statoil has agreed not to oppose efforts to unionize by its employees in any country where it operates (e.g. Azerbaijan and China). It is unclear, however, what legal force this kind of contract has in the case of a transgression.

International standard-setting is an area of work which will continue at both 'official' (UN, ILO, EU, etc.) and NGO levels. Systematization and better implementation of existing standards would seem to be the key strategy which NGOs and trade unions should be promoting, including:

- Devising an international set of standards;
- Establishing international implementing/monitoring mechanisms;
- Establishing incentives and sanctions.

Finally, work with codes of conduct and standards is not an alternative to legal approaches but a complement and a support to them. Lawyers, NGOs and trade unions were urged to work together to contribute to raising standards.

Keeping the issues on the agenda

Although much of the seminar focused on actual and potential legal approaches to corporate liability, it was clear from the contributions of the NGOs present that **campaigning, awareness-raising** and **North/South linking** would continue to be major tools for them, reflecting their specific competence, networks and advocacy capacity. Although campaigning does not generally result in actual redress for the victims or survivors of corporate malpractice, the mobilization of public opinion through publicizing key cases can shame companies into better practice. The value of the glare of publicity to which MNCs are exposed in public hearings has already been mentioned.

Sometimes the **media** can be a useful ally. Roger Blanpain cited an example concerning the French oil company Total, where public opinion over a large oil spill ran so high that Total, not the ship immediately responsible for the spill, had to pay up. He urged NGOs and trade unions to lobby and get media coverage around key cases. However, a note of caution was sounded about the reliability of the media as a weapon for justice, since media interest is notoriously fickle and short-term, driven by the need to provide ever-fresh news.

Richard Meeran stressed the importance campaigning and direct action can have in terms of **solidarity** with claimants in particular cases. He acknowledged how heartening it had been both for claimants and for Leigh & Day that, since they started finding it harder to win cases over the last few years, organisations such as AI and WDM had begin to support the claimants with campaigns and demonstrations. This can not only give valuable moral support to the claimants but can have a wider influence. In the Cape case, the increasing influence of the National Union of Miners in organizing demonstrations and lobbying could help explain why the South African government is now thinking of intervening in the case.

2 Collaboration

How can lawyers, trade unions and NGOs work together with/for claimants? Lawyers need cases, in order to accumulate evidence against MNCs. At the same time, NGOs and trade unions working with claimants need lawyers, to get legal redress in specific cases and to reinforce non-enforceable advocacy and public awareness-raising with concrete successes in favour of those whose rights have been violated.

Some NGOs are already working with lawyers, for instance WDM and Amnesty International with Leigh & Day. NGOs of different kinds are also increasingly cooperating with each other: AI UK, for example, is collaborating in its campaign on socially responsible investment with War on Want and Traidcraft in the UK and is considering wider collaboration outwith Britain in order to maximize the channels for change that can be brought into play.

However, the most effective way in which NGOs and others can collaborate is in sharing information and **building up a body of evidence**. NGOs and trade unions were strongly encouraged to gather cases and to find out from lawyers what specific kinds of information are needed to build solid cases. To build up this body of case law, **more research** on MNCs' violations of rights is needed. Among specific resources in this respect, AI has much experience in doing research on violations by governments,

which are often in collusion with MNCs, and it was suggested that it might consider extending its research to cover corporations. The UN Human Rights Centre (CDR) in Geneva and the UN HCR were also mentioned as valuable sources of well-researched information.

More research needs to be done not just in terms of building up case law but on the applicability of many different areas of national and international law, such as competition law (how much should be regulated at the international level and how much/what should be left to national competence?), international rules on mergers, and criminal law.

Finally, as Willem van Genugten reminded participants, it is important not only to build up case law but also to use instruments such as the OECD guidelines and ILO conventions and declarations. Use of these instruments confirms their value and the need to ensure their effectiveness.

Which are the best fora for presenting evidence?

The answer to this question varies according to each specific case. Different fora and instruments are effective in different situations. This is why building up a body of evidence with detailed information on cases is so important: it can give lawyers, NGOs and trade unions an idea of the kinds of argument that do and don't work, the kinds of counter-argument by MNCs that are accepted or rejected by courts, and how this varies with forum and instrument. NGOs are well placed to gather data on violations, which lawyers can then put into the most appropriate legal form in the light of the legal instruments that offer the best chances for a successful action.

NGOs and trade unions expressed the need for more guidance from lawyers on the most useful type of evidence to gather and the most effective way of presenting it. ICEM, for instance, has evidence on hundreds of cases, but it has been collected for the purposes of campaigning rather than legal action – legal initiatives tend to be taken up by ICEM's member unions in their own countries. What would be useful for them, Vic Thorpe pointed out, would be a checklist of criteria indicating what forum or legal instrument, applied at what level, would be most suitable in each case. Kjell Sevón (Green group, European Parliament) suggested that a resource indicating the kinds of argument that could be built up in different situations, supported by accounts of both successful and failed cases, could be valuable for both lawyers and NGOs.

3 Can MNCs contribute positively to development?

Strictly speaking, this question is not a relevant one for lawyers. The law is not interested in anything that exceeds compliance with the law – it is only concerned with whether the law is broken or respected and only actively interested once it is broken. NGOs and trade unions, however, are interested in companies doing more than comply with the law and in the positive contributions they can make. Both approaches are necessary, both to ensure that the law is respected in the strict sense and to promote good practice by companies.

NGOs have a great interest in promoting good practice alongside preventing bad. Sometimes this can be done simply by calling companies to account on their own promises. Bread for the World, for instance, is interested in putting to the test Shell's statements of commitment to sustainable development, and would even be prepared to

award it a social/environmental quality label if it really complied. AIBG's *Human rights guidelines for companies* are a useful set of positive recommendations.

'International companies are likely to operate in countries where there are serious and frequent human rights violations ... Companies therefore have a direct self-interest in using their influence to promote respect for human rights.'

(AI UK Business Group, *Human rights guidelines for companies*, p1)

In terms of standard-setting, positive obligations are more difficult to formulate than negative ones, but can include at the most general level MNCs' obligation to use their influence to improve conditions in the countries where they operate. Examples of good practice as well as bad could be gathered as a contribution to developing standards.

As an immediately material contribution, ICEM is calling for the application of an international tax on international investment, with the proceeds to go to the World Bank for an international development fund. Unfortunately, this call has so far not met with success.

VI CONCLUSIONS AND PROPOSALS

1 Conclusions

- The current focus on MNCs is very new. But the issue of corporate accountability is now 'in the air' – people in general are starting to assume that corporations should bear responsibility for what they do abroad.
- The growth of rules and regulations that has accompanied the globalization of institutions means that people, and companies, are more familiar and comfortable with rules and with ideas of transboundary accountability. In fact, corporations prefer the law, because it is clear, everyone knows where they stand. MNCs can be regulated, should be regulated, and ultimately want to be regulated.
- MNC accountability can be demanded either **directly** from the corporations involved, or **indirectly** from the states where they operate and especially from those where they are domiciled. Such accountability can be demanded via legal action at the **domestic**, **regional** or **international** level.
- However, there are a number of **constraints** on winning either redress for past or ongoing abuses by MNCs or greater accountability in the future. These include:
 - Collusion between MNCs and states which are not willing to enforce existing laws or which actively exempt MNCs from their national legal systems, often under pressure from their own economic needs;
 - Laws, and models of legal system, emanating from the North, where the companies have their HQs, thus weighting the system towards the already powerful;

‘Reverse forum-shopping’, where the accused corporation fights to have a case refused in a country favourable to the complainants (usually the home country) and to get it returned to a location favourable to itself (usually the host country);

The ‘corporate veil’ or smokescreen – ambiguities in the nationality of MNCs and the separation of identities of the parent company and the subsidiaries, created by MNCs to enable them to escape legal responsibility in any country where they operate;

WTO rules, which have little help to offer claimants and are not really interested in labour issues;

Limited access of civil society to WTO and other international institutions;

Internal codes of conduct, which allow corporations to feel good while not imposing any *legal* obligations on them, and which also do not address the claims of victims;

Poor implementation mechanisms in most international regulatory instruments;

Counteroffensives by MNCs, e.g. libel cases against campaigners;

The expense of legal actions, which can sometimes be crippling even in the case of a victory, particularly where an NGO is defending itself against a corporate counteroffensive.

- Lawyers, trade unionists and NGOs have a common goal – to minimize the impunity of MNCs as their power increases with globalization. Organisations don’t have to take on MNCs on their own, but can do it in coalition or collaboration, to optimize the use of funding and the specific competences of different sectors, organisations and people.
- Ultimately, what is needed is **binding and enforceable legislation** at the international level to regulate MNCs’ activities, and effective **international institutions** to enforce it. The road to this goal is long and fraught with difficulty and conflict, but there are a number of steps on the way which are useful and practicable. The following proposals indicate some of these.

2 Proposals

- Pool resources and knowledge to come up with ways of getting evidence from victims or claimants and ways of applying them where it matters most. Put resources into gathering evidence.
- Build coalitions; share information among victims/claimants and experts in Northern legal systems, and systematize this into written materials.
- Develop, with the help of lawyers, economists and accountants, tools for analysing MNCs’ activities and their impact, and for keeping track of changes in corporate practice and structure.
- Research into applicable national and international legal instruments, including competition law, law on mergers, and criminal liability of MNC management.
- NGOs and academics shd work harder on getting more **test cases** going in Europe.

- Build up a body of evidence around case law. This could be facilitated by a reporting and advisory body where evidence could be accumulated, taken with a common set of standards as a measure.
- Use the development of a body of norms as contained in codes of conduct as a basis for reporting and cooperation with the UN Subcommission on Promotion and Protection on Human Rights.
- Implementation, implementation, and implementation! Existing international instruments will remain toothless and invisible if they are not used. Write to local OECD NCPs, and if they do nothing, this can be used to **demonstrate** that NCPs are incompetent and press for reform of the system.
- Develop a different type of cooperation between Northern and Southern NGOs, one in which Northern NGOs could advise Southern ones on how to complain.
- Finally, get everyone talking to each other and sharing information. As an initial step, a website on these issues has been set up, and GLODIS/Department of International Law, SOMO and IRENE can serve as a clearinghouse for information.

Colophon:

Report written by Mandy Macdonald

Organisers of the seminar:

Hilke Molenaar, Peter Pennartz, IRENE

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An electronic reader for this seminar has been produced by IRENE available on request.

IRENE, Stations straat 39, 5038 EC Tilburg, The Netherlands, tel. + 31.13.535.15.23., fax: + 31.13.535.02.53., E-mail: peterpennartz@irene-network.nl

Appendix II

<p>Jury List PPT 22 - 25 March 2000 The University of Warwick</p>
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Gianni Tognoni
 (Secretary General of
 the Tribunal)

Lelio Basso International
 Foundation
 Via della Dogana Vecchia, 5
 00186 Rome, Italy
 Tel: 00 39 06 6881 1468
 Fax: 00 39 06 6877 774
 Email: filb@iol.it

<i>Name</i>	Contact Details
Freda Meissner-Blau (president)	Braunerstrasse 10/a 1010 Vienna, Austria Tel/Fax: 00 43 1 5355221
Prof. Miren Etxezarreta	Dpto. De- Economia Aplicada E-08193 Bellaterra-Barcelona, Spain Tel: 00 34 93 581 1680 Fax: 00 34 93 581 2292 Miren.Etxezarreta@uab.es
Prof. Elmar Altvater	Ojmestrasse 21 14195 Berlin, Germany Tel: 00 49 30 838 54965 Fax: 00 49 30 838 54066 altvater@zedat.fu-berlin.de
Prof. François Houtart	5, Av Sainte Gertrude 1348 Ottignies Louvain la Neuve, Belgium Tel: 00 32 10 450 833 Fax: 00 32 10 453 152 Houtart@espo.ucl.ac.be
Barbara Dinham	The Pesticides Trust Eurolink Centre 49 Effra Road London, SW2 1BZ Tel: 0171 274 8895 Fax: 0171 274 9084 Pesttrust@gn.apc.org Barbaradinham@pan-uk.org

Peter Custers	Director, Bangladesh People's Solidarity Centre (BPSC) P.O. Box 40066 1009 Amsterdam, The Netherlands Tel / Fax: 00 31 20 693 7681 Bpsc@xs4all.nl
Prof. Abdul Paliwala	The School of Law The University of Warwick Coventry, CV4 7AL Tel: 01203 523090 Fax: 01203 524105 Abdul.paliwala@warwick.ac.uk
Jitendra Sharma	Senior Advocate at the Supreme Court, Secretary General, International Association of Democratic Lawyers Jsharma@del3.vsnl.net.in

Appendix III

<p>Witness List PPT 22 – 25 March 2000 The University of Warwick</p>

Name	Contact Details	Case
Bhargava Pushpa	Aveshna Consultancy Services, India Tel: 00 91 40 7017789 Fax: 00 91 40 7017857 Sukriti@hd1.vsnl.net.in	Monsanto
Brady Mike	Baby Milk Action, UK Mikebrady@talk21.com Mikebrady@babymilkaction.org	Reflexive Session
Budiardjo Carmel	The Indonesia Human Rights Campaign, UK Tel: 0181 771 2904 Fax: 0181 653 0322 Tapol@gn.apc.org	Freeport
Sheshardri Deepti	68, III Cross, S.B.M Colony Anandnager, Bangalore 560024 India Tel: 00 91 80 334 7136 Tel: 00 91 80 333 1203 Asurfacing@mailcity.com	Monsanto
Feld Steven	Anthropologist	West Papua (video)
Flynn Laurie	Journalist of the Guardian Tel: 01865 716 498 Tel: 0171 713 4475 Laurie.Flynn@guardian.co.uk	Union Carbide
Jarman Melanie	Corporate Watch	Monsanto, Reflexive Session

	Mel@corporatwatch.org	
Jelsme Martin	Martin Jelsma / Transnational Institute (TNI) Paulus Potterstraat 20 / 1071 DA Amsterdam tel: -3120 6626608 fax -3120 6757176 mjelsma@tni.org	Monsanto
Kruszewska Iza	International Programmes Co-ordinator ANPED, Northern Alliance for Sustainability Iza@cpa-iza.u-net.com	Monsanto
Madeley John	Journalist and Editor of UK Food Group Report JohnMadeley@compuserve.com	Reflexive Session
Mani Rajani	Tel: 080 554 1840, India Manis@bgl.vsnl.net.in	Monsanto
McKenna Patricia	MEP, Ireland Pmckenna@europarl.eu.int	Union Carbide
Morehouse Ward	Council on International and Public Affairs, NY Tel: 001 212 9729877 Fax: 001 212 9729878 Cipany@igc.apc.org	Reflexive Session, Union Carbide (video)
Nayar Jayan	University of Warwick School of Law Tel: 024 7652 3097 Fax: 024 7652 4105	Reflexive Session
Nettleton Geoff	11, Faringdon Road Stanford, OXON Tongton@gn.apc.org	Freeport / Rio Tinto
Ondawane John	Political Leader	West Papua (video)
Palmer Eric	National Lawyer's Guild Radicallawyer@igc.org	Reflexive Session Monstanto Co-ordinator
Paul Helena	Gaia Foundation Helena@gaiagnet.org	Monsanto
Peck Juliet	Tel: 01937 835 933 Partizans Scrawl@pobox.com	Freeport, Rio Tinto
Phonklieng Anchalee	Inter-Mountain Peoples' Education and Culture in Thailand Association (IMPECT)	Reflexive Session
Ransom David	Co-Editor, New Internationalist Magazine, Oxford Davidr@newint.org	Reflexive Session
Saltford John	22 Eastwood Street SW16 6PX Tel: 0781 7699362 John.saltford@pro.gor.uk	Freeport
Santos-Abrams Elyssa	Council on International and	Assistant Co-ordinator for

	Public Affairs, NY Tel: 001 212 9729877 Fax: 001 212 9729878 Elyssas-a@excite.com	Freeport
Saldanha Leo	Leosaldanha@vsnl.com	Reflexive Session
Solly Richard	Tel: 01634 200 520 Richard.solly@talk21.com	Case Co-ordinator for Freeport Presentation
Stapleton Barbara	Freelance Producer, London 6, Cortayne Road, London SW6 3QA Tel: 0171 272 6731 Bjstapleton@gn.apc.org	Reflexive Session
Tampoe Bala	General Secretary, CMU- Sir Lanka Gscmu@sltnet.lk	Freeport / Union Carbide
Tognoni Gianni	Lelio Basso International (Secretary General of Foundation the Tribunal) Via della Dogana Vecchia, 5 00186 Rome, Italy Tel: 00 39 02 3901 4468 (direct) Fax: 00 39 02 33 2000 49 Email: tognoni@irfmn.mnegri.it	Union Carbide
Warwick Hugh	Citizens Jury Project, India Tel: 01865 716 498	Reflexive Session

Appendix IV

**Participants List
PPT 22 - 25 March 2000
The University of Warwick**

Name	Contact Details	Comments
Ade Adegite	University of Warwick Tel: 0956172912 Joksylou@yahoo.co.uk	Student
Aldis Len	BVFS LenAldis@compuserve.com	
Alvin Radiner	Arachier@hotmail.com	
Anelli Maria Augusta	Lelio Basso International Fondation Via della Dogana Vecchia, 5 00186 Rome, Italy Tel: 00 39 06 6881 1468 Fax: 00 39 06 6877 774 Email: drema. filb@iol.it	
Angelopoulos Nick	AnNangelo@excite.com	Com Peace
Areuds Gerald	G.Areuds@warwick.ac.uk	
Aukot Ekuru	University of Warwick Tel: 024 7657 2572 ext:30326 Ldekuru@themis.law.warwick.ac.uk	student
Blengino Chiara	Tjal254t@cisi.unito.it Tel: 00 39 011 329 4897	Universita Del Piemonte Orientals (Italy)
Bowring Bill		
Busingye Harriet	University of Warwick	Student
Carter Assheton	University of Warwick Corporate Citizenship Unit Warwick Business School	Research Fellow

	A.Stewart-Carter@warwick.ac.uk	
Chellenbrau Lawrence	University of Warwick	
Colquhoun Helen	University of Warwick Tel: 01926 778542 h.colquhan@mailcity.com	Student
Coysh Joanne	University of Warwick Joanne.coysh@virgin.net	Student
Evans Tara	Lapuu@csv.warwick.ac.uk	
Faribe Ola	University of Warwick Tel: 09589 76224 Lavmh@csv.warwick.ac.uk	Student
Feig Stephan	University of Mannheim, Germany Stefan_feig@hotmail.com	
Foster Ken	University of Warwick Tel: 01203 523170 K.Foster@warwick.ac.uk	Academic
Froehner Juliano	University of Warwick Tel: 02476 572 572 ext:30852 Jfroehner@yahoo.com	LLM Student
George Alan	68 Marryat Road, London, SW19 5BN Tel: 0181 947 8268 101467.3363@compuserve.com	Journalist
Gerald Ireuds		
Godden Christopher	Christopher.Godden@warwick.ac.uk	School of Law
Goodwin Ojo	University of East Anglia School of Development Studies, Norwich u.ojo@uea.ac.uk	Friends of the Earth
Green Peace & West Papua Forum	The Annex 30, Mawson Road, Cambridge, CB1 2EA, UK	
Gyamtua Nana Yaa	University of Warwick Tel: 01203 712815 n.y.gyamfua@warwick.ac.uk	Student
Habib Fortunee	The Green Party of Italy Via Salandra, 6 00187 Roma, Italy Tel 00 39 06 863 24614 Star_globe@usa.net	Volunteer
Hadrid Gilma	Wsrbl@csv.warwick.ac.uk	
Heesterman Wiebina	University of Warwick w.heesterman@warwick.ac.uk	Student
Hitihamu, D. Dr	University of Teesside Centre for Community Education Tel: 01642 342 141 Fax: 01642 342 143 d.hithamu@tees.ac.uk	Senior Lecturer
Hodson Loveday	University of Warwick Tel: 01203 522886 Loveday.hodson@warwick.ac.uk	Graduate Teaching Assistant
Hong Liu	Lawpt@csv.warwick.ac.uk	Law in Development, University of Warwick

Hosseinbor Kanbar	The University of Warwick Tel: 01926 771752 Launp@csv.warwick.ac.uk	Student
Hundt Adam		
Jägers Nicola	Netherlands Institute of Human Rights Tel: 00 31 30 253 8407 / 8033 Fax: 00 31 30 253 7168 N.Jagers@law.uu.nl	PhD Candidate
Jukes Nick	Lynx@gn.apc.org	DELTA
Katayanagi Mari	University of Warwick Tel: 0780 309 0820 Pgmari@themis.law.warwick.ac.uk	Student
Kiryabwive Angela	Lapul@csv.warwick.ac.uk	
Koepke Ronald	HWP Polytechnic for Science and Policy Tel/fax: 00 49 521 494 2649 Ronald.koepke@arcormail.de	Project on Codes of Conduct
Koessler Christophe	CETIM Europe Third World Centre Tel: 00 41 22 731 5963 Fax: 00 41 22 731 9152 cetim@bluewin.ch	Project Co-ordinator Human Rights Assistant
Kunbuor Ben	University of Warwick Tel: 01203 524162 Benjamin.Kunbuor@warwick.ac.uk	Student
Lam Solin	Elsalam@excite.com	
Lapwm Nahid	Lapwm@csv.warwick.ac.uk Or Sni@bangla.net	
Liebling Helen	The University of Warwick Centre for the study of Women and Gender Tel: 01203 523523 H.J.Liebling@warwick.ac.uk	PhD student / Clinical Psychologist
Luna Letica		
Mackova Darina	Centre for Women & Studies University of Warwick D.Mackova@warwick.ac.uk	Student
Malpass Alice	Department of Sociology and Social Policy, University of Newcastle Tel: 0191 222 8469 Alice.malpass@ncl.ac.uk	PhD Research Student
Marhia Manjit	Laubz@warwick.ac.uk	
Methley Margaret	Medical & Scientific Aid to Vietnam 22 Barnack Avenue Coventry, CV36LA	Chairman of EC

	Tel: 024 76416399	
Mimkes Philipp	Gegen Bayer-Gefahren EV Germany Tel@ 00 49 211 333 911 Fax: 00 49 211 333 940 Cbgnetwork@aol.com	Co-ordinator
Mirer Jeanne	19949 Shrewsury Road Detroit, Michigan 48221, USA Tel: 001 248 398 9800 Fax: 00 248 398 9804 Mirerfam@earthlink.net	Deputy Secretary General, International Association of Democratic Lawyers
Mohamud Hussein	The University of Warwick Tel: 01203 961707 Laudy@csv.warwick.ac.uk	Student
Molenarr Hilke	Irene, The Netherlands Tel: 00 31 13 535 1523 Fax: 00 31 13 535 0253 Irene@antenna.nl	
Molenuk Aillie		
Ms Tosti	12 Franklin Road Witnash Leamington Spa 01926 314613	
Muller Claudia	laput@warwick.ac.uk	Law in Development Student
Mulles-Plantenbeg Clarita	University of Kassel Department of Applied Socail Sciences, Germany Claritamp@cs.com Mueller@hrz.uni-kassel.de	
Mwaka Beatrice	University of Warwick Tel: 00 44 1203 524484 Laseb.LA@Warwick.ac.uk	
Oldenziel. Joris	Research Centre on Multinational Corporations The Netherlands Tel: 020 639 1291 Fax: 020 639 1321 Email: j.olenziel.somo.nl	SOMO
Onoja Elizabeth	University of Warwick Tel: 09561 52136	Student
Otiso Wycliffe	University of Warwick Tel: 01926 856125 Laver@csv.warwick.ac.uk	Student
Papadakis Starros	Anchor House, 7 Park Road Coventry, CV1 2LE, UK Maref@warwick.ac.uk	
Pattni Sonia	London School of Economic & Political Science Tel: 0171 955 6491 Soniap17@aol.com	Part-time Lecturer and PhD student
Pennantz Peter	Irene The Netherlands Tel: 31 13 535 1523 Fax: 31 13 535 0253 PeterPennantz@irene-network.nl	Responsible for the Irene seminar on Corporate liability held at the University of Warwick 20 – 21 March 2000
Phommanivong Khamphone	University of Warwick P_Khamphone@hotmail.com	Student
Pieri Antonio	University of Warwick Tel: 01203 413880 Pganton@themis.warwick.ac.uk	PhD student (part-time)

Rachier Alvin	University of Warwick Tel: 07769 66 44 87 Arachier@hotmail.com	Student
Ramrattan Hemma	Hemma6576@hotmail.com	
Royal Chris	11, Arden Road, Kenilworth, CV8 2DW, UK Tel: 01926 852 657	
Sahni Binda	University of Exeter B.P.Sahni@exeter.ac.uk	Student
Santilli Willy	University of Warwick	Student
Scanbin Sheila		
Sevon Keith	European Parliament Belgium Ksevon@europarl.eu.int	
Sharp Mardleino	MSAULC Medical & Scientific Aid to Vietnam 49 Baginton Road, Coventry Tel: 024 7641 4512	Hon. Secretary
Shaw Julia		
Sherman Melani		
Shuping Wang	Wshuping@hotmail.com	Law in Development, University of Warwick
Sidik Frida	University of Warwick ls pdu@csv.warwick.ac.uk	Student
Silva Upeka de	University of Warwick Tel: 040 344 6374 Lauge@csv.warwick.ac.uk	Student
Subbuswamu Kala	Kalasubbu@yahoo.co.uk	
Swobooda Ben	b.e.swobooda@warwick.ac.uk	
Tan Hui Yee		
Thrope Vic	ICEM International Chemical Energy, Mine,Gen, Union Belgium Tel: 32 2 626 2020 Fax: 32 2 626 2020 Just.solutions@belgacom.net	
Tini Maria Paola	Lelio Basso International Fondation Via della Dogana Vecchia, 5 00186 Rome, Italy Tel: 00 39 06 6881 1468 Fax: 00 39 06 6877 774 Email: MPTini@mclink.it	
Toro Vegas Luz Marina	University of Warwick Luztor@hotmail.com	Student
Toumi Marika	University of Warwick Tel: 01203 523071 Email: marika.toumi@warwick.ac.uk	
Warhurst Alyson	Director, Mining & Energy	

	Research Network, Corporate Citizenship Unit, Warwick Business School, University of Warwick Tel: 024 7657 3130 Alyson.warhurst@warwick.ac.uk	
Woodroffe Jessica	Press@wdm.org.uk	World Development Movement
Wycliffe Otiso	Whyachoti@hotmail.com	Student University of Warwick
Xiling Jia	University of Warwick Xilingj@hotmail.com	Student
Yehudi Van Pol	Oilwatch Europe C/o A Seed Europe The Netherlands Yehudi@aseed.antenna.nl Oilwatch@aseed.antenna.nl	

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**School of Law University of
Warwick**

CV4 7AL Coventry
ENGLAND

Tel: +44 (024) 76523097

Fax. +44 (024) 76524105

jayan.nayar@warwick.ac.uk

<http://www.warwick.ac.uk/lawschool>

**Council on
International and
Public Affairs
Suite 3C**

777 United Nations Plaza
New York NY 10017
USA

Tel. +1 (212) 9729877

Fax +1 (212) 9729878

cipany@igc.apc.org

**Lelio Basso International
Foundation**

Via della Dogana Vecchia, 5
00186 Rome

ITALY

Tel: 0039-06-68801468

Fax: 0039-06-6877774

Filb@iol.it

<http://www.grisnet.it/filb>