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## **GLOBAL GOVERNANCE:**

### **International law on human rights and the liability of transnational corporations**

Report of the international seminar, organised by IRENE, the Netherlands, EAD/  
Evangelic Academy, Bad Boll, Germany.  
3 and 4 December 2001

by Julie Smith

## **INTRODUCTION**

Globalisation has made the links between civil, political, economic, social and cultural rights international. These links are predominantly shaped by the cross-border activities of non-state actors, especially transnational companies, and this has had a particular consequence for human rights.

International legislation is lagging behind these changes although there is increasing pressure to effect corporate liability of transnational corporations (TNCs) in breach of national and international law.

## **THE SEMINAR**

The seminar was held as a joint initiative between IRENE, the Netherlands, EAD and the Evangelic Academy Bad Boll, Germany. It followed up on an IRENE seminar – *Controlling corporate wrongs: the liability of transnational corporations* - held at Warwick University, UK, 20 and 21 March 2000 and linked into other programmes being run by the Evangelic Academy, Bad Boll, Germany. (See for the Warwick report News From IRENE no. 31 or contact IRENE).

The aims of the seminar were:

1. awareness raising on the role of international law in relation to the obligations of TNCs
2. discussion about the pro's and cons of denationalisation of international law
3. discussion about what is needed to effect corporate liability of TNCs in national and international law

About 35 people attended from several European countries and the US. A wide range of experience was represented, including lawyers involved in human rights litigation; human rights lawyers and specialists from NGOs and religious federations; academics and researchers; trade union and human rights organisations and business.

The informal, round-table setting, using short presentations and discussion, enabled participants to share experience, ideas and proposed legal activities. It should be stressed that this was not a meeting of experts, but an opportunity for dialogue and to share experience between the interested groups.

## PRESENTATIONS

### 1. HUMAN RIGHTS AND TNCs:

#### OVERVIEW OF THE DEVELOPMENTS IN INTERNATIONAL LAW

The opening presentation by **Mark Curtis** of Christian Aid, UK looked at the issue of governance of global business as one of the most important aspects of globalisation.

Although there is a responsibility for the private sector to uphold international human rights standards, there is a major problem in terms of enforcement. Legal actions concerning foreign direct liability have centered on the US Alien Tort Claims Act (ATCA, a 200-year-old law which gives US courts jurisdiction to hear cases of human rights abuses, violations of customary international law, occurring anywhere in the world as long as the US courts have jurisdiction over the defendant) – based on ensuring compliance with international law (ref. *Doe v. Unocal*; about the case of the California based US company UNOCAL and its operations in Burma) and in countries such as the UK, Canada and Australia, addressing companies' applying the same standards of care overseas as at home (ref. *Thor Chemicals and Cape*; about the UK based company Thor Chemicals of which over 28 workers in its South African factory suffered severe mercury poisoning; and about the UK based Cape plc and the 2,000 South African victims of asbestosis from long-term unsafe practices in its wholly-owned subsidiaries in South Africa). The UK also has two recent acts that have extra-territorial effect: the Child Sex Tourism Act and the OECD Convention on anti-bribery (signed in April 2001).

With evidence showing that voluntary codes are not enough, and international law in relation to TNCs a murky area, Christian Aid is working on the issue of establishing legally-binding regulation that would ensure TNCs work more in the interests of the poor. The new trade campaign aims to make legally-binding regulation a public issue and to counter the view that corporate social responsibility (CSR) is enough. More cases of bad practice amongst companies who claim CSR need exposing. (This will be a major feature of the new NGO coalition Trade Justice Movement).

Christian Aid will be campaigning for national legislation for regulation in developing and OECD countries to make companies more accountable, plus, at international level, to

build support for the guidelines drafted by the UN Sub-Commission of the Promotion and Protection of Human Rights to make them more enforceable.

They propose the establishment of a new Global Regulation Authority (GRA) within the UN system to oversee the regulation of TNCs, establish a set of standards and monitor company compliance, with additional powers to make legally-binding rulings against companies breaching the code in situations where governments have failed to enact sufficient national legislation.<sup>1</sup>

#### **DISCUSSION**

There were questions about the need for another new Global Regulation Authority (GRA) and why it would be more effective than making additions/improvements to the existing structures. Alternatives included expanding the effectiveness of sub-section 3 of the UN Declaration on Human Rights and the International Criminal Court, and continuing to lobby for a WTO with responsibility for social issues. There was further comment on how a Global Regulation Authority, empowered to make legally-binding rulings, could gain support from governments, in particular the US.

Christian Aid pointed out that the proposal aims to provoke discussion like this and to open up the debate. The hard thing is to get national governments interested in, or able to implement, legally-binding regulation. The implementing body, like the Global Regulation Authority would be the next step.

With regard to legally-binding regulations reference in the discussion was also made to the initiative of Friends of the Earth International in the UK who run a campaign on a Corporate Accountability Convention.

#### **➤ THE INTERNATIONAL LEVEL; THE DEVELOPMENT OF INTERNATIONAL LAW, HUMAN RIGHTS AND TNCs WITHIN THE WTO FRAMEWORK**

**Peter Prove**, Office for International Affairs and Human Rights, the Lutheran World Federation, focused on the international level and looked at how international economic law relates to international human rights law – he called it “*A Dialogue of the Deaf*”.

Human rights encompass both *civil and political rights* and *economic, social and cultural rights*. The latter category is mostly ignored in much of the discussion on human rights at the WTO. The right to development, which includes the realization of all human rights, is perhaps the sharpest challenge of all to current economic policy and practice.

There are possibilities to front-load human rights into the WTO because these legal obligations are already there. This may be called the ‘primacy of human rights approach’ and it is firmly rooted in international human rights law and is fundamentally an empowering tool for the poor.

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<sup>1</sup> see *Reader 2001*, document 18

Much more reference could be made to the social purposes indicated in the preamble to the Agreement establishing the WTO :

*“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, ... while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development...*

*Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,...*”

Similarly, GATT article XX was also noted as offering ‘general exceptions’ with relevance to human rights and articles XX1 (security exceptions and definitions of ‘like product’) TRIPS, GATS, Agreement on Agriculture ( Non-trade concerns: food security, Dispute settlement mechanism) were also mentioned as having positive human rights implications. New possibilities in the Doha Ministerial Declaration, adopted 14 November 2001, were also highlighted.

Many States have described human rights as the first and most fundamental responsibility of governments. Governments are accountable for human rights, when negotiating international trade policy, through the legal commitments of international human rights treaties.

Human rights should be seen as the guiding principles for economic policy decisions at both the national and international levels, particularly within the WTO. Developing countries could utilize human rights principles in economic negotiations from the perspective of their own self-interest (e.g. submission Mauritius in agriculture negotiations). NGOs should campaign for change at the national level as that is where the decisions are made.<sup>2</sup>

#### **DISCUSSION**

The discussion was wide ranging and emphasised that human rights are relevant under treaty law and that States need to take their obligations seriously. The use of Article 20 was considered and the possibility that if human rights are used as an exception that this would lead to trade sanctions was noted. Most Article 20 exceptions have not been applied; there are only very restrictive interpretations. Further work needs doing to use them successfully.

The non-implementation of legal obligations of States under treaties, governments’ lack of knowledge about the content of economic, social and cultural rights and the emphasis on States as the duty bearers of international law rather than companies were all discussed. A strengthening by States of the legal frameworks within which companies operate was acknowledged, together with the need to use advocacy to embarrass governments by emphasising their legal responsibilities.

### **3. NATIONAL LAW: THE INDIRECT APPROACH –**

<sup>2</sup> see *Reader 2001*, documents 4, 5, 6 & 19

### INTERNATIONAL HUMAN RIGHTS: THE AMERICAN LITIGATION EXAMPLE

The logical next step was to look at the national level as this particularly addresses the responsibilities of governments. **Judith Brown Chomsky**, Center for Constitutional Rights, USA, looked at the American example.

Legal cases against TNCs in the US use the ATCA, the Alien Tort Claims Act, as this provides federal jurisdiction for civil actions for aliens to bring an action for wrong doing under international human rights law. An ATCA claim must allege a violation of customary law norms and not be on the violation of a treaty obligation. Treaties, however, have been regularly cited and accepted as evidence of customary law. Developments since 1980 have set the stage for claims against corporations based on their participation, with a state actor, in human rights violations.

Examples were given of the court case *Wiwa v. Royal Dutch Petroleum and Shell* which was considered a federal case because both companies are active on the New York stock exchange (being the case of the murder of Nigerian activist Ken Saro-Wiwa and others of the 'Ogoni 9', that was brought in New York by their families, where Shell's argument was that it bears no responsibility on the grounds that it does not legally exist in the USA). This means that all TNCs come under the jurisdiction of NY federal law. Secondly, *Doe v. Unocal*, is the only TNC case that has progressed beyond the procedural issues and the court has granted summary judgement against the plaintiffs. The court found evidence suggesting that Unocal knew that forced labour was being used but could not establish liability as there was no evidence that Unocal controlled the military. In the appeal, the plaintiffs have argued that claims arising under human rights abuses brought under the ATCA must be adjudicated under standards of international law.

Defendants frequently claim that the US court is not an appropriate forum for an ATCA case and rely on *Forum non conveniens* (literally 'inconvenient' or 'inappropriate legal forum' to hear case) to transfer cases somewhere else. This sends them into oblivion. This tactic did not hold up in the *Wiwa* case.

Current cases in the US are looking at two areas :

- i.) the relationship between a TNC and its subsidiaries and whether the parent company is liable for the conduct of a subsidiary
- ii.) the relationship between a TNC and the military – the liability of TNCs for the acts of the military

Cases need to have a political context - agitation in the host country and a political movement in the US in support of the issues - to bring them into the public arena.

### DISCUSSION

The *Wiwa* case was discussed as revealing the complexity of a situation where oil companies took advantage of political corruption and instability in Nigeria. As a consequence, 90% of Nigeria's revenue comes from oil and the TNCs hold all the power.

The importance of law-suits was recognised and the possibilities for enforcing the obligations of TNCs through national courts. The importance of public opinion was noted as of particular interest to NGOs. There was discussion about bringing cases based on environmental degradation and also against TNCs supporting the military if, in practice, the military is supported by the US government. The relationship between TNCs and their suppliers was also raised in terms of liability of banks and insurance companies.

The issue of access to information for NGOs considering legal activities was a recurring theme throughout the seminar. The Center for Constitutional Rights in New York ([ccr@igc.org](mailto:ccr@igc.org)) have prepared information on current US cases.

#### **4. BRITISH EXAMPLES**

**Sharon McClenaghan** of Christian Aid highlighted the cases in the United Kingdom by giving a brief introduction to the examples of the Thor Chemicals case and the Cape plc case. Attempts are being made to hold TNCs to account through foreign direct liability, and two cases were cited<sup>3</sup> where the parent company is being sued for activities that have taken place in a developing country. It was noted that some legal practices work on a 'no win, no fee' basis which makes bringing this type of case a possibility.

An example of a company re-structuring assets to avoid liability is demonstrated by the case of *Thor Chemicals* accused of mercury contamination of the entire workforce and of environmental pollution in Kwa-Zulu Natal, South Africa. The case was settled out of court with the company not admitting liability. Thor then de-merged its assets and transferred these to Tato Holdings. This has threatened the compensation claim of claimants as the 'new' company has little registered assets.

The *Cape* case of action brought by South African workers who had been exposed to high levels of asbestos contamination also underlines the lengthy process of legal action. Attempts to bring the parent company to account began in 1989. *Forum non conveniens* has been used by opposing lawyers to keep the case 'ping-ponging' backwards and forwards as a delaying tactic. In July 2000 the House of Lords ruled that the case should be held in the UK in July 2002 – there is an obvious fear that another significant number of workers will have died by then.

#### **5. POSSIBILITIES FOR NGOs REGARDING TNCs BEFORE DUTCH COURTS - THE DUTCH LITIGATION EXAMPLE**

**Serge Bronkhorst**, the Netherlands Committee for IUCN – the World Conservation Union, followed up with a look at the possibilities for NGOs to bring litigation.<sup>4</sup>

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<sup>3</sup> see *Reader 2001*, document 2

<sup>4</sup> see *Reader 2001*, document 8

NGO lawsuits play an important role in increasing public pressure on TNCs to be more accountable. Dutch environmental NGOs can bring legal proceedings against private persons when it is in the public interest and when harm occurs in an area that is covered by its own objectives. But it is untried and unclear whether this can be applied to TNCs who damage the environment in foreign countries.

In the Netherlands, the court of the defendant's domicile has jurisdiction. This implies that the Dutch courts have jurisdiction where TNCs are based in the Netherlands (ie where companies are incorporated under Dutch law). When a TNC is based outside The Netherlands there are two situations: the case that the TNC is based outside The Netherlands but within another European country, the Brussels Convention applies, which means that the Dutch courts will only have jurisdiction when the environmental harmful activity (the tort) takes place in The Netherlands or when the resulting environmental damage occurs in The Netherlands. The same argument applies to other member states of the Brussels Convention. For companies based outside Europe the Dutch courts may have jurisdiction – at least in theory – if the plaintiff is domiciled in the Netherlands, but it is very doubtful whether the Dutch courts will apply this theory in practice.

There is also the issue of applicable law. Although the Dutch court may have jurisdiction, this does not necessarily mean that Dutch civil law applies to the case in question. In the situation that a TNC causes harm to the environment in a developing country, the applicable would be that of the developing country. However, Dutch national law on torts may be applicable if the headquarters of the TNC are located in The Netherlands. In that situation one could argue that the headquarters fail to supervise the activities of its subsidiary in the developing country. The tort is then the lack of supervision which takes place in The Netherlands, instead of the damage to the environment in that developing country.

It is only by bringing cases before Dutch courts that the jurisdiction of Dutch courts and the standing of NGOs can be tested in cases against TNCs who cause environmental damage in foreign countries. But it is clear that the description of the purpose of the NGO must specifically relate to the case.

Two recent developments may also offer alternatives for NGOs. These are: the proposed European legislation that gives public interest groups the right to take action when public authorities do not take action to protect the environment (European Commission's White Paper on Environmental Liability) and the new Rules for Arbitration of Dispute relating to Natural Resources and the Environment of the Permanent Court of Arbitration which also includes standing for environmental public interest groups. Under these new Rules environmental disputes between NGOs and TNCs may be resolved much more quickly than through law-suits - an important consideration in terms of environmental damage.

#### **DISCUSSION**

There was a lively response from NGOs – an analogy of a route planner was used for NGOs considering how best to pursue legal action in the Dutch courts. It was noted that

although cases tend to use individuals, this is not always possible for environmental damage and an NGO is more appropriate.

The question of legal costs came up again and it was pointed out that it is not automatic that the loser pays the winner's costs, the judge decides. Also, if the plaintiff is a refugee, he/she has nothing to lose.

It was suggested that NGOs start a fund to pay for proceedings of court cases. It was stressed that without case law we can only hypothesise.

## **6. THE CONCEPT OF GLOBAL GOVERNANCE AS A NECESSARY POLICY FOR THE FUTURE**

**Armin Frey**, Foundation for the Rights of Future Generations (SRzG), Germany, gave his view of the political issues concerning the realization of global governance.

Globalisation was not planned, it is the consequence of increased innovation of finance and communications technologies. But it does need a political response. The environment needs protection and economic, social and cultural issues arising out of the negative effects of globalisation need addressing.

He proposed a global governance structure including the WTO, ILO, UN and World Bank with a content that reflects a world trade system based on ecological, social and economic principles that deal with debt. In this structure, the political level is split into three: nation states, regional levels (EU, NAFTA etc.) and a world state with its own parliament, currency and legislation.

This proposed system of global governance would include reforming the UN, increasing co-operation at the regional level, giving NGOs more participation in the political process (especially from developing countries) and organising structures according to economic rules that mean that corporations and BINGOs (NGOs that represent business interests) co-operate with the whole structure. An integrative approach is required which includes co-financing and a new Marshall Plan for Global Governance.

He concluded that there is no ready-made theory – a standard is needed that is effective and sustainable with commitment at the political level.

## **DISCUSSION**

The presentation raised a number of questions: where can TNCs and civil society/NGOs co-operate in this structure? Where are the interests of industry? How do we go about building international standards and how are companies held to account? Under what type of legal code would this global structure be set up?

There was also some discussion about the 'race to the bottom' theory. Two views were raised: first, that this was not supported by the facts. For example, Scandinavian countries are competitive internationally despite good social standards. On the other hand, the fact that many governments use low wages as an argument to attract companies and that

social standards are being undermined in all countries by globalisation gives credence to the theory.

The issue of co-operation between business and the human rights movement was also raised. Discussion centered on two conflicting views: focussing on confrontation between NGOs and TNCs does not hurt business and, the fact that human rights and environmental problems only come to the surface when NGOs challenge companies.

#### **7. THE OECD'S REVISED GUIDELINES FOR MULTINATIONAL ENTERPRISES: A WAY TO INTERNATIONALLY BINDING RULES ?**

The revised OECD Guidelines – the recommendations by OECD governments to their TNCs - were presented by **Joris Oldenziel** from SOMO, Center for Research on Transnational Corporations, the Netherlands.

These revised guidelines for transnational enterprises include some major changes that bring improvements in the following areas: all core labour standards are now included; the content includes contributing to sustainable development and a respect for human rights; together with the precautionary principle and whistle blower protection. Weaknesses include weak wording which provides loopholes; no living wage clause and the definition of supply chain responsibility as “Encourage where practicable..”

On reporting and verification, TNCs are only encouraged to disclose information on social and environmental issues. Monitoring and independent verification is not there. Implementation re-defines the role of NCPs (National Contact Points) and gives NGOs the ability to raise cases. The role of NCPs includes responding to enquiries and a focus on problem solving which stresses conciliation or mediation. If there is no agreement on a complaint case, a public statement must be issued. In case of violations of workers' rights or any other breach of the Guidelines, Trade Unions and NGOs can raise a case through these NCPs. Governments adhering to the Guidelines must set up the NCPs.

Implementation weaknesses include possible variations in implementation by NCPs, cases can not be brought directly to CIME (Committee on Investment and Transnational Enterprises), lack of clarity on cases in non-adhering countries and the issue that there is transparency unless confidentiality would be in the best interest of effective implementation which makes ‘naming and shaming’ questionable.

At a more general level, the voluntary nature of the OECD declaration with mere recommendations and encouragements and the fact that procedural guidance is voluntary for NCPs has led NGOs to “continue to call for a binding international instrument to regulate the conduct of transnational corporations.”

In summary, the new Guidelines have severe limitations without monitoring and independent verification or incentives and sanctions and the reporting criteria are very weak. On the positive side, adoption of the Guidelines by OECD governments gives them a legal authority and linking them to government instruments, such as subsidy schemes and export credit schemes (as in the Netherlands) will make them more binding. Cases

will show their relevance and how they are being interpreted and could demonstrate why binding rules are needed.

So what can NGOs do? There is a need to build different types of cases and NGOs need to document and share information. They can also raise issues of NCP performance, transparency and effectiveness at CIME.

SOMO will compile an inventory and analysis of current cases – although Dutch NGOs are not supposed to talk about a case until a decision is reached.

#### **DISCUSSION**

The discussion gave participants further opportunity to share information and proposed legal activities.

Points raised included the issue of non-adherence in non-OECD countries as underlining a major weakness in the Guidelines. The limitations caused by NGOs having no representing body and being unable to make appeals at CIME and the possibility of raising non implementation of company codes by small subsidiaries as corruption cases in front of an NCP were also raised. It was noted that the NCP itself decides which cases are applicable.

There were other questions on what happens if NCP decisions are not followed up and what if an NGO does seek publicity whilst a case is being considered by the NCP. What legal recourse does the company have ?

More positively, the point was made that this version of the Guidelines is much improved and there are possibilities to use the process towards getting binding instruments. The NCP process could be used to prepare the way for court cases.

It was also noted that TUAC (Trade Union Advisory Committee) have produced a booklet on the Guidelines and Friends of the Earth are producing one. (See for more information: A Users' Guide for Trade Unions to the OECD Guidelines to Multinational Enterprises, produced by TUAC. Contact: tuac@tuac.org).

#### **8. INTERNATIONAL TREATIES AGAINST CORRUPTION**

**Richard Albrecht**, representing Transparency International, Germany, used the slogan: “Power corrupts – absolute power absolutely” (Robert Nisbet) as the basis for his presentation.

He talked about the levels of corruption in Germany concentrating on “mega corruption” where huge amounts are stolen. Corruption was defined as the abuse of power for private means, identifying that it is only possible to fight corruption if the state and civil society co-operate. He posed the questions: Is corruption part of the economic/ political system and incorporated within the system itself? and would a world without corruption be

utopia or dystopia? In his view, corruption is a global, mafia system which takes over state bureaucracy and leads to a change in the whole state administration.

There is a clear lack of information on German cases and legal torts are not being applied. He pointed out that many corruption cases could be prevented by small measures, for example, changing the tax law that could have much wider implications.

#### **DISCUSSION**

The definition of corruption was raised as being out-dated and the current private/private, as opposed to private/government, debate needs looking at.

Issues of culture and tradition, in particular, the African tradition of present giving, were explored.

**Kirstine Drew** of the UK-based UNICORN, the newly established trade union anti-corruption network to mobilise trade unionists to share information and coordinate action to combat international corruption,<sup>5</sup> made the following points. It is necessary to consider the use of anti-corruption laws. For example, the OECD anti-bribery convention criminalizes officials taking bribes overseas. This is being monitored but there are no cases yet. The OECD Committee is currently looking at Finland and the US which provides an opportunity to bring evidence. NGOs can monitor progress on the OECD web-site. If TNCs have bribery charges proved, they can not tender for public contracts – this can be used to curb TNC practices. In addition, the World Bank already has a black list of 70 companies, although these are currently all very small companies.

### **9. CONCLUDING SUMMARY**

#### **STATE OF THE ART OF THE DISCUSSION – QUESTIONS TO BE TACKLED AND NEW CHALLENGES**

The concluding session was introduced by **Markus Zöckler** from the University of Munich, Germany. Globalisation, he said, is not driven by TNCs alone, they take advantage of the opening of markets by national governments with the belief that economic growth benefits everybody.

The paradigm of neo-liberal globalisation has failed because it overlooks the idea that all markets must be based on trust, knowledge and orderly social advantage. There is a need for mutual interest and basic shared values and human rights should be accepted as a fundamental constitutional right in the new economic order.

He also felt that it is a mistake to think that legal rules solve everything as some States don't have the capacity to implement them and there are many gaps in interpretation. The attempt to formulate rules for TNCs is based on the belief that States have failed but he queried the value of legally-binding rules as many non-binding instruments have been effective. The OECD Guidelines could be a good starting point and that TNCs need time to adapt.

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<sup>5</sup> see *Reader 2001*, document 12

On enforcement, national laws on false advertising and unfair competition could be entry points for Codes and labelling and proposed a network of legal consultants who have knowledge of different countries. Ratings of companies in sustainability indices and working with governments on export credit systems could be entry points for NGOs.

He proposed the need for a win-win strategy and that positive incentives work best with TNCs who already have a growing interest to do something because of public pressure. Examples like the Soccer Ball Campaign can be used to convince bad governments and international organisations that good practice can be sustainable for the future.

### **IDEAS FOR FUTURE WORK**

The final presentation led on to a round-up of all the proposed activities of participants in the legal field. These included :

- preparing a legal checklist
- NGOs working together on common concerns and strategy
- web-sites on legal activities
- trying to get public procurement procedures changed
- environmental and social standards in FDI
- improved N/S relationships between NGOs
- publications on the OECD Guidelines
- raising public awareness on Export Credits and Human Rights
- preparing cases to test the OECD Guidelines
- tracking activities of NCPs in other countries
- testing systems of monitoring and verification
- exploring the idea of an NGO Advisory Committee
- building support for binding legislation
- promoting the UN Sub-Committee Guidelines on the Promotion and Protection of Human Rights
- looking at how business operates in conflict situations
- establishing more co-operation between TNCs, NGOs, unions and human rights groups

### **COLOPHON**

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## READER

A reader has been made in preparation for this seminar. See for the contents the overview in this issue of News From IRENE. For information contact IRENE at:  
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