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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

I Introduction

Multinational or transnational corporations (MNCs or TNCs) have been around for many decades, but the current international economic order of trade liberalization and economic globalization, in which workers' rights and environmental considerations are increasingly seen as barriers to free trade, places MNCs in positions of extraordinary power and equally extraordinary lack of accountability to anyone or anything except their shareholders. Whereas in the 1960s and 1970s there was concern about excessive interference by MNCs in the affairs of developing countries, today they are failing even to control bad practice by their overseas affiliates or subsidiaries. Although many of them are more powerful and wealthier than governments, they recognize no moral obligation to use their power and wealth to contribute to improving life for people in the countries where they operate, even those they touch directly such as their employees and consumers. Meanwhile, governments' space for regulating MNCs is shrinking. The division of accountability between states and MNCs is often unclear, resulting in an accountability vacuum in which neither takes responsibility.

Some key legal rulings on behalf of claimants have been won in recent years (e.g. against Thor Chemical Holdings in South Africa, see paper reader for this seminar [PR] pp26—8), but they are very few in comparison with the number of cases where companies have escaped scot-free and the even greater number of violations reported to human rights organizations, trade unions and environmental organizations. At the same time, many of the existing international instruments devised to regulate the activities of transnational companies are unenforceable and therefore largely ineffectual in practice. There is a considerable array of these instruments but few if any of them are binding, and corporations have no qualms about flouting them, particularly in Southern countries where national accountability mechanisms are rare, access to justice for ordinary citizens is difficult, and national governments are prepared to collude with corporations for the sake of the perceived benefits to their own economies. In this situation, lawyers, trade unions and human rights organizations working on behalf of workers and others whose rights have been violated find themselves at an impasse.

► The seminar

In April 1999 the Department of Public International Law at the Erasmus University of Rotterdam organized a colloquium on corporate responsibility – one of the first seminars to address these issues (*see* brief report, in electronic reader 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 organized 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 organizations;

- 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 organizations 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 emphasizing 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.'

II LEGAL & PSEUDO-LEGAL EXPERIENCES

Opening presentations by Menno Kamminga, of the Faculty of Law at Maastricht University, and Saman Zia-Zarifi, of the Department of International Law at the Erasmus University, Rotterdam, outlined the general legal context in which cases against MNCs can currently be pursued. Multinational corporations can be held accountable for their operations in other countries either directly or through the governments of countries where they operate, and under either domestic or international law. But corporations also have an armoury of avoidance strategies and countermoves which they can bring into play. The question of whether it is more fruitful to pursue legal action in the state where abuses are committed (the **host** state) or the state where the parent MNC has its headquarters (the **home** state) is also crucial.

1 Holding governments to account for MNC behaviour

States are obliged to protect the rights of people in their jurisdiction, and this implies that they must regulate companies operating or domiciled in their jurisdiction. It is therefore important not to lose sight of states' responsibility by always targeting MNCs directly. Working at the level of governments means getting governments of both home and host states to formulate and implement legislation, regulatory mechanisms, monitoring and supervision to ensure that they can control and regulate the activities of MNCs in their jurisdiction. It means exposing and challenging collusion between governments and MNCs in both home and host countries. In parallel, international instruments which are directly binding on MNCs are necessary, together with effective international institutional mechanisms to enforce them.

In the context of the shrinking state and the privatization of public services, states are increasingly trying to shift responsibilities, e.g. to provide water, onto private companies, usually resulting in a poorer service especially for poorer citizens living in less profitable areas. In many countries governments bend or waive their own labour and environmental legislation to allow MNCs a freer rein, or turn a blind eye to violations. States such as Sri Lanka have created free trade zones (FTZs), within which the state allows a separate system of law or waivers of national law. At worst, MNCs and governments actively collude: in Burma, for instance, the state oil and gas company MOGE was part of a joint venture with UNOCAL accused of serious human rights violations, carried out by the Burmese security forces, to clear territory and obtain forced labour for the construction of a gas pipeline; while in Nigeria, even under the new civilian government, state security forces are still being used to repress protest by local people at the activities of Shell and other oil companies in the Niger river delta. In such cases, collusion produces a legal vacuum. Who can be held accountable? Whom can claimants sue?

Bringing states to account on these responsibilities can force them to put pressure on companies. So it is important to pressure both MNCs' **home** states to ensure that they act responsibly in other countries, and the **host** states where MNCs operate to formulate and implement appropriate legislation regulating business activity in their jurisdiction and not to collude with

MNCs. On the other hand, MNCs have ways of avoiding being pressured through governments: they can move their headquarters to a more compliant state, or they can use their vague national identity to declare themselves free of the law of any country in which they operate.

2 Holding MNCs to account directly

Although it removes the spotlight from states' responsibilities to provide an adequate regulatory framework for MNC operations, the shift of attention away from dealing with states towards dealing with corporations, calling corporations directly to account, offers greater possibilities for winning actual redress for victims of abuses by MNCs. Here, however, MNCs use their ephemeral and shifting legal nature, existing in many countries at once, to argue that they exist in none and are therefore free from regulation by any government other than that of the country they happen to be in – the host country. When approaches in the host country are fruitless – which is usually the case – approaches can be made under either domestic or international law:

(a) at the level of the MNC's home state;
(b) at the regional level;
(c) at the international level.

► Home or host state?

There were differences of opinion over whether cases should be put forward in the home or the host state. Existing experiences suggest that claims are less likely to succeed in host states, for a variety of reasons. Access to justice for victims/claimants may be more difficult in their own countries. In South Africa, for instance, employees are banned by law from suing employers, this right being replaced with 'no-fault compensation', and the relatives of claimants who have died cannot bring a claim at all in South Africa, though they can do so in the UK against a UK-domiciled company. Collusion is likely to be greater, partly because developing countries, which are usually host states, *need* MNCs in the globalized economy. Many small, weak national economies are dependent on MNCs, and it is understandable, if regrettable, that they fear alienating them.

On the other hand, having recourse to MNCs' home states raises the question of sovereignty. In the past, home states have exercised diplomatic protection on behalf of corporations against the host state, but this became seen as a colonial practice and an infringement of the host state's sovereignty. Arguments on the grounds of sovereignty, however, are double-edged. Companies often use (or abuse) sovereignty as a pretext for devolving responsibility to host states, hoping to benefit from less adequate legal protection of victims, lower costs, or less judicial rigour. In many cases, claimants have *insisted* on bringing their cases in the offending MNC's home country.

Yet host governments' laws should not be ignored out of hand. One participant mentioned that hundreds of cases involving oil spills have been brought successfully against Shell in Nigeria, resulting in damages payouts of about $0.5 million. With the arrival of the civilian government in Nigeria there are hopes that the judiciary will be more independent; but even under Gen. Abacha judges were prepared to rule against oil companies, often because they were themselves from communities affected by the companies' operations. However, it was pointed out that these cases resulted from a very specific contract signed between Shell and the former Nigerian government granting Nigerians the right to sue Shell *only* on oil spills, so human rights violations cannot be addressed.

► Subcontractors and suppliers

If control of MNCs' affiliates and subsidiaries in other countries is difficult, control of their subcontractors and suppliers, which are at a further remove from the central sphere of influence of the parent company, is even more so. Could UNOCAL, for instance, itself be accused of forced labour in Burma, or would that responsibility belong to the Burmese subcontractors involved? And how far down the line does the responsibility of the mother company apply to more remote 'generations' of subcontractors? The OECD Guidelines for Multinational Enterprises recommend that subcontractors and suppliers should be 'encouraged' to comply with the guidelines; but it was felt that this text could be stronger, and most participants were emphatic that the mother companies should be responsible for the actions of their subcontractors and suppliers and should put in place, or improve, their mechanisms for monitoring their subcontractors and suppliers.

3 Approaches in the home state

A number of cases in industrialized countries where MNCs are domiciled – principally the UK, the USA, Canada and Australia – are slowly increasing the space within which it is possible for claimants from host countries to hold MNCs legally accountable in their home countries.

In the **United States**, the most useful instrument to date is the **Alien Tort Claims Act** (ATCA), a 200-year-old law which gives the 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. This covers a limited range of charges of

severe human rights abuses, namely slave labour, collusion in genocide, collusion in torture, and collusion in extrajudicial murder. Several cases in the US are being brought on the basis of the ATCA, notably that of the Burmese people v. UNOCAL of California (*see* ER 2.2), which has progressed some way partly because of the judge's strong reaction to the idea that a US company could be using slave labour in view of the USA's own history of slavery. It was argued that where a mother company is not US-based, US courts had no jurisdiction, for instance over Total, a French company which is a partner in the same joint venture as UNOCAL in Burma. This argument is being adduced in the case of the murder of Nigerian activist Ken Saro-Wiwa and others of the 'Ogoni 9', brought in New York by their families, where Shell's argument that it bears no responsibility on the grounds that it does not exist in the USA is incredible but legally sound. However an American judge also has jurisdiction in the case of a not-US based company 'doing business' in the USA. A non-American company that has an office in the USA would - for that reason - fall under the jurisdiction of the ATCA. However up till now no case against a non-American company has been accepted by the judge. But the argument of Shell in the case of Ken Saro-Wiwa that it has no responsibility because it does not exist in the USA, has been overthrown by the District Court because Shell has an agent based in New York. Another case against a US mining company in Irian Jaya, where the claim is of collusion in genocide of indigenous people through environmental pollution, was not upheld at the first stage.

In **England**, the legal standard being used under English law is the 'duty of care', which is an obligation applying to everyone in the UK, individuals as well as organizations. Richard Meeran reported on several cases which have been pursued by his firm, Leigh, Day and Co., to get compensation in the English courts for people living in the countries where the abuses have occurred, by holding the UK parent companies liable at home. They include cases against the Kent-based company Thor Chemicals, in which over 28 workers in its South African factory suffered severe mercury poisoning (*see* PR pp 2–3, 26–8); against Cape plc, brought by over 2,000 South African victims of asbestosis from long-term unsafe practices by Cape and its wholly-owned subsidiaries in South Africa (*see* PR pp4–5, 31–4); and against Rio Tinto (formerly RTZ), brought by a worker poisoned by uranium dust in Namibia (*see* PR pp3, 29–30).

The central issue in these cases is whether the MNC parent company has a legal **duty of care** to people affected by the operations of its subsidiaries overseas. Leigh, Day and Co. argue that it does have such a duty, because :

- The parent company, domiciled in England, exercised control, including financial control, of operations from its home base;
- Practices unacceptable in the country of domicile were exported to other countries (e.g. the Thor case);
- The profits are repatriated to the home country.

If the parent company was aware of the dangers caused by its practices, but took advantage of lower safety standards in other countries to expose people to greater risks than would be acceptable in the UK, this is a failure of due care on its part.

In **Australia**, a case has been brought against the mining company BHP for destroying the livelihood of 25,000 people in Papua New Guinea (PNG). But PNG is so poor and economically dependent on BHP that its government would not agree to sue BHP, until it was discovered that BHP had been lobbying the PNG parliament. Australian court argued that the case would be an infringement of the sovereignty of PNG and that the PNG government had colluded in BHP's behaviour. A secret settlement was drawn up after much public outcry, according to which BHP agreed to clear up some of the environmental damage and compensate some of the people.

In **Canada**, another 25,000 people are mentioned as victims of HRVs in a mine in Guiana, where the company was using methods that had been illegal in Canada for 25 years, with terrible results. The court in Canada said it could hear such a case, theoretically, but that in this case the facts were not clear and the local government was too closely involved.

Different legal systems offer different possibilities and constraints. Saman Zia-Zarifi noted that most of the cases mentioned as being brought under domestic law are happening in common-law countries, and wondered whether similar actions would be possible in the civil-law countries of the European continent. If a court in Holland, France or Germany were to sue a corporation domiciled in their country for its activities abroad, even if such a claim were lost, the case could raise the possibility of the claimants invoking EU mechanisms. The Canadian case mentioned above was from Quebec, which has a civil-law system, and could thus perhaps provide a good model. Philipp Mimkes reported that the Bayerwatch campaign in Germany had tried to bring criminal charges against the German management of Bayer over workers injured and killed as a result of exposure to chrome dust at a South African mine owned by Bayer, but without success.

As we have seen, MNCs create and exploit ambiguity and vagueness over their identity in order to avoid being called to account, using 'complex and confusing corporate structures … to distance and separate the parent company from the local operating subsidiaries'.[1] In particular, in many of the most notable British cases, defendant companies fight bitterly not on the basis of the facts of the case (which usually clearly condemn them) but on the technical questions of duty of care and, particularly, **venue** and **jurisdiction**. The Brussels Convention on jurisdiction, which applies to all EU-based companies, stipulates in article 2 that the place of jurisdiction of a case is the country of domicile of the parent company. But, under English law, a defendant company can apply to the court to stay, or prevent, the action on the grounds of *forum non conveniens* (unavailable venue). Whereas claimants, unable to get redress in the host country, seek to have cases against UK-based companies heard in England and to establish jurisdiction there, the companies use *forum non conveniens* to get the case returned to the host country, where they will benefit from less adequate legal protection of victims, the compliance or collusion of the government, and lower costs. For NGOs as well as claimants it can be disconcerting and disappointing that the success or failure of a legal action often depends not on the facts of the case but on technicalities of this kind, which distract attention from the actual violations, the relationship between parent and daughter companies, and where the duty of care lies. In the Cape case, for instance, three years have now been spent in argument over where the case should be held.

These differences in national legislation and the loopholes which companies can exploit strengthen the argument for seeking international solutions to the question of corporate accountability.

4 Approaches at the regional level

Several approaches were identified at different regional levels, including the European Union (EU), the North American Free Trade Agreement (NAFTA), and the OECD.

► The European Union

The EU has been interested in issues of corporate responsibility since the 1970s and has issued a series of Directives, mostly on working conditions, with relevance to MNC behaviour. Existing EU mechanisms for accountability include the European Court of Human Rights, the human rights provisions contained in the Amsterdam (1997) and Maastricht (1992) treaties, and the collective complaints provision of the EU Social Charter, which has been used successfully in a handful of cases concerning, for example, child labour in Portugal.

Willem van Genugten (Faculty of Law, Tilburg University) suggested that it could be useful to bring test cases to the European Court in Luxembourg, and also spoke of the need to fight for horizontal force in the application of human rights decisions in the EU framework. However, he warned that MNCs have used EU instruments for their own ends on several occasions, such as the Nord/Nolde case of 1974, in which a German company sued the EU for violating its right to property.

Most recently, a parliamentary resolution based on a report by Richard Howitt MEP led to the adoption in January 1999 of the idea of a **European Code of Conduct for European Enterprises Operating in Developing Countries**. The European Commission (EC) is now instructed to draw up a model code based on existing minimum standards for MNCs. This will not be legally binding; but, by adopting the Howitt report, the EP has called on the EC to enforce an existing requirement – that private companies undertaking work for the EU in third companies should respect fundamental rights in accordance with the Treaty of Europe, or lose their funding.

The main use of the Howitt resolution lies in its creation of a Monitoring Platform, consisting of independent experts, trade unionists and European business representatives, which would investigate complaints and hear evidence from representatives of corporations about their actions in other countries. This forum would rely for effectiveness on subjecting companies to the glare of publicity and a semi-judicial setting. The EP Committee on Development and Cooperation will hold public hearings at least once a year to which cases of abuse may be presented (see below).

► NAFTA

The North American Free Trade Agreement contains a specific provision (11.14) which allows citizens to bring claims for environmental or labour violations against companies operating in the NAFTA region. Some cases have been brought, but with little success, and it must be concluded overall that NAFTA has been much more favourable to corporations than to anyone trying to challenge them.

► OECD Guidelines for Multinational Enterprises

The OECD is not truly international, and is heavily weighted towards the global North, its members being the governments of 29 industrialized countries.

[1] Richard Meeran, 'Liability of multinational corporations: A critical stage', PR p24.

Nonetheless, it has a series of agreements and guidelines for member governments concerning corporations A strength of OECD instruments is that they are drawn up by and for governments. They could, and should, be brought into national legislation; but governments rarely do this. Moreover, implementation is notoriously weak.

The OECD **Guidelines for Multinational Enterprises**, drawn up in 1976 and revised several times, most recently in 1999, are wide-ranging, covering employment, industrial relations, environmental considerations, information disclosure and transparency, competition, taxation, and other aspects of corporate activity (*see* Duncan McLaren, 'The OECD's revised *Guidelines for Multinational Enterprises*: A step towards corporate accountability' (February 2000), ER 3.4, PR p12). However, they are widely seen as out of touch with current corporate behaviour and crippled by their voluntary nature. In particular, the inertia and ineffectiveness of the National Contact Points (NCPs) which constitute the Guidelines' enforcement mechanism are criticized.

The OECD Guidelines were discussed at length in the seminar. Roger Blanpain, the rapporteur for the 1999 revision of the Guidelines, outlined the revision process, which had been relatively open: trade unions and to a lesser extent NGOs were consulted by the working party responsible for the review, and information was available on the Web. He listed areas where new text has been introduced, including:

- extraterritoriality: making all MNCs domiciled in OECD countries responsible for their activities even when operating through subsidiaries outwith the OECD area;
- introduction of positive aspects, such as 'encouraging human capital formation', which should apply also to subcontractors and suppliers;
- changes in the 1976 text on industrial relations, including access to decision-makers and compliance with prevailing labour law;
- age discrimination;
- a new guideline on health and safety;
- new rules on giving notice prior to restructuring a company.

New text has also been introduced on the use of environmental impact assessments, child and forced labour, bribery and corruption, and consumer interests. Suppliers and subcontractors are encouraged to apply the Guidelines. But there are many loopholes (McLaren, ibid.) and, above all, the proposals for improving implementation are toothless, since they focus strongly on reviving and strengthening the NCPs, which have already proved useless. For instance, the revised guideline on extraterritorial application of the Guidelines, which could cover some of the worst abuses by MNCs in developing countries, is positive. But without an effective enforcement mechanism, this too stands to be as widely ignored by companies as the Guidelines have been hitherto.

Discussion at the seminar centred on the limited use of the Guidelines – in the 24 years of their existence the OECD has examined only about 30 cases presented under the Guidelines, and only two in the 1990s – and to what extent a voluntary code could ever be effective in practice. Roger Blanpain argued that although the Guidelines were not legally enforceable, the fact that they have been agreed and promulgated by many countries, companies, and labour organizations gives them moral force. He recommended that NGOs should take up more cases, present them to the OECD, and lobby around them, on the grounds that the public opinion mobilized by such cases can make MNCs change their practice. Given the present lack of implementation, however, it is not surprising that there is little confidence in the system.

According to Saman Zia-Zarifi, a much more interesting and effective OECD instrument is its **Convention on Corruption**, which holds companies criminally liable for bribing public officials in third countries. The existence of this convention gives the lie to corporations which have always claimed such a law would be unworkable. However, as so often, implementation to date has been weak.

5 Approaches at the international level

In parallel with national legislation, we need **international standards** which are **directly binding on MNCs**. States have long resisted these, because imposing such obligations would give companies status in international law, which they felt was dangerous. However, the OECD Convention on Corruption, currently the only international instrument which imposes obligations on MNCs, could be a useful precedent for setting similar obligations in the fields of human rights and environmental responsibility.

These instruments need to be accompanied by **international institutions** with the power to supervise and **enforce** the implementation of binding standards. With the failure of the MAI and of the attempt to make companies as well as individuals accountable before the International Criminal Court in Rome, there are only international codes of conduct, such as the ILO and OECD mechanisms. These are severely hampered by their non-binding nature and very weak supervisory mechanisms.

International human rights law, which can apply to international as well as national companies, offers some opportunities for calling companies to account, but to date has been more widely used in relation to states. However, the UN Subcommission on the Promotion and Protection of Human Rights, in the context of its work on economic, social and cultural rights, has begun looking at the activities of TNCs and their impact on human rights and is expected to produce a new code in 2001. The Subcommission is also interested in other economic areas, such as trade liberalization and globalization and their impact on human rights.

- **UN Subcommission for the Promotion and Protection of Human Rights**

The UN human rights mechanisms have begun to address the fact that many of the problems they deal with have their roots in corporate conduct, and the **UN Subcommission for the Promotion and Protection of Human Rights** has a working group dealing specifically with these issues. Françoise Hampson is a member of the group and reported upon its work.

Of the three principal focuses that human rights mechanisms can take – enforcement, monitoring, and standard-setting – the Subcommission's particular strength lies in standard-setting. Much of the standard-setting as regards civil and political rights is now considered to have been accomplished, and the Subcommission has been concentrating more on the realization of economic, social, and cultural rights.

The issue of MNCs' operations first came to the Subcommission's attention in a systematic way in 1998. The Subcommission established a three-year sessional working group, which is now putting together a document aiming to integrate all the measures and norms necessary to ensure that the activities of MNCs are consistent with the promotion and protection of human rights. The group is collecting data from as many constituencies as possible on how MNCs affect the enjoyment of civil, cultural, economic, political and social rights, including the rights to development and to a healthy environment. It aims to cover good as well as bad practice, and seeks input from NGOs, especially on the elaboration of sustainability reporting guidelines. A report on elaborating a possible code of conduct, with relevant human rights standards and a possible implementation mechanism, should be ready by the August 2000 session of the Subcommission and the group's final meeting in 2001 may result in a draft code, although the Subcommission would not itself be empowered to make this into a concrete obligation.

The working group wants the new code to have a binding character, but expects this will be difficult to achieve, since there is already considerable opposition to this in the Subcommission from various Western European governments which do not favour imposing obligations on businesses. It also wants to require MNCs to prepare regular impact assessments.

► **ILO conventions**

Currently there are 180 ILO Conventions in existence, of which those addressing the five 'core' themes are:

- Conventions 29 and 105 on the abolition of forced labour;
- Conventions 87 and 98 on the rights to freedom of association and collective bargaining;
- Conventions 111 and 100 on the prevention of discrimination in employment and equal pay for work of equal value;
- Conventions 138 and 182 on the minimum age for employment and child labour;
- Conventions 174 and 176 on industrial accidents, safety and health.

ILO Conventions are international treaties, subject to ratification by ILO member states, and as such are held to be 'hard law', allowing claimants to proceed against governments for violation of them They are negotiated between governments, workers and employers and, like the OECD instruments, are intended to promote rather than punish. The ILO also has a specific, less formal instrument related to MNCs, the *Tripartite Declaration of Principles concerning multinational enterprises and social policy* (1977), which it describes as a voluntary code.[2]

The ILO is the principal international standard-setting body for labour relations, and many internal codes are based on ILO Conventions. As a legal instrument for obtaining corporate accountability, however, it suffers from many of the same limitations as the OECD, principally as regards implementation. There is a MNCs Committee, but it tends to be very slow and inconclusive in practice. Participants at the seminar who had tried to use it had found it frustrating.

► **World Bank**

The World Bank was originally set up to eradicate poverty, so its guidelines do protect certain resource-poor groups such as indigenous people. These ideals have become somewhat diluted in the growth of the World Bank as a major development donor and a promoter of neoliberal economic principles through structural adjustment programmes. This makes it an unpromising partner in any challenge to corporate power; but in recent years NGDOs and people's organizations have started to take the Bank to task and

[2] http://www.ilo.org. Site consulted 20 May 2000.

press it to meet up to its founding principles, with some success. Now the IMF and WB are starting to put poverty reduction into their mandates alongside free trade imperatives. Although this may seem to ignore the inevitable contradictions, it opens up a space for calling on these institutions to fulfil their promises.

► World Trade Organization

The WTO is the only international body with real power to enforce, but, from the point of view of challenging MNCs, its devotion to free trade makes it on the whole part of the problem rather than part of the solution. The less power national governments have, the more necessary international regulation is; but unfortunately the WTO, the one organization most involved in international regulation, is also the one coming under the strongest criticism, as the uproar at Seattle shows.

The WTO authorizes victims of unfair trade practices to impose sanctions on companies up to a certain maximum amount, and there are several cases in the WTO of states both paying and being paid. Corporations have had to change their behaviour, and ultimately bear costs, in a number of cases. However, most WTO cases are between industries or corporations. In practice, civil society has no meaningful access to the WTO, and the institution does not present itself as a defender of the economic rights of citizens. In fact, protection of some rights by States can result in a violation of WTO rules. Thus the WTO in itself raises a series of human rights questions.

6 NGOs and legal action

While NGOs generally choose to challenge corporate power by non-legal means such as campaigns, public awareness-raising, and advocacy, some have taken the legal route and others are considering it as a strategy. In Belgium, Oxfam Magasins du Monde / Clean Clothes Campaign is campaigning for the rights of employees of Adidas, a sponsor of the Euro 2000 football tournament starting in June 2000, and would like to pursue legal actions (*see* box, p10). In Germany, the Bayerwatch campaign, which – as its name suggests – monitors the activities of the powerful German pharmaceuticals MNC, Bayer, has tried to bring many cases against the company, but has had limited success and was itself sued by Bayer in the late 1980s. After a seven-year legal battle that went right to the German supreme court, Bayerwatch won the case, but at enormous expense.

Amnesty International's Netherlands section is exploring the possibilities and problems of legal actions with lawyers and other NGOs. In the UK, World Development Movement has been working with Richard Meeran on the Cape case, but is still trying to clarify the most effective role it can play as a campaigning organization; this may be most usefully defined on the basis of public interest.

III NON-LEGAL MEANS: CAMPAIGNS AND ADVOCACY

Semi-legal and non-legal means of pressuring companies are also very important, and can lead to economic punishment for companies, which is a good deterrent. NGO activities such as working on standards and codes, raising public awareness, solidarity with claimants, research and evidence-gathering, advocacy with governments and companies, can complement legal work. The various NGDOs and campaigning organizations at the seminar represented a wide range of experience of this kind of work.

► Public hearings

In 1999, as a result of the Howitt report and resolution (see above, section II 4), the **European Parliament** decided to hold public hearings where victims of abuses by MNCs could complain publicly before MEPs and in the presence of representatives of the MNCs, who would reply. The press and media would also be invited. Hearings in the EP are decided on by presidencies, but are brought forward by the parliamentary committees. It requires a lot of lobbying to obtain an EP hearing, and so far only the Committee on Development and Cooperation has agreed to hold a hearing on MNCs. The big advantage of EP hearings is that the facts speak for themselves, and that the mechanisms confronts industries with complainants.

The **Permanent Peoples' Tribunal on Global Corporations and Human Wrongs**, based in Rome, works on important test cases such as that involving Union Carbide at Bhopal in 1984, which has been described as the world's worst industrial disaster. It also holds periodic Tribunal hearings to receive the testimony of those who have suffered from the activities of MNCs. The present seminar preceded one such Tribunal (also held at the University of Warwick, 22–25 March 2000), at which a panel of 5–7 persons selected to represent the international community, sitting in a public hearing, heard and examined evidence against Freeport McMoran/Rio Tinto, Monsanto and Union Carbide. Representatives of industry were not invited to respond at this stage. PPT secretary Gianni Tognoni explained that this was deliberate; historically corporations have refused to come to tribunals, so the PPT organizers wanted to use this session as the start of ongoing proceedings in which MNCs would be presented at the next session with all the evidence gathered at this one.

► Shareholding

Corporations' main legal responsibilities are to their shareholders, and they often insist on this when called to account for putting profits before the welfare of workers and consumers or environmental considerations. Holding a few shares in a company theoretically gives the holder a limited say in how the company operates. Some human rights and environmental organizations and activists have tried to use shareholding in the past as a strategy for promoting accountability of companies, but the companies can mobilize far greater resources for influencing other shareholders than individual small shareholders can. UNOCAL, for instance, has shareholder resolutions pending against it for about US$400 million, but has responded by writing to all shareholders calling on them to dissociate themselves from the resolution.

► Codes of conduct and standard-setting

The formulation and promotion of codes of conduct and standards, including the awarding of social or environmental labels such as Rugmark (a social label for carpets produced in India and Nepal without the use of child labour), is perhaps the most common NGO activity aimed at making MNCs more accountable. While the effectiveness of this strategy is debated (*see* below, section IV), one result is that there is now a large array of codes of conduct, dealing with the same broad issues. An interesting example of work in this area is the set of *Principles for the conduct of company operations within the oil and gas industry* elaborated by Bread for the World. BfW realized that although there is no shortage of codes there is a need for principles that allow such codes to become operational, meaningful, and verifiable. The *Principles* form a comprehensive list of regulations covering people's participation in planning oil and gas extraction projects, sustainable development, respect for indigenous peoples and their traditions, environmental standards, including intergenerational equity, and human and labour rights, and enjoining independent monitoring, auditing and verification of codes of conduct and an independent and accessible mechanism for receiving complaints.

► Advocacy with governments

In Britain, Oxfam and World Development Movement (WDM) are pressing on the UK government to improve national law and policy, in order to make it possible to sue corporations or put pressure on them to abide by the law.

WDM, having been frustrated by attempts to promote voluntary codes of conduct effectively, has shifted its focus towards promoting **enforceable regulations** and their use as a complement to voluntary codes. Here it is focusing on the UK government and especially a review of company law. The key issue is the need to change the idea that a company's legal responsibility is primarily to its shareholders. WDM wants this responsibility extended not only to all UK stakeholders, for instance employees, but also to overseas stakeholders.

The question of international regulation of MNCs is more complex. WDM identified from international agreements a list of rights which corporations can be expected to respect. However, states are often unwilling to implement these rights, and WDM is still examining whether corporations can be made directly responsible in for implementing them. Even harder to regulate is the economic impact of MNC activity in host countries, especially in the context of mergers and other shifts in corporate ownership. To what extent can these aspects be regulated by national or even international law?
More indirectly, WDM is challenging the power of MNCs through work on the Biosafety Protocol, in which it aims to strengthen the power of Southern governments to refuse to import genetically modified (GM) crops, giving both consumers and producers some rights against the companies which are pushing GM crops.

► Advocacy with companies

As well as work on codes of conduct, some NGOs are carrying out other forms of advocacy with companies. For Amnesty International, the protection of economic and social rights has not been part of the core mandate, but this emphasis is changing, and AI sees that to remain relevant it must address the human rights impact of globalization and free trade. The Business Group of AI UK (AIBG) has a number of activities aimed at getting companies to be more aware of the human rights implications of their operations, including a letter campaign sensitizing companies operating in Indonesia to the East Timor crisis. In situations where human rights violations are prevalent, companies' activities can either contribute to these violations or can protect human rights. AIBG outlines a series of policies which companies can adopt in such situations in its *Human rights guidelines for companies*.

Over the last year or so, AIBG has also been working on issues of corporate governance, using the example of pension funds. Local authorities invest huge sums of money in companies in this area, and are concerned with accountability. Pension funds control as much as a third of the Stock Exchange. A recent amendment to the Pensions Act requires all pension funds now to declare whether or not they have an ethical policy, and AIBG sees this as an opportunity to get the major financial institutions which manage their funds to develop their own ethical policies and criteria.

AI in the Netherlands has been involved since the 1970s in advocacy with companies on human rights, and is currently working on terms of reference for companies in this respect. However, as Gemma Crijns pointed out, companies have proven ignorant of even the basic notions of human rights and have only in the last few years become acquainted with human rights instruments such as the ILO Conventions and OECD Guidelines. AIBG is trying to develop terms of reference for companies in the sphere of human rights, and is also asking AI members to ask their pension funds about their activities.

ADIDAS – NOT PLAYING BY THE RULES

Carole Crabbe of Oxfam Magasins du Monde (OMM – Belgium) reported on an initiative being undertaken in the context of the Clean Clothes Campaign (CCC) against Adidas. Based in Germany, Adidas is the mother company to many subcontractors in countries where low wages and poor working conditions are common. Under pressure from public opinion in 1998, it signed a very low-level voluntary code of conduct, which says nothing about implementation, monitoring, or sanctions.

Adidas is a sponsor of the Euro 2000 football tournament. In the runup to the tournament, CCC asked the Euro 2000 organizers to include in their contract with sponsors the so-called FIFA code of conduct, which – although FIFA apparently has not actually signed it -- is a much better code than Adidas' own code and is based on ILO Conventions, with provisions for implementation and sanctions. This has been done, which means that all footballs and equipment made by Adidas and bearing the E2000 logo must comply with the FIFA code.

Meanwhile, several violations of workers' rights in Bulgaria, El Salvador, Thailand, and Indonesia have emerged, including denial of freedom of association, paying less than minimum wages, excessive working hours, making workers take pregnancy tests, and prohibition of collective bargaining. In March 2000, OMM tried to present the cases to the Euro 2000 as evidence of violation of workers' rights in the supply chain, but they accepted no further responsibility. OMM is continuing to draw attention to the violations, for instance by sending a television team to one of the countries involved, but would also like to move on the legal front against either Adidas or Euro 2000.

Seminar participants discussed the basis and fora in which these cases could be pursued at the home-state, regional and international levels. Possibilities raised included proceeding against the Bulgarian government for allowing violation of ILO conventions in its jurisdiction, or against Germany for allowing its citizens to violate those rules; bringing a claim against Adidas in Germany, its home state; or bringing a case against Adidas in Belgium on the grounds of false advertising (using the Euro 2000 logo on its equipment while breaking the FIFA code). However, a two-pronged process was recommended, in which, if NGOs could get strong enough evidence of the violations, lawyers could use it to identify the most appropriate legal instruments and begin to apply them.

Predictable problems were also raised. The agreement of the workers concerned would have to be obtained before taking the case forward, and they would be unlikely to favour any action that would further endanger them. Might Adidas reply that it cannot guarantee the quality of *all* its subcontractors and suppliers? Would evidence have to be found that Adidas is in fact using the FIFA code of conduct for publicity purposes? Strong arguments would have to be found for targeting Adidas specifically, so that other sports goods companies such as Reebok and Nike would not seem to be let off the hook. Is litigation advisable if it means that the company might pull out of a country where it is a key contributor to the local economy? And finally, what if Adidas starts a libel action against the NGOs?

► Awareness-raising, education and public campaigning

Most if not all of the NGOs represented at the seminar accompany their advocacy and other work with public awareness-raising and campaigning. It is important to build a critical mass of informed public opinion calling corporations to account for their activities. AIBG, Banana Link, Bayerwatch, and WDM were among the NGOs present at the seminar who publish awareness-raising and campaigning materials, including regular newsletters (*Banana Trade News Bulletin*, *Keycode Bayer*, *Human Rights and Business Matters*) to equip members of the public to call companies to account. Weltumspannend Arbeiten of Austria is a specifically education-oriented project working with organized workers and development issues and the effects of globalization.

IV Discussion: Codes of conduct

> 'Voluntary labels and codes of conduct are no substitute for legislation and binding international agreements. However, they can be helpful in promoting fundamental labour and human rights all over the world.'
> (India Committee of the Netherlands)

A major discussion thread running through the seminar concerned the value and usefulness of codes of conduct. Codes of conduct are currently mushrooming, being created by governments, companies, and NGOs; and there was a clear division of opinion between those who considered them at best ineffectual and at worst dangerous, and those who found value in promoting meaningful codes and lobbying for them to be treated by companies as a mechanism of public accountability to society at large, even though they are not legally binding. This division of opinion coincided to some extent with the two constituencies present, lawyers and NGOs/activists. Lawyers' principal interest is in getting legal redress for victims of abuses, while that of NGOs is in non-legal means, which have a wider appeal to public opinion and can therefore have some public impact even if a legal action fails.

The NGO position, broadly speaking, is that while legal methods are both valuable and necessary, successes are still very small, and attempts by civil society to push MNCs towards more acceptable practice, such as work on codes of conduct, should be seen not as an alternative but as a support or complement to legal actions. Some participants also felt that codes of conduct were valuable in establishing general, agreed principles which could then be developed on the evidence of individual cases, leading subsequently to binding legislation.

The main problem with both internal codes of conduct and international standards and guidelines is implementation. In the case of internal company codes the public relations component is invariably high; internal codes have even been described as a form of advertising. But there is a serious danger of abuse of them by companies if they are not subject to tough, independent, binding supervisory mechanisms. These should consist not of internal accounting mechanisms set in place by the company itself, but of independent mechanisms to which victims of abuses by companies can submit complaints. Without such mechanisms, codes of conduct remain at the level of a PR exercise and can be flouted or perversely interpreted by companies at will.

Another danger of internal codes of conduct is revealed when corporations change, for instance through breakup or merger. Shell, for instance, accepted a minimum code of conduct which allowed it to claim the moral high ground and bask in a good deal of credit. When Shell in Nigeria later sold off parts of the corporation to small companies far less accountable than Shell and without codes of conduct, affected workers and communities were left without even the minimal protection offered by Shell's minimum code. Similar fears – and a strategic dilemma for those seeking MNC accountability – arise when MNCs leave an area, perhaps even as a result of successful actions against them, and smaller and even less accountable companies move in to replace them. An example is Petronas, a Malaysian-based oil company which is moving into areas abandoned by Northern oil companies. Internal, company-based codes cannot address situations of this kind: independent international mechanisms are the only option.

The weak implementation mechanisms of the relevant international codes and standard-setting instruments have been discussed above. A chief advantage of standard-setting is that it applies across the board and in many cases includes reporting mechanisms. But there is still an urgent need for meaningful implementation, putting the right procedures in place and getting them applied.

In the end, codes of conduct, particularly internal ones, make corporations look and feel good without addressing the actual or potential victims, whereas legal methods are based around the victim. However, neither lawyers nor NGOs and campaigners can afford to lose sight of the double objective: to get justice for the victims of past abuses, and to put systems in place to ensure that such abuses don't recur.

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 UN 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 some successes with this strategy in individual US states, where the attorney-general or governor can revoke a company's charter. A petition to revoke UNOCAL's charter is currently under way,[3] as is the attempt to get the government of New York state to start a charter revocation action against Union Carbide, which is incorporated in New York state.

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 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?

[3] Ward Morehouse, *Challenging corporate rule: the petition to revoke UNOCAL's charter* . London: Carpenter, 2000.

- 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, organizations 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. Organizations 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, organizations 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 should 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

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This seminar is part of a series of development education activities of IRENE on corporate social responsibility and workers' rights.

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