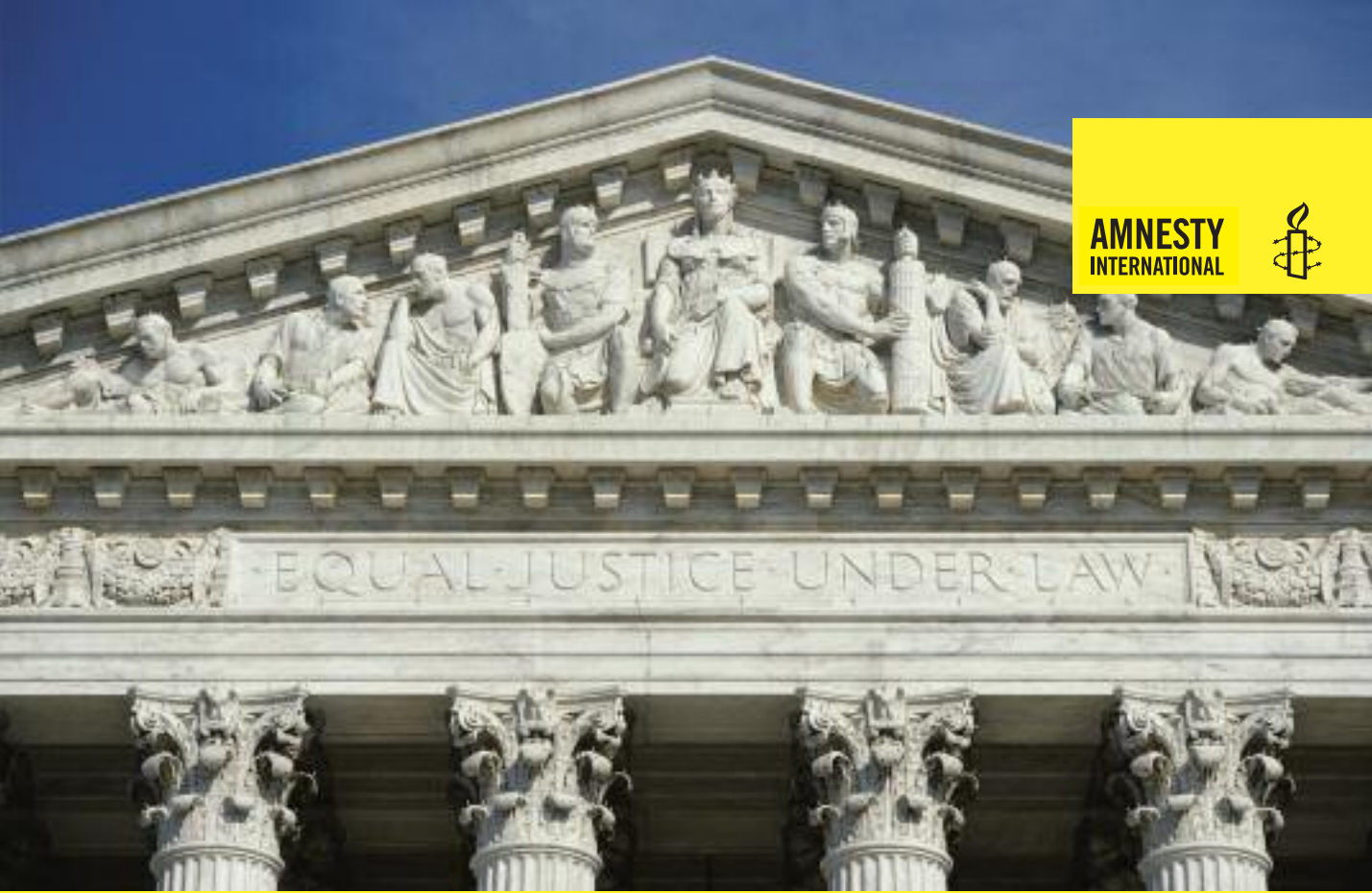




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EQUAL JUSTICE UNDER LAW

INJUSTICE INCORPORATED

CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY



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(28)
2016

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The boundary wall of the former UCIL plant in Bhopal, 2 December 2009. Almost 30 years later, survivors continue to fight for recognition of inter-generational health impacts, legal justice, adequate compensation, clean drinking water and remediation of the site.

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A woman protests outside the law courts in
Abidjan, Côte d'Ivoire, 29 September 2008.
This date marked the start of the criminal
case against individuals implicated in the
dumping of toxic waste in sites around the
city in 2006.
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INJUSTICE INCORPORATED

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GLOSSARY

ACHPR	African Commission on Human and Peoples' Rights
APS	Amsterdam Port Services
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute (USA) – the same thing as ATCA, the Alien Tort Claims Act.
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
BHP	Broken Hill Proprietary Company Limited
BTC pipeline	Baku-Tbilisi-Ceyhan Pipeline
CAFTA	Central America Free Trade Agreement
CBI	Central Bureau of Investigation (India)
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CJM	Bhopal Chief Judicial Magistrate (India)
CMCAs	Community Mine Continuation Agreements
CNVDT-CI	National Coordination of Toxic Waste Victims of Côte d'Ivoire
CRC	UN Committee on the Rights of the Child
CSE	Centre for Science and Environment (India)
CSRS	Centre Suisse de Recherches Scientifiques en Côte d'Ivoire (Switzerland)
DMB	Environmental and Buildings Departments of the Amsterdam Municipality (Netherlands)
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act (USA)
Dow	The Dow Chemical Company
DRC	Democratic Republic of the Congo
ECAs	Export Credit Agencies
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDC	Export Development Canada
EIS	Environmental Impact Statement
EU	European Union
EWSR	European Waste Shipment Regulation
FCO	Foreign and Commonwealth Office (UK)
GDP	Gross Domestic Product
GGMC	Guyana Geology and Mines Commission
Guyana EPA	Guyana Environmental Protection Agency
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICMR	Indian Council of Medical Research
IFC	International Finance Corporation
IFIs	International Financial Institutions
ILO	International Labour Organization
IMF	International Monetary Fund
IPC	Indian Penal Code
MDA	Mineral Development Agreement
MIC	Methyl isocyanate
MIGA	Multilateral Investment Guarantee Agency, World Bank
MOA	Memorandum of Agreement
NCDAO	National Committee for Defence against Omai (Guyana)
NEERI	National Environmental Engineering Research Institute (India)
OECD	Organisation for Economic Co-operation and Development
OGML	Omai Gold Mines Limited
OTML	Ok Tedi Mining Limited
PNG	Papua New Guinea
PNGSDP	PNG Sustainable Development Program Limited
ppm	Parts per million
RDS	Royal Dutch Shell Plc
RIQ	Recherches Internationales Québec (Canada)
RTI	Right to Information
SEC	US Securities and Exchange Commission (USA)
SPDC	Shell Petroleum Development Company of Nigeria Limited
Tailings	The materials left over after the separation of the valuable fraction from the uneconomic fraction of an ore
TBBV	Trafigura Beheer BV
UCAPC	Union Carbide Agricultural Products Company
UCC	Union Carbide Corporation
UCE	Union Carbide Eastern
UCIL	Union Carbide India Limited
UDHR	UN Universal Declaration of Human Rights
UN Guiding Principles on Business and Human Rights:	UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework 2011
UNEP	UN Environment Programme
US EPA	US Environmental Protection Agency (USA)
WAIBS	West African International Business Services
WHO	World Health Organization

KEY LEGAL PRINCIPLES

ACT OF STATE PRINCIPLE

According to this principle, the courts of one State will not sit in judgement on the sovereign acts of another State in its own territory.

CAUSE OF ACTION

The grounds – such as violation of a right – that entitle one person to seek judicial redress or relief against another.

CORPORATE VEIL

The “corporate veil” or its more technical term “separate legal personality” is the legal doctrine under which each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own separate liabilities. In company law, when corporations are created, they have separate and distinct legal personalities, despite the fact that they may be members of a corporate group that has the same shareholders and/or directors. This doctrine implies that the liabilities of one member of a corporate group will not automatically be imputed to another, merely because there is an equity relationship between them.

DOUBLE ACTIONABILITY PRINCIPLE

This requires claimants who have brought a tort action on one jurisdiction concerning an act committed in another jurisdiction to show that the harm for which they are claiming reparation is actionable under both jurisdictions.

EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS

Extraterritorial human rights obligations refer to the responsibility of States for acts and omissions of the State, within or beyond its territory, that have effects on the enjoyment of human rights outside that State's territory as well as obligations to engage in international co-operation and assistance for the realization of human rights, as set out in the Charter of the United Nations and a number of human rights treaties and standards. The scope of the State's responsibility for human rights beyond its borders is being defined by expert legal opinion and analysis (see Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, below)

EXTRATERRITORIAL JURISDICTION

States exercise jurisdiction based on international legal rules. Jurisdiction sets out the limits of the State's entitlement to make and enforce rules with regard to the conduct of natural or legal persons. The most common and widely accepted basis for State jurisdiction is territorial jurisdiction. However, States are permitted to exercise jurisdiction extraterritorially or put in place laws that have an effect beyond their borders in a number of circumstances. The parameters for the exercise of extraterritorial jurisdiction are subject to international legal rules, which prevent one State from unduly interfering in the territory of another State.

FORUM NON CONVENIENS

Forum non conveniens is a doctrine that allows courts to decline jurisdiction on the basis that the venue chosen by the claimant is not the most appropriate venue for proceedings.

LIMITED LIABILITY

A corporate law doctrine, under which a shareholder is not liable for the debts and liabilities of the company in which it owns shares (meaning that its liability is limited to the amount it has paid for its shares in the company)

LOSS OF AMENITY

A form of non-financial harm suffered by a claimant and for which they are entitled to recover damages, such as the loss of enjoyment of quality of life, (for example the loss of the enjoyment of land).

MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

These Principles were articulated and adopted by a group of experts on international law in 2012. They are drawn from international law and aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights.

MOZAMBIQUE PRINCIPLE

According to this principle, national courts do not have jurisdiction to hear cases that relate to rights to foreign property.

SUBJECT MATTER JURISDICTION

The authority of a court to hear particular types of cases based on the nature of the claim. For example, some courts specialize in a particular area of the law, and cannot adjudicate on others.

TORT OR DELICT

A branch of law that imposes civil liability on a person for breaching duties or obligations imposed by law (for example, the tort of negligence requires the breach by a person of a duty of care owed to another under law, as a result of which that other person suffered harm).

A NOTE ON THE TERMINOLOGY AND FOCUS IN THIS BOOK:

This book focuses on multinational companies and in particular those in high-risk sectors, such as extractive industries. In general it uses the terminology of “parent” and “subsidiary” company as well as “home” State and “host” State (meaning, respectively, the home State of the parent or controlling company and the State that hosts its investment — usually via a subsidiary). However, many of the same issues and arguments apply to companies whose operations rely on supply chains, or sub-contracting chains and joint ventures or other commercial arrangements.

WE WILL SURELY GET OUR RIGHTS... I AM READY TO SACRIFICE MYSELF, BUT FOR THE SAKE OF THE MOVEMENT AND MY POOR PEOPLE, I WILL NOT GIVE UP THE STRUGGLE. UNTIL MY LAST BREATH, UNTIL MY PULSE STOPS BEATING, I WILL NOT BACK DOWN FROM THE FIGHT.

Rampyari Bai, Bhopal gas leak survivor and activist, March 2012.

WE BELIEVE THAT OMAI'S PROFITABILITY HAS BEEN GIVEN GREATER IMPORTANCE BY NATIONAL AND INTERNATIONAL AUTHORITIES THAN OUR HEALTH, SAFETY, AND WELFARE. WE WELCOME DEVELOPMENT BUT IT MUST NOT BE AT THE EXPENSE OF THE LIVES OF OUR PEOPLE.

Villagers living along the Essequibo river, Guyana, impacted by spills and discharges from the Omai gold mine, in a letter to the Multi Investment Guarantee Agency, part of the World Bank, November 1999.

WE NEED SUPPORT SO THAT THE TRUTH IS KNOWN. [WE MUST] PUT PRESSURE ON OUR STATE AND THE EU FOR ITS ENVIRONMENTAL OVERVIEW AND [SO THAT IT] BEARS RESPONSIBILITY. AFRICA MUST STOP BEING THE RUBBISH BIN [FOR THE WEST].

Rachel Gogoua, Akouedo resident affected by the 2006 dumping of toxic waste in Côte d'Ivoire, February 2009.

1/INTRODUCTION

When human rights violations and abuses occur, international law requires that the perpetrator is held accountable and the victim receives an effective remedy. These are vital elements of the international human rights system: securing justice and redress is not only a way of addressing the past, but an essential tool to shape the future, both for the individuals directly affected and in order to protect the rights of society as a whole.

Victims of human rights violations and abuses frequently face significant challenges when seeking remedy. These range from a lack of political willingness to ensure remedy, to procedural and legal hurdles which people do not have the money or knowledge to overcome. The nature of the obstacles that victims face is shaped by a range of factors – including the identity of the victim and the perpetrator. This book explores the challenges involved in securing an effective remedy in cases where multinational companies are perpetrators of human rights abuse or are complicit in violations committed by State actors.

Multinational companies are powerful economic actors operating in multiple countries either directly or through subsidiaries, supply chains or other commercial partnerships. The multinational nature of their operations, and their access to political power, raise very specific challenges for the right to effective remedy, which this book considers in detail.

In doing so it focuses not just on the challenges but solutions. The international discourse on business and human rights has for many years been dominated by consideration of the obstacles to holding corporations accountable and securing victims' right to remedy; however, little has been achieved in terms of effective legal, policy and practical change. This is partly because more effort has been devoted to understanding the obstacles than removing them.

This book seeks to ground the debate on the human right to remedy in cases of corporate-related abuse in the lived experiences of victims of such abuses, moving beyond – and in some cases challenging – the more theoretical debates. To achieve this the book focuses on four emblematic cases and exposes how corporate political and financial power intertwined with specific legal obstacles to allow companies to evade accountability and deny, or severely curtail, remedy.

In each of the cases examined, the political and economic power of multinational corporations was used to exacerbate existing obstacles to remedy and to create new challenges. In each case, States that should have acted to protect victims of abuse instead colluded with corporate actors.

The four case studies are examined in some depth, with particular focus on all of the efforts made by the affected communities to seek justice. For three of the cases this detailed investigation has not been done previously, and the data presented represents new research. The cases are:

- The 1984 Bhopal gas leak in India, which resulted in the deaths of more than 20,000 people. More than 570,000 people, many of whom are still suffering, were exposed to damaging levels of toxic gas. Ongoing environmental pollution resulting from prior operations at the old plant site continues to pose serious risks to the health of surrounding communities.
- The case of Omai gold in Guyana, where a waste containment system failed in August 1995, flooding a river with hazardous material and causing serious harm to local livelihoods. The contamination has never been properly cleaned up.
- The Ok Tedi mine in Papua New Guinea, which also involved the failure of a mine waste containment system and the flooding of local rivers with harmful waste. The initial event occurred in 1984. No clean-up has ever taken place and the law was changed to legitimize ongoing pollution of the river system, which continues to this day, despite the damage to the environment and the risks to human health.
- The dumping of toxic waste in Abidjan in Côte d'Ivoire in 2006, which resulted in more than 100,000 people seeking medical treatment. The waste originated in Europe, was unlawfully transported to Abidjan and dumped in 18 locations around the city. The long-term health impacts of the dumping are unclear and the decontamination process remains incomplete.

In the first three cases, the abuses originated between two and three decades ago, and in the case of Bhopal, the impact has been inter-generational. The reason these cases were chosen was in part because of the length of time victims have been trying to seek an effective remedy, with only very limited success. As no effective remedy has been provided, the abuses are ongoing. The failures cannot be relegated to the past – the efforts to achieve remedy continue today.

Moreover, far less has changed over the past 30 years than might be imagined. Ongoing pollution remains an issue in Bhopal and Ok Tedi and the struggle to decontaminate these areas has not become any easier. If anything the length of time that has elapsed since the original incidents has made remedy less, rather than more, likely. The lessons of the past have not been learnt. The Côte d'Ivoire toxic waste case is evidence of this. Almost a quarter of a century after Bhopal, many of the same serious failures were repeated: the State, in exchange for a financial settlement, signed away the rights of victims and gave the company at the centre of the dumping sweeping immunity from prosecution, exactly as the Indian government did in 1989.

While using four detailed case studies to unpack the real-world problems confronting victims of corporate-related human rights abuses, this text also draws on numerous other cases investigated by Amnesty international over the past decade. In all of these cases, corporations' political and

economic power and – critically – their willingness to use it to frustrate victims' access to justice, have been prominent features.

In some respects the corporate model is antithetical to the right to effective remedy; by admitting and addressing human rights abuses companies expose themselves to financial liability and reputational harm which shareholders (if not the directors and officers of the company themselves) see as entirely contrary to their interests. Consequently, the most common corporate response to allegations of abuse and demands for remedy is defensive. This response itself frequently leads to further abuse; as companies seek to manage and contain the risks to themselves they – whether intentionally or not – can block legitimate routes to remedy. Amongst the ways that companies do this are: deals with governments, denying victims access to vital information and using vastly greater financial means to delay and frustrate attempts to bring cases to court.

This basic fact needs to be confronted in any proposals for action. Moreover, while international human rights law places an obligation on States to ensure that rights, including the right to remedy, are fully realized, international law has yet to adequately address non-State actors that may be substantially more powerful than the State and who draw power from a global political economy that plays by very different legal rules.

What is needed is a shift in the paradigm. While it is vital that basic legal and jurisdictional obstacles to remedy are addressed, a far more radical approach is needed to overcome corporate involvement in human rights abuse. When thousands of indigenous communities, tens of thousands of people in garment supply chains, hundreds of thousands of poor farmers, fishers and others who depend on the environment confront massive corporate power and influence, the scales of justice are not balanced; the disparity in power is too phenomenal and legal reforms – while vital – will not be sufficient to ensure the right to remedy. Therefore this book also proposes reforms to reduce undue corporate influence on the State and to ensure that legitimate influence is open to public scrutiny.

Finally, the book questions whether the existing legal protections afforded to corporations are in the public interest. In so doing, it challenges one of the fundamental bases of corporate law – the concepts of separate legal personality and limited liability, which protects each individual company within a corporate group from exposure to the liability of other members of the group. This legal mechanism has allowed massive multinational companies to benefit from human rights and environmental abuses with impunity. The book does not propose the elimination of separate legal personality or limited liability; rather it argues that a counter-balance is needed to protect public interest and the international human rights framework. This counter-balance is to place parent companies under an express legal duty of care with respect to those who may be or are affected by their global operations, the effect of which would be to require companies to undertake due diligence in respect of those operations.



Children play in front of the old Union Carbide factory in Bhopal, 18 November 2009. The soil and ground water remain contaminated affecting people's rights to health, water, and a healthy environment.

2/THE INTERNATIONAL HUMAN RIGHT TO REMEDY

“FOR RIGHTS TO HAVE MEANING, EFFECTIVE REMEDIES MUST BE AVAILABLE TO REDRESS VIOLATIONS.”

UN Committee on the Rights of the Child¹

INTRODUCTION

All victims of human rights violations have a right to an effective remedy. This right lies at the very core of international human rights law. It also stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.² The right to an effective remedy has been recognized under various international and regional human rights treaties and instruments³ and also as a rule of customary international law.⁴

The right to an effective remedy encompasses the victim's right to:

- equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered; and
- access to relevant information concerning violations and reparation mechanisms.⁵

Reparations – or measures to repair the harm caused to victims of human rights violations – can take many forms. The actual reparation that should be provided in each case will depend on the nature of the right violated, the harm suffered and the wishes of those affected. The touchstone of reparation, however, is that it must seek to remove the consequences of the violation and, as far as possible, restore

those who have been affected to the situation they would have been in had the violation not occurred.

Reparations can and should be used to redress underlying systemic problems, such as situations of structural disadvantage and marginalization.

1. THE MEANING AND SCOPE OF REMEDY UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to remedy was first enshrined in Article 8 of the UN Universal Declaration of Human Rights (UDHR) in the following terms:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The UN International Covenant on Civil and Political Rights (ICCPR) gives particular effect to the general rights of individuals to an effective remedy. Article 2(3) states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.*

The right to an effective remedy has also been guaranteed under all the core international and key regional human rights treaties.⁶ Though some treaties do not include specific provisions on State parties' obligations to provide a remedy, treaty monitoring bodies have clarified that States parties are required to provide effective remedy for victims as part of their obligation to take all appropriate measures to implement the rights recognized in the treaty.⁷

The UN Committee on Economic, Social and Cultural Rights (CESCR), the expert body that monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR) has emphasized:

The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.⁸

The UN Committee on the Rights of the Child (CRC), the expert body that monitors the UN Convention on the Rights of the Child, has also emphasized:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.⁹

The right to an effective remedy has both procedural and substantive elements. In order for a remedy to be effective, a victim must have practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation.¹⁰ Where a violation is established, the individual must actually receive the relief needed to repair the harm.¹¹ The remedy should also be affordable and timely.¹²

International human rights monitoring bodies have also stated that the right to an effective remedy requires that all allegations of violations are investigated thoroughly, promptly and effectively through independent and impartial mechanisms.¹³ The UN Human Rights Committee (HRC) has also emphasized that where investigations reveal violations, States parties must ensure that those responsible are brought to justice. The failure to investigate allegations or failure to bring to justice perpetrators of such violations could in itself give rise to a breach of the ICCPR. The HRC has stated that these obligations arise notably in respect of violations recognized as crimes under domestic and international law.¹⁴

Effective remedies do not always have to be judicial remedies but treaty monitoring bodies have provided guidance on situations in which judicial remedies are necessary, either in the first instance or through the provision of the possibility of judicial appeal.¹⁵

The CESCR has stated:

“Administrative remedies will, in many cases, be adequate ... Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, ... in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”¹⁶

1.1 REPARATIONS

Central to the right to effective remedy is the requirement of reparation. The aim of reparation measures is to “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”¹⁷

There are five recognized forms of reparation, which include a broad range of measures aimed at repairing the harm caused to survivors and victims: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁸

Restitution This is intended to restore the victim to the original situation that they were in before the abuse took place and includes, as appropriate, “restoration of liberty, enjoyment of human

rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".¹⁹

Compensation When the damage can be economically assessed, monetary compensation should be provided. The harm that can be compensated includes: "(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services." ²⁰

Rehabilitation This includes any medical and psychological care needed by the victim as well as support from legal and social services.²¹

Satisfaction This covers a broad range of measures which will be applicable as appropriate to the circumstances and includes: measures aimed at the cessation of the violations; verification of the facts and full and public disclosure of the truth; a public apology, including acknowledgement of the facts and acceptance of responsibility; and judicial and administrative sanctions against those responsible for the violations.²²

Guarantees of non-repetition The prevention of further abuses can be achieved through a number of measures, any or all of which will contribute to non-repetition in the future. For example, changes in laws to prevent discrimination or ensuring that proper oversight mechanisms are put in place may be necessary to guarantee non-repetition. Prosecution systems which ensure that those responsible for human rights violations and abuses are prosecuted in a manner that respects the rights to a fair trial can also be an effective guarantee of non-repetition. Failure to investigate and prosecute crimes that result in human rights violations is a key driver of impunity and ongoing violation and abuse. ²³

2. REMEDY IN THE CONTEXT OF CORPORATE ACTORS

As noted above, the responsibility to ensure and provide effective remedy is based on the existing legal obligations of States to respect and protect human rights. States also have a duty to protect against violations by non-State actors such as companies. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

2.1 THE STATE DUTY TO PROTECT

The duty to provide remedy is one element of the broader duty to protect human rights from abuses committed by non-State actors. Under the duty to protect, States are required to take appropriate measures to prevent human rights abuses by private actors and to respond to these abuses when they occur by investigating the facts, holding the perpetrators to account and ensuring effective remedy for the harm caused.

The duty to regulate the conduct of non-State actors in order to protect human rights is well established in international human rights law. The CESCR, building on the work of other human

rights experts, utilized the tripartite typology of State obligations (respect, protect, fulfil) to clarify the nature and scope of State parties' obligations under the ICESCR.²⁴ The CESCR has clarified that the obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of rights protected under the ICESCR. In relation to the right to water for example, the Committee has stated:

The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.²⁵

This duty of due diligence has been affirmed by a large number of international and regional human rights bodies and tribunals.²⁶ It was clearly articulated by the Inter-American Court of Human Rights (IACtHR) in its 1988 landmark decision on *Velásquez-Rodríguez v Honduras*,²⁷ and reiterated in numerous subsequent cases. In *Velásquez-Rodríguez v Honduras*, the IACtHR stated:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.²⁸

This [State] duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.²⁹

The African Commission on Human and Peoples' Rights (ACHPR), in a 2001 decision on a case involving the actions of oil companies in the Niger Delta in Nigeria, held that:

[T]he State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect

*beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.*³⁰

This was echoed in a 2012 decision of the Economic Community of West African States (ECOWAS) Community Court of Justice, which found Nigeria had failed to protect the rights of those affected by the oil industry, and directed the Nigerian government to hold oil companies to account and ensure effective remedies.³¹

The State duty to protect has similarly been upheld by the European Court of Human Rights (ECtHR) in numerous cases.³² In *Kalender v. Turkey*, for example, the State was found to be liable under Article 2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) for its serious failure to implement safety regulations, which led to the death of the applicants' relatives during a rail accident. The Court also found that Turkey had failed to instigate criminal proceedings against the railway company.³³

The duty of the State to protect from human rights abuses carried out by corporations is also articulated in the 2011 UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (the UN Guiding Principles on Business and Human Rights).³⁴ These principles were endorsed by the UN Human Rights Council on 16 June 2011.³⁵ Guiding Principle 1 states:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Guiding Principle 1 of the UN Guiding Principles on Business and Human Rights also notes:

*The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or **where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.** [Emphasis added]*

The duty to protect extends to all rights, and this therefore includes the right to remedy. Indeed, the State is expected not only to guarantee the right to remedy but to protect this right from undue interference by private parties.

The pivotal principle of this duty is that States must protect individuals and communities from the harmful activities of corporate actors through "effective policies, legislation, regulation and adjudication".

THE CONCEPT OF DUE DILIGENCE AND THE STATE DUTY TO PROTECT

The IACtHR has stated “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”.³⁶ The concept of “due diligence” has been incorporated into international human rights standards³⁷ and has been widely used by human rights treaty monitoring bodies.

The HRC also articulated this legal standard in its General Comment 31. It placed due diligence in the context of the State’s duty to protect individuals from acts committed by private persons or entities, which would impair the enjoyment of ICCPR rights. In the HRC’s view, this duty requires taking appropriate measures or exercising due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.³⁸ This is also a key standard in assessing how far States have met their obligations to protect women from violence, discrimination and other interferences with their rights by private actors.³⁹

2.2 CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

There is a clear international consensus that companies should – at a minimum – respect all human rights. This responsibility was expressly recognized by the UN Human Rights Council on 16 June 2011,⁴⁰ when it endorsed the UN Guiding Principles on Business and Human Rights.⁴¹ On 25 May 2011, the 42 governments that had then adhered to the Declaration on International Investment and Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD)⁴² unanimously endorsed the principle that companies should respect all internationally recognized human rights wherever they operate, when they approved a revised version of the OECD Guidelines for Multinational Enterprises which contain this principle. They also affirmed the expectation that companies “address adverse human rights impacts with which they are involved”, that they co-operate “through legitimate processes in the remediation of adverse human rights impacts” and, more specifically, that they co-operate “with judicial or State-based non-judicial mechanisms”.⁴³

The corporate responsibility to respect all human rights includes respecting the right to remedy. In this context, the UN Special Representative of the Secretary-General on business and human rights affirmed that “companies that obstruct or corrupt judicial mechanisms act at variance with their responsibility to respect.”⁴⁴ The Special Representative further emphasized the importance of both States and companies acting in a manner that is supportive of judicial integrity and independence, and of courts being able to act independently from any political or economic pressures from either the State or corporations.⁴⁵

2.3 THE EXTRATERRITORIAL DIMENSION OF THE STATE DUTY TO PROTECT

Corporate entities operate across State borders with ease, but State borders often present institutional, political, practical and legal barriers both to corporate accountability and to redress for the victims of corporate human rights abuses. So, in the context of business activity, the State duty to protect

THE 'HOME' STATE AND THE 'HOST' STATE

The concepts of the "home" State of a multinational company and the "host" State in which the company operates, directly or through a business relationship, are used frequently in discussions on business and human rights, and foreign investment. This book also uses this terminology, which is explained below.

The **home State** is the State of incorporation or registration of a company, where it has its legal address (domicile) or registered main office. In law, this place is considered the centre of a corporation's affairs. Interpretations of "domicile" are often broad. Under European Union (EU) legislation, for example, a company is "domiciled" in the place where it has its statutory seat, its central administration or principal place of business (Article 60 of Regulation No. 44/2001). In relation to a multinational company, the home State is the State in which the parent company is domiciled (or, according to the applicable legislation, where it has its central administration, principal place of business and so on).

The **host State** is any State, other than the home State, in which a multinational company operates, often through subsidiaries. In foreign direct investment terms, it is the State "receiving" the investment. In the context of human rights abuses associated with corporate activity it is also sometimes called the **territorial State**, as it is the State in whose territory the abuses occur.

Besides the home and host States, other States may also be more or less directly connected to the abuse through other linking factors. These include, for example:

- States in whose territory important aspects of a company's operations, such as its financial or trading activities, take place.
- States in which the corporate buyers in large multinational supply chains are located; and
- States through which harmful substances, such as toxic waste, pass.⁴⁶

human rights and ensure effective remedy if abuses occur must include an extraterritorial dimension.

Multinational corporate groups can undermine human rights in different jurisdictions in numerous ways. For example, the decisions made by a branch based in one country can lead directly to human rights abuses in another country. The actions of a subsidiary may be substantially influenced by its parent company, or the parent company may benefit financially from a subsidiary whose operations are responsible for human rights abuses. Or a company may contract with a company in another country whose operations on its behalf result in abuses.

The responsibility of the home State, or a State other than the one in which human rights abuses occur, does not diminish the legal responsibility of the host State. In a statement specifically addressing home State obligations, the CESCR says that States in whose jurisdiction companies have their main seat should take measures to prevent human rights abuses abroad "without ... diminishing the obligations of the host States under the Covenant."⁴⁷ A home State's obligations – or the obligations of States other than the host State – are parallel and complementary to those of the host State and respond to different rationales. Whereas the obligations of a host State correspond to their ability to exercise effective control over their national territory, the obligations of other States are based on, and will be shaped by, other factors, such as their ability to take action, in both legal and practical terms, under the circumstances.

One reason the issue of home State regulation of multinational companies has gained such prominence is because corporate groups that are headquartered in developed countries but operate in developing countries – directly or through subsidiaries or partnerships – have been shown to operate to standards that would be unacceptable in their home State.⁴⁸ There are several reasons for this: in some developing countries the regulatory framework is weak and there are not sufficient resources to enforce laws and regulations; in some cases the company, as a relatively powerful economic actor, has undue influence in the country, whether over the executive or legislative arms of government, or – often – the agencies and civil servants in charge of regulation.

While developed countries are by no means immune from corporate bad practice, the challenges that some developing countries face in regulating companies (because they lack the will or ability to do so) has meant that people living in poverty are more likely to experience corporate human rights abuses and are less able to access remedies. Because of the multi-jurisdictional nature of corporate networks, and the phenomenon of powerful multinational companies, human rights advocates have argued for laws with extraterritorial effect. They have also argued that victims of abuse should have increased options for seeking redress in States other than the one in which the violation occurred. In the absence of laws with extraterritorial effect, victims of human rights abuses can be denied an effective remedy, which is itself a human rights violation.

The extraterritorial dimension of the State duty to protect human rights is controversial. Some States, and many companies, have argued that action to prevent and address human rights abuses by companies should be based on territorial jurisdiction only. However, there is a growing body of authoritative legal opinion and jurisprudence that has accepted and elaborated on the scope and implications of the extraterritorial human rights obligations of States. These have been further elaborated by an increasing number of UN treaty body commentaries, statements and country observations. There are two elements: the responsibility of States for actions (including failure to take necessary and appropriate action) and decisions that occur inside their jurisdiction and which affect other jurisdictions; and the obligation of international co-operation and assistance. These are addressed in the following paragraphs.

International and regional jurisprudence has established relevant principles. The International Court of Justice (ICJ) indicated in its *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, the:

*existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.*⁴⁹

This obligation is not limited to situations of transboundary pollution. In the *Corfu Channel* case, the ICJ observed that due diligence obligations “are based ... on certain general and well-recognized principles, namely ... every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” The ICJ further indicated that “a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation”, where the State knew or should have known that activities unlawful under international

law were perpetrated on its territory and caused damage to another State.

Regional bodies have established similar responsibilities in relation to acts of State authorities or agents that produce adverse human rights effects abroad. The ECtHR noted that, for the purpose of defining the scope of the duties of States parties under Article 1 of the ECHR, jurisdiction:

*may extend to acts of its authorities which produce effects outside its own territory.*⁵¹

In another case, the ECtHR also indicated that:

*[a] State's responsibility may ... be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.*⁵²

The Inter-American Commission on Human Rights (IACHR) has similarly stated that:

*a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that State's own territory.*⁵³

The HRC has also affirmed that:

*[A] State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.*⁵⁴

These general principles have been interpreted to apply to State regulation of the activities of non-State actors. Under this understanding, States have an obligation to regulate the conduct of non-State actors who are under their control in order to prevent them from causing or contributing to human rights abuses. Regarding corporate actors in particular, international human rights law has been increasingly interpreted as requiring States in whose territory or jurisdiction corporations are domiciled or headquartered to take measures to ensure that these corporations do not cause or contribute to human rights abuses abroad.⁵⁵

The CESCR has highlighted, for instance, that in order to comply with their international obligations in relation to the right to health, States parties:

*have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.*⁵⁶

Similarly, in relation to the rights to water and social security, the CESCR has stated that steps should be taken by States parties to these treaties to prevent their own citizens and companies from violating these rights in other countries, and that:

*[w]here States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken....*⁵⁷

More recently, the CESCR has said that States parties should:

*take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.*⁵⁸

A number of recent Concluding Observations by the UN Committee on the Elimination of Racial Discrimination (CERD), the expert body that monitors the UN International Convention on the Elimination of All Forms of Racial Discrimination, call on home States to secure corporate accountability and remedy for abuses committed by companies (or their subsidiaries) abroad. The CERD noted the adverse impacts that the activities of transnational corporations registered in Canada, the US, Australia, Norway and the UK were having on the human rights of indigenous peoples in other countries, and encouraged all these States to take legislative or administrative measures to prevent these impacts and explore ways of holding the corporations to account. It noted with particular concern the absence of a legal framework in Australia to regulate the activities of Australian corporations both at home and overseas. The CERD recommended that Australia “regulate the extra-territorial activities of Australian corporations abroad”.⁵⁹

The CRC has repeatedly called on home States to establish and implement regulations and administrative measures to ensure that companies respect human rights, particularly the rights of the child, in their operations abroad, and to provide for appropriate oversight, monitoring and accountability mechanisms.⁶⁰ In its 2012 Concluding Observations on Canada, for example, the CRC recommended that the State establish and implement regulations to ensure that Canadian companies (in particular oil, gas and mining industries) operating in territories outside Canada do not negatively impact on human rights in particular those of children. It furthermore called on Canada to ensure “monitoring of implementation” and “appropriate sanctions and remedies” when violations occur.⁶¹

The view of the UN human rights treaty bodies is clear about the obligations of home States to regulate the conduct of multinational companies domiciled or headquartered in their territory in order to protect human rights in other States.

The importance of extraterritorial regulation of corporate actors has also been advanced by independent legal experts.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a group of experts on international law and drawn from international

law, aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights. The principles highlight that:

*States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.*⁶²

Principle 24 of the Maastricht Principles formulates a helpful general “obligation to regulate” in the following terms:

*All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures.*⁶³

Referring to the obligations of home States in particular, Principle 25 indicates that States must adopt and enforce

*measures to protect economic, social and cultural rights through legal and other means, including diplomatic means...[where] the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned.*⁶⁴

There are examples of how such regulatory action can work in practice. One is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub L No. 111-203). This is a law passed by the US Congress in July 2010 that includes a provision (Section 1502) requiring companies to determine, by carrying out supply chain due diligence, if their products contain conflict minerals from the Democratic Republic of the Congo (DRC) or adjoining countries, and to report this to the US Securities and Exchange Commission (SEC). The purpose of this provision is to help end the financing of conflict and violence in the eastern DRC and associated human rights abuses. The requirement applies to all SEC “issuers”, regardless of whether they are incorporated in the US or not.⁶⁵

2.4 REMEDY FOR ABUSES BY NON-STATE ACTORS

Some international instruments as well as treaty body decisions and statements have referred explicitly to, or given more specific detail about, the right to remedy for abuses by non-State actors, including corporate actors. This is particularly true of standards on violence against women, which often involve private actors. The UN Declaration on the Elimination of Violence against Women places a duty on the State to “develop penal, civil, labour and administrative sanctions to punish

and redress the wrongs caused to women who are subjected to violence”.⁶⁶ In General Recommendation 19, the UN Committee on the Elimination of Discrimination against Women, the expert body which monitors the UN Convention on the Elimination of All Forms of Discrimination against Women, recommends that States establish “criminal penalties and civil remedies” to overcome family violence and “effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence”, including violence and abuse in the family and workplace.⁶⁷

The CESCR recently highlighted the importance of access to remedy for abuses committed by companies. In a statement addressing State obligations in the context of corporate activity, the CESCR stated:

*It is of utmost importance that States Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means.*⁶⁸

The UN Guiding Principles on Business and Human Rights, in Guiding Principle 25, specifically address the duty of the State to provide remedy for corporate human rights abuses:

*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*⁶⁹

Principle 26 refers to the need for States to ensure effective judicial mechanisms to hear claims of business-related human rights abuses, including through the reduction of barriers to remedy. Principle 27 in turn refers to the need for States to provide effective non-judicial mechanisms alongside the courts as part of a comprehensive State-based system for the remedy of business-related human rights abuses.

Several other UN bodies and texts have also noted that effective remedy for abuses by non-State actors includes two components – an obligation on the State to provide remedy and also to enable the victim to make claims against the perpetrator. For example, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation expressly indicate that non-State actors found to be responsible for human rights abuses should provide reparation to the victims:

*in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.*⁷⁰

The CESCR has also indicated that States should facilitate legal claims directly against the perpetrator of an abuse, such as in relation to the protection of the right to adequate housing. This

might include the ability to complain against illegal actions by private or public landlords concerning rent levels, dwelling maintenance, racial or other forms of discrimination or unhealthy or inadequate housing conditions.⁷¹

The HRC has similarly indicated that States should facilitate direct actions against private actors for reparation. Referring to violations of the right to freedom from torture and cruel, inhuman and degrading treatment (Article 7 of the ICCPR) by “private contractors”, the HRC said that States should “ensure there are effective means to follow suit against abuses committed by agencies operating outside the military structure.”⁷²

3. THE RIGHT TO REMEDY BEYOND BORDERS

A consequence of the extraterritorial dimension of the State’s obligation to protect human rights includes an obligation to ensure remedy for abuses that occur outside its territory – where these abuses were reasonably foreseeable and the State has the legal capacity to act to prevent the abuse.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights clarify that “where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim”.⁷³ The Principles also state that to give effect to this obligation, States should: a) seek cooperation and assistance from other concerned States where necessary to ensure a remedy; b) ensure remedies are available for groups as well as individuals; c) ensure the participation of victims in the determination of appropriate remedies...”.⁷⁴

In its Concluding Observations of 2012 in the sixth periodic report on Germany under the ICCPR, the HRC expressed concerns about the State’s failure to protect human rights against the activities of German companies operating abroad. Addressing concerns about the forced eviction of a group of Ugandan families by a German multinational coffee company, the HRC stated:

While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (Article 2, para 2).

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.⁷⁵

Another legal obligation of States, which has extraterritorial dimensions and is important for the right to remedy, is the obligation of international co-operation and assistance. International legal instruments, including the ICESCR and the CRC, expressly include the obligation of international co-operation and assistance, which requires States to help realize human rights in other countries.⁷⁶

The obligation have been reaffirmed in numerous international declarations in which States recognize the existence of extraterritorial duties and commit to ensuring that their international policies are consistent with the realization of human rights.⁷⁷

The obligation to co-operate and assist is also important in relation to the provision of remedy, in particular where two or more States may need to cooperate to ensure adequate investigation of human rights abuses – including crimes that result in human rights abuses – and, within specific parameters, to enable remedies awarded by courts or other bodies in one country to be enforced in another.

4. TO SUM UP

This section has set out the basic elements of the right to remedy as provided for by international human rights law. In practice, the right to remedy is the vehicle through which victims of human rights violations demand an appropriate response for the harm they have suffered: reparations and sanctions. In the context of corporate abuses, remedy therefore encompasses both the measures to repair the harm suffered by those whose rights are negatively affected by corporate activities as well as State action to hold corporations to account for their involvement in human rights abuses. Though this book will focus primarily on the first aspect of remedy – that related to reparation of harm – it will also address measures to bring corporations to account since both are intricately related and are often affected by the same obstacles and challenges.

This section has addressed the now widely acknowledged corporate responsibility to respect human rights and the consequent responsibility to respect the right to remedy. In so doing, it has highlighted some of the key implications of this responsibility. These include the expectation that companies respect the integrity and independence of the courts (for example by refraining from exerting political or economic pressure on judicial processes) and avoid acting in a way that obstructs the exercise of the right to remedy by the rights holders or the ability of the State to ensure remedy.

The obligations of the home States of multinational companies to take action to protect human rights outside their territory or jurisdiction were examined. Without being exhaustive, this section has set out some of the key legal sources, as well as the scope and limitations, of these obligations. It has clarified that the obligations of States other than the host or territorial State coexist with, and in no way detract from or diminish, the obligations of the host or territorial State. Although other States might be expected to take action to control corporate activity in order to protect human rights, this book will primarily focus on the responsibilities of home and host States, as defined above. The focus on home States is justified by the dominant and decisive role these States can often play in controlling the central operations of multinational corporations, by virtue of their effective capacity to regulate their conduct.



OK TEDI MINING LIMITED



CAUTION

**DO NOT WASH OR DRINK
FROM THESE PONDS**

PA AV TO

**D KJ BONA INUA LASI
INAI DAM DEKENAI**

WOTORO SIGNS

For almost three decades, the Ok Tedi mine in Papua New Guinea has been dumping waste directly into the Ok Tedi-Fly River system, devastating the surrounding environment and affecting the lives of thousands of indigenous people.

3/THE CASES

INTRODUCTION

Individuals and communities whose human rights are adversely affected by the activities of multinational corporations often struggle or fail to obtain an effective remedy. This is due to a myriad of obstacles they face in accessing mechanisms of redress or obtaining adequate reparation. In cases involving corporate human rights abuses, multinational companies may play an active role by creating new obstacles, exacerbating existing ones, or engaging in activities that obstruct people's efforts to access remedy or which impair the ability of States to provide one. As the following case studies demonstrate, corporations and governments often act jointly to obstruct access to justice and remedy in defence of their common economic interests.

The four cases featured in this book involve abuses of human rights by multinational corporations for which a remedy was actively sought. The cases were chosen because of their emblematic nature and the extent of the efforts made by victims to obtain an effective remedy. The cases were also chosen because the challenges involved are typical of those faced by individuals and communities across the globe trying to achieve justice and reparation for abuses committed in the context of corporate activity, particularly when companies operate across borders.⁷⁹ All these cases include efforts to seek redress in both the host and home States.

The case studies strive to combine the human story with the legal and theoretical analysis. They are the stories not just of the struggle to obtain remedy but how the people affected experienced this struggle. An academic recitation of the facts cannot on its own convey the enormity of the obstacles which victims of corporate-related human rights abuses encounter. Amnesty International's aim, in focusing on the lived reality of victims and survivors, is to promote a mix of legal and other changes that will address not only legal obstacles but the significant power and information imbalances that are often the biggest stumbling blocks in corporate-related cases.



Residents of Bhopal collecting water, Bhopal, 2012. The Madhya Pradesh government was instructed by the Indian Supreme Court to supply fresh drinking water by tankers to people whose potable water supplies were contaminated by pollutants from the former UCIL plant

1/THE BHOPAL GAS LEAK DISASTER IN INDIA

WHATEVER LITTLE COMPENSATION WE HAVE RECEIVED SO FAR IS THANKS TO THE STRUGGLE THAT SURVIVORS HAVE WAGED FOR YEARS ... NEITHER THE CENTRAL GOVERNMENT, THE STATE GOVERNMENT OR THE COMPANIES HAVE GIVEN US JUSTICE.

Hazra Bee, Bhopal survivor and activist, Union Carbide Gas Affected Women's Collective.⁸⁰

THE BHOPAL PLANT

In 1968, Union Carbide India Limited (UCIL), a company majority-owned by the United States-based Union Carbide Corporation (UCC), built a pesticide plant in Bhopal in the central Indian state of Madhya Pradesh. The plant was to manufacture pesticides such as Sevin, using methyl isocyanate (MIC) and other chemicals.⁸¹ Under India's Industrial Development and Regulation Act 1951, the production of pesticide had been reserved for small Indian companies; however, UCC obtained a waiver of this requirement.⁸² In October 1972, the Madhya Pradesh state granted the company a 100-year lease on the land for the plant.⁸³

The Bhopal plant was built close to densely populated slum areas with approximately 5,000 residents.⁸⁴ However, the slums around the site expanded to accommodate migration from rural areas to the city during the 1960s and 1970s. By 1984, one area alone, Jai Prakash Nagar colony, across the road from the plant, had an estimated 7,000 residents.⁸⁵

At the time that UCIL/UCC submitted the applications required to establish the plant, no local or national regulations existed in relation to the locating of hazardous industries. On 25 August 1975, the Madhya Pradesh state authorities published the Bhopal Development Plan, part of the Bhopal Town and Country Planning Act. This required all hazardous or polluting industries to be located in an area of the city

THE COMPANIES INVOLVED

The Bhopal plant was owned and operated by UCIL, an Indian company, majority-owned by US-based UCC. UCC owned a 50.9 per cent interest in UCIL, the government of India controlled 22 per cent, and the rest was owned by thousands of Indian investors. UCIL was directly managed by Union Carbide Eastern (UCE), a wholly owned subsidiary of UCC based in Hong Kong but incorporated in the USA. UCE was dissolved in 1991. In 1994, UCC sold its stock in UCIL to McLeod Russel India Limited, part of the Williamson Magor Group. After the sale, UCIL was renamed Eveready Industries India Limited (Eveready). In 2001, UCC became a wholly owned subsidiary of US-based The Dow Chemical Company (Dow).

away from and downwind of densely populated areas.⁸⁶ On this basis, a local commissioner ordered the relocation of the UCIL plant,⁸⁷ but this order was reportedly “opposed by Union Carbide and others in the Madhya Pradesh administration.”⁸⁸

On 31 October 1975, India’s central government granted UCIL a licence to manufacture and store MIC at the site.⁸⁹ Between 1976 and 1980, UCC designed and supervised the construction of the MIC unit and trained UCIL employees in India and the USA to work on all aspects of the MIC plant.⁹⁰ Onsite production of MIC began in February 1980, and the chemical was bulk-stored in three big tanks.⁹¹

THE GAS LEAK AND BEYOND

Shortly before midnight on 2 December 1984, toxic gas⁹² leaked from tank 610, one of the three MIC storage tanks at the UCIL plant, into the atmosphere. According to UCC, “[a]pproximately 54,000 pounds [24,500kg] of unreacted MIC left Tank 610 together with approximately 26,000 pounds [11,800kg] of reaction products.”⁹³ One of the 20th century’s worst industrial disasters had begun to unfold.

Even though plant officials knew that there was a possibility that MIC was leaking into the atmosphere shortly after midnight, they did nothing to alert the communities living in the area or the local city administration or the police until around 2am, when the loud toxic gas siren began to sound continuously.⁹⁴ Residents had no emergency information, and many fled in the same direction as the gas cloud, increasing their exposure to dangerous toxins.⁹⁵

Subsequent investigations found that, some time after 12.50am, one of the UCIL employees who had first noticed the MIC leak broke the alarm glass to start the loud factory siren. One worker explains:

*This was to warn other workers and to call the rescue squad. After a few minutes, the loud siren was turned into a muted siren. The rescue squad came to the MIC plant and tried to stop the toxic release by putting large amounts of water spray through fire hydrants. The leak was uncontrollable so that after some time, everyone started to flee from the MIC unit in the opposite wind direction. I also ran away from the MIC plant.*⁹⁶

Survivor and activist Rashida Bee described how she had just fallen asleep when she was woken by screams.

*When we looked out, everyone was running all over the place and was shouting, “Run away, we will all die”... When we reached Pokhta Bridge our eyes had got swollen and we had so much trouble in our lungs that it felt as if someone had lit a fire in our body... Our eyes started to black out and we found it very hard to breathe... We could hear voices around us saying “O God, please grant us death”. That day, death appeared desirable.*⁹⁷

Within hours, the city’s hospitals were flooded with thousands of gas-stricken victims.⁹⁸ Over

the first day, around 20,000 people were treated in Hamidia Hospital alone, and over the following weeks, people suffering from exposure to the gas continued to need medical care. In the first three weeks after the accident, more than 160,000 people were treated at the city's hospitals and almost 7,400 were admitted, even though there were fewer than 1,800 beds.⁹⁹ People who went to Hamidia Hospital to search for missing relatives in the days following the gas leak described seeing rows and rows of dead bodies piled up.¹⁰⁰

The number of people who died in the immediate aftermath of the leak has been contested. In research done in 2004, Amnesty International estimated that an estimated 7,000 to 10,000 people died within three days of the leak.¹⁰¹ The young and old were most vulnerable; large numbers of children under the age of 10 lost their lives.¹⁰²

More than 570,000 people, were exposed to damaging levels of toxic gas¹⁰³ leading to a wide range of chronic and debilitating illnesses. Many continue to suffer the consequences of their exposure to the toxic fumes to this day.¹⁰⁴

A FORESEEABLE DISASTER?

There is overwhelming evidence to suggest that UCC management was aware of safety problems at the Bhopal plant for at least several years before December 1984. In May 1982, an Operational Safety Survey of the Bhopal plant was carried out by a team of UCC technicians from the USA.¹⁰⁵ This survey noted numerous lapses in safety regulations and highlighted at least 10 hazards which it classified as "major", including in relation to the phosgene/MIC unit. Various others also raised concerns about safety at the Bhopal plant in the years leading up to the disaster. Despite these warnings, a series of cost-cutting measures were implemented at the plant between the beginning of 1983 and the time of the disaster.¹⁰⁶

Issues with safety and a pattern of serious failures by UCC were evident in the years prior to the accident. During the factory design stage, UCIL had preferred to store MIC in small individual containers for reasons of both economy and safety. However, UCC disagreed, and bulk storage tanks for MIC were installed at the Bhopal plant, similar to those at the UCC plant in West Virginia, USA. The crucial difference was that the UCC plant in West Virginia worked round the clock, processing large quantities of MIC for production of pesticides or for sale as a chemical. In Bhopal, the MIC processing capacity was so low that it resulted in large quantities of MIC being stored for weeks.¹⁰⁷

A comparison between safety measures at UCC's plant in West Virginia and the Bhopal plant shows that UCC's standards of safety in design or operations in Bhopal were different from those in the USA.¹⁰⁸ In particular, UCC failed to set up any comprehensive emergency plan or system in Bhopal to warn local communities about leaks, even though it had such a plan in place in the USA.

The immediate precipitating factor for the disastrous leak was the entry of a substantial amount of water and other impurities into Tank ⁶¹⁰ that stored MIC.¹¹⁰ There has been more than one explanation of how the water and other impurities entered the MIC storage tank. One theory, argued by workers at the plant, is that it occurred during routine water washing of pipes on the evening of 2 December, when there was no longer a maintenance supervisor due to staff cuts.¹¹¹ UCC did not

SAFETY MEASURES IN UCC PLANTS IN THE USA AND INDIA¹⁰⁹

INSTITUTE, WEST VIRGINIA, USA

BHOPAL, MADHYA PRADESH, INDIA

Capacity

High production of MIC matched with high processing capacity. MIC not stored for long periods of time.

High production capacity of MIC but low processing capacity. MIC stored in large quantities for long periods of time.

Emergency scrubbers

MIC storage tank equipped with emergency scrubbers (to neutralize any escaping MIC) designed to operate under emergency conditions.

No emergency caustic scrubber to neutralize any MIC leak.

Computerized monitoring

Computerized monitoring of instruments (gauges, alarms, etc) and processes to support visual observation.

No computerized monitoring of instruments and processes. Relied solely on manual observation.

Cooling system

MIC field storage tanks used a cooling system based on chloroform (inert and non-reactive with MIC).

MIC tanks used a cooling system based on brine (highly reactive with MIC).

Refrigeration unit

Refrigeration unit to control temperature in the tanks was never turned off.

Refrigeration unit had been turned off since June 1984.

Nitrogen pressure

MIC was always maintained under nitrogen pressure.

MIC tanks had not been under nitrogen pressure since October 1984.

Emergency plan

An elaborate four-stage emergency plan to deal with toxic releases, fires, etc, including a general public alert linked to community police, river and rail traffic and local radio stations. Various emergency broadcast systems in place to alert and disseminate appropriate information to the public.

No system to inform public authorities or the people living adjacent to the plant. No emergency plan shared with communities living adjacent to the plant; No system to disseminate information regarding emergency to the public with the exception of a loud siren.

Maintenance programme

A maintenance programme to determine and evaluate replacement frequency for valves and instrumentation and alarm systems. Weekly review of safety valves and reviews and maintenance recorded extensively.

No evidence of an effective instrument maintenance programme. Safety valve testing programme largely ineffective and no proper records maintained of reviews of instruments, valves and alarm systems, etc.

Lab analysis

A lab analysis of MIC was conducted to test quality and check for contamination prior to storage, processing or distribution.

No lab analysis of quality was undertaken. MIC stored for long periods without testing for contamination.

Training

Extensive employee training programme to ensure high levels of training and information among all employees of normal and emergency procedures.

Operators put in charge without sufficient training.

Protective equipment

Extensive provision of appropriate personal protective equipment to employees including protective clothing, air respirators, etc.

Personal protective gear and breathing air equipment not easily accessible, inadequate and of poor quality.

identify any specific cause for entry of water into the tank in its 1985 investigation report.¹¹² Sometime after the leak, UCC started to give credence to the theory that it was due to sabotage by a disgruntled employee. The sabotage theory has been challenged by many, including workers from the factory and testimony by UCC managers themselves.¹¹³ UCC has refused to name the employee and has not produced any specific evidence in court regarding sabotage.

THE IMMEDIATE RESPONSE

In the days and weeks after the Bhopal disaster, the Madhya Pradesh government organized a relief effort that involved housing people in camps, distributing food, disposing of thousands of dead animals and providing medical treatment.¹¹⁴ However, these efforts were insufficient given the scale of the disaster, and a few months later, in August 1985, the Madhya Pradesh government created the State Gas Relief and Rehabilitation Department to co-ordinate relief and rehabilitation of the Bhopal gas victims.¹¹⁵

The government's lack of capacity was not the only factor that hampered the emergency response efforts at Bhopal. Despite the fact that thousands of children, men and women were dying from exposure to the gas, or suffering agonizing injuries, UCC failed to disclose critical information on the substance that had leaked. There is also evidence that the company opposed treatment that might have been more effective. These issues are discussed in the next section.

UCC'S FAILURE TO PROVIDE INFORMATION ON THE GAS

As thousands of people flocked to Bhopal's hospitals, doctors and medical staff struggled to administer the right treatment. MIC's toxicological properties, its short and long-term effects on health and the correct treatment for the effects of exposure were unknown in India. There was also a lack of information about other chemicals produced during the explosion.¹¹⁶

The immediate response of UCC and UCIL to the disaster was to downplay the toxic nature of MIC in public. UCIL's Chief Medical Officer, for instance, assured reporters that "[T]he gas that leaked is only an irritant, it is not fatal."¹¹⁷ UCC's then Director of Health and Safety and Environmental Affairs, claimed MIC was "nothing more than a potent tear gas."¹¹⁸ A group of US medical specialists sent to Bhopal by UCC also downplayed the adverse impacts of exposure to the gas, denying it would have any long-term effects on survivors.¹¹⁹ They also asserted that only surface tissue of the body was affected, denying any impact on internal organs.¹²⁰

In late 2005, UCC's Chief Executive Officer (CEO) Warren Anderson expressed satisfaction that UCC-sponsored experts had determined that survivors were "rapidly recovering and display little lasting effects."¹²¹ But this was very far from the truth.

Over the past 30 years the ongoing health problems experienced by thousands of Bhopal survivors – including children who were born after the leak to gas-affected parents – have shown UCC's claims about limited and relatively short-term health impacts to be completely incorrect. Studies done five and 10 years after the leak found ongoing respiratory problems; there is also evidence to suggest increased rates of cancer, nervous conditions and mental health problems.¹²²

However, this is not something that could only have been known with hindsight. UCC's public

assurances contradict internal company literature, which documents the extremely toxic, volatile and reactive nature of MIC. Internal safety data on MIC notes that exposure to the gas “may cause fatal pulmonary edema” [swelling of the lungs due to accumulated fluid].¹²³ A confidential UCC manual on MIC, dated March 1974, reveals it to be “assigned the maximum health rating of 4 in the UCC hazard signal system” due to being a “hazardous material by all means of contact”, and warns that, over the long term, “Major residual injury is likely in spite of prompt treatment.”¹²⁴

UCC’s statements playing down the toxicity and severity of MIC’s effects on human health raise questions about whether the company was trying to limit its potential legal liability.¹²⁵ In information provided to the Bhopal District Court, UCC admitted that “under certain conditions MIC is toxic, flammable and hazardous,” but went on to say, “the defendant denies that MIC is ‘ultra-hazardous’.”¹²⁶ However, on 14 December 1984, UCC’s Director of Health, Safety and Environmental Affairs had told a US Congressional Hearing, “MIC is an extremely hazardous chemical. It is reactive, toxic, volatile and flammable.”¹²⁷

UCC’s denial of any long-term effect of MIC exposure was echoed by scientists connected to the Indian government raising questions about the extent to which the Indian authorities relied on UCC’s information in the aftermath of the leak.¹²⁸

Downplaying the toxicity of MIC was not the only way in which UCC and UCIL hampered medical treatment of survivors. The companies also withheld information on MIC’s toxicology and the identity of other reaction products released during the leak from the public, authorities and doctors.¹²⁹ In February 1985, a leading chemical industry journal noted:

*Union Carbide Toxicologists may have the best information on MIC toxicity around, but they’re treating it like a trade secret. Although the company has not allowed its information to be published, it is sharing it with the [US] National Toxicological Programme and EPA [US Environmental Protection Agency]... Carbide considers details of its findings to be proprietary.*¹³⁰

As noted above, in March 1985, UCC’s own investigation concluded that:

*Approximately 54,000 pounds [24,500kg] of unreacted MIC left Tank 610 together with approximately 26,000 pounds [11,80 kg] of reaction products.*¹³¹

Yet to this day, UCC has not named any of the chemicals and reaction products that leaked along with MIC.¹³²

The lack of accurate information about MIC and other reaction products, and their effects on human health, contributed to a highly inadequate medical response.¹³³ Contemporary reports show that very few doctors treating the victims were aware of the toxic nature of the gas that had leaked.¹³⁴

In the absence of accurate information from the companies, local medical authorities were forced to rely on the very scanty information available from alternative sources such as the press

and the World Health Organization.¹³⁵ Doctors could administer only symptomatic treatment. According to an article in The Illustrated Weekly of India published in 1984:

*Each symptom was dealt with separately, eye-drops for the eyes, antibiotics to prevent infections, antacids for the stomach. There was no attempt to purge the blood of the toxin, which continued to ravage the organism from within.*¹³⁶

A week after the gas leak the Indian government invited a team of medical experts, led by Jeffrey Kaplan of the US Centres for Disease Control, to offer guidance on the government's response. Kaplan summed up the problem:

*The basic issue is that we have very little experience with MIC. What is known could be written up in two or three pages.*¹³⁷

One theory which some medical professionals put forward at the time was that victims were suffering from cyanide-like poisoning.¹³⁸ If this was the case, the correct treatment would have been to administer an antidote that would eliminate the poison from the body.¹³⁹ Doctors and experts who believed people were suffering from cyanide poisoning¹⁴⁰ recommended injections of the antidote, sodium thiosulphate.¹⁴¹ This was supported by the findings of the Indian Council of Medical Research (ICMR),¹⁴² and UCC's own medical director at its office in West Virginia, USA. A telex message to the Bhopal medical authorities of 5 December 1984, entitled "Treatment of MIC Pulmonary Complications" advised:

*If Cyanide Poisoning is suspected use Amyl Nitrite. If no effect... Sod. Thiosulphate 12.5 gms.*¹⁴³

However, within days UCC appears to have overturned its medical advice on the issue, saying that Sodium Thiosulphate should not be used.¹⁴⁴ The Director of Health Services in Bhopal then sent a circular to all doctors with the directive that "under no circumstances should antidote Sodium Thiosulphate be used..."¹⁴⁵

These directives to stop the use of Sodium Thiosulphate were made despite the fact that, according to doctors - including Bhopal's chief pathologist and Dr Max Daunerer, a clinical toxicologist from Germany - survivors to whom the drug was administered showed signs of improvement. At a meeting of those doctors to discuss treatment of patients, it was noted that several patients administered the drug "showed overall improvement...within hours."¹⁴⁶

In response to the ban on the use of Sodium Thiosulphate, some medical professionals and social activists set up a makeshift clinic in the factory grounds to administer the drug.¹⁴⁷ However, on 24 June 1985, the clinic was raided by police, who arrested 40 people, six of them doctors.¹⁴⁸

Some 26 years too late to protect the health of survivors, the ICMR made public a study that established "acute cyanide toxicity" and "delayed or recurrent cyanide toxicity" through MIC exposure.¹⁴⁹ No effective treatment protocol was ever put in place for Bhopal survivors; despite the

ICMR's 2010 study and, as far as Amnesty International could discover, there is still no treatment protocol and treatment remains largely symptomatic.

At the time, and since, activists including Satinath Sarangi, Managing Trustee of the Sambhavna Trust Clinic have expressed the concern that UCC did not want sodium thiosulphate to be used, because its effectiveness would demonstrate that the poison had gone into the bloodstream and caused damage to the entire body, not just the lungs and the eyes as the corporation was claiming.¹⁵⁰

In the aftermath of the gas leak, in a context where UCC was seeking to downplay the seriousness of the event, the company suggested, but then opposed, the use of a drug that clearly could have helped thousands of victims.

Confirming the lack of a proper treatment protocol, Sarangi stated:

*Nearly three decades have passed since the disaster and there are still no standardized treatment protocols for exposure induced chronic illnesses. This has resulted in indiscriminate prescription of steroids, antibiotics, pain killers and psychotropic drugs among others causing more harm than good.*¹⁵¹

SOME POSITIVE LEGAL REFORMS

A number of laws were enacted or amended in India in the aftermath of the Bhopal disaster. India's Factories Act was amended in 1987 to incorporate new provisions dealing with "hazardous processes", and two new laws were enacted: the Environmental (Protection) Act 1986 (accompanied by the Environment Protection Rules, 1986 and the Hazardous Wastes Management and Handling Rules, 1989) and the Public Liability Insurance Act 1991.¹⁵² Section 7 of the Environmental (Protection) Act prohibits the discharge or emission (or permitting such discharge or emission) of any environmental pollutant in excess of certain prescribed standards. Section 8 of that Act regulates the handling of "hazardous substances". Section 16 deals with offences by and the responsibility of companies.¹⁵³

A number of key principles were later developed by India's Supreme Court in line with international standards on the protection of the environment:

- The precautionary principle – the duty to take precautions to avoid environmental pollution.
- The "polluter pays" principle.¹⁵⁴
- The principle of restitution – the polluter must restore the environment to its prior state, and repair the harm done to victims.¹⁵⁵ In the case focused on in this chapter, the land for the Bhopal factory was taken on lease from the Madhya Pradesh state government by UCIL and, as per the terms of the agreement, the land was to be returned in its original condition.

These principles were not in effect at the time of the gas leak. However, they are applicable to those who caused the pollution at the plant site and/or failed to remove it when they were under an obligation to do so, from the date they were established and for as long as the contamination remains.

THE LONG FIGHT FOR JUSTICE

THE CRIMINAL CASE IN INDIA

Less than 24 hours after the gas leak, the state authorities launched criminal proceedings.¹⁵⁶ Nine individuals and three corporations were accused of several criminal offences under the Indian Penal Code (IPC), including “culpable homicide (not amounting to murder)”.¹⁵⁷ The individuals accused included: Warren Anderson, a US national and Chairman of UCC since 1982; Keshub Mahindra, an Indian national and Chairman of UCIL, and V P Gokhale, an Indian national and Managing Director of UCIL.¹⁵⁸ The corporations accused were UCC, UCIL and UCE.¹⁵⁹ Anderson, Mahindra and Gokhale were arrested four days after the gas leak, on 7 December 1984, but Anderson was released on bail the same day, following intervention by the US Embassy in India, and left the country two days later.¹⁶⁰ The bail bond signed by Anderson contained a promise to return when summoned. Anderson was: “undertaking to be present whenever and wherever I am directed to be present by the police or the Court”.¹⁶¹ The other people who had been arrested were also subsequently released on bail.

Three years after the gas leak, on 1 December 1987, India’s investigating agency, the Central Bureau of Investigation (CBI), filed criminal charges before the Chief Judicial Magistrate’s Court in Bhopal (CJM), against the corporations UCC, UCIL and UCE, and the nine accused individuals.

In November 1988, the CJM issued a warrant for the arrest of Anderson. However, while criminal proceedings were underway, negotiations between the government of India and the companies resulted in an out-of-court settlement, which was ratified by India’s Supreme Court in February 1989.¹⁶² The agreement included the termination of all other proceedings (civil and criminal) that were then pending in the lower courts, including the criminal proceedings before the Bhopal CJM.

The decision to quash the criminal proceedings caused a public outrage following which India’s Supreme Court decided to review it. In October 1991, the Supreme Court upheld the 1989 settlement but revoked the decision to quash criminal prosecutions.¹⁶³ This opened the way for renewed criminal proceedings, which remain open today.

On 11 November 1991, the criminal case was relaunched before the Bhopal CJM’s Court. In December 1991, the CJM ordered the foreign accused, Anderson, UCC and UCE, to appear in court on 1 February 1992 to face charges. By this time UCE had ceased to exist.¹⁶⁴ Of the US-based nationals, neither Anderson nor UCC appeared in court so the CJM declared them “proclaimed absconders” and made an order for their properties to be seized by the court if they did not appear at the next hearing (set for 27 March 1992).¹⁶⁵ The hearing was adjourned to 30 April 1992 but, in the meantime, on 15 April 1992, UCC announced the creation of the Bhopal Hospital Trust in London, and endowed (pledged) the totality of its shares in UCIL to the Trust. On the day of the hearing, the CJM refused to recognize the Trust’s creation, and declared that the transfer had been made mala fide (in bad faith) and with a view to defeating the attachment order of the court. Consequently, the CJM ordered attachment of all of UCC’s properties in India (which, at the time, were its 50.9 per cent stock in UCIL).¹⁶⁶

Two years later, on 14 February 1994, India’s Supreme Court modified the terms of the

attachment order and allowed the sale of the shares held by UCC in UCIL. Advocates working on behalf of survivors filed applications to halt the transfer but these were adjourned on five occasions. By the time the applications were heard, on 20 October 1994, the shares had already been sold.¹⁶⁷ This transfer would later give grounds for UCC's legal counsel to argue that the Indian courts had no jurisdiction over UCC because the company had disposed of all its interests in India.¹⁶⁸ This attachment order for seizure of property still remains in force.

ATTEMPTS TO EXTRADITE WARREN ANDERSON

On 27 March 1992, the Bhopal CJM issued an arrest warrant against Anderson and requested the government of India seek his extradition from the US. Ten years later, in 2002 a Committee of the Indian Parliament found that the CBI and the Ministry of External Affairs had created numerous procedural delays that had prevented the extradition file moving forward, and ordered immediate action to revive the extradition process.¹⁶⁹ It was not until 2003 that the government of India formally asked the US government to extradite Anderson.

The US government rejected this request in June 2004 on the grounds that it did not meet the requirements of the US-India extradition treaty.¹⁷⁰ Interestingly, the Indian Attorney General had previously advised the Indian government that the proceedings in the US for extradition of Anderson were “not likely to succeed and, therefore, the same may not be pursued.” This conclusion was reached on the basis of legal advice from US lawyers who said in 2001:

*the State Department would likely find policy reasons not to surrender Mr. Anderson to the Indian government. The reasons are humanitarian concerns such as Mr. Anderson's age, said to be 81 years old, and health, and length of time that has elapsed, almost 17 years, between the event and the Indian government's decision to make a formal request for his extradition.*¹⁷¹

What happened after 2004 is unclear. According to news reports, on 31 July 2009 the CJM reissued an arrest warrant for Anderson and ordered the Indian central government to press on with extradition.¹⁷² In August 2009, the CBI said that the matter was with the Indian Ministry of External Affairs.¹⁷³ Amnesty International understands that requests were communicated to the US government for Anderson's extradition in April 2011.¹⁷⁴ In 11 January 2012, the US Department of Justice informed the Indian Embassy in Washington that the matter was still being examined.¹⁷⁵

THE FIRST CRIMINAL CONVICTIONS

While the foreign accused remained abroad (or, in the case of UCE, ceased to exist), the prosecution of the Indian UCIL employees went forward. However, their prosecution was neither quick nor effective. On 13 September 1996, India's Supreme Court downgraded their charges from “culpable homicide (not amounting to murder)” to “causing death by negligence” (the charges on the foreign accused remained unchanged).¹⁷⁶ By August 2009 (22 years after charges had been instituted), the CJM was still hearing witnesses' depositions. The fact that the trial did not proceed on a daily

basis and that the presiding magistrates changed several times are given as some of the reasons for the extreme delay.¹⁷⁷

Twenty-six years after the gas leak disaster and 23 years after registering initial charges, on 7 June 2010, the Bhopal CJM finally handed down a judgement convicting UCIL and the seven accused individuals for causing death by negligence under Section 304A of the IPC. UCIL was ordered to pay a fine of INR500,000 (equivalent to around US\$11,000), while all the individuals were sentenced to the maximum prison sentence of two years and a fine of around INR100,000 (equivalent to around US\$ 2,200).¹⁷⁸

The sentences handed down to the seven individuals sparked outrage in India and elsewhere because of what was seen as a very light punishment.¹⁷⁹ In August 2010, the CBI filed a Curative Petition (Criminal) seeking to recall the Supreme Court's 1996 order downgrading the charges.¹⁸⁰ On 11 May 2011, the Supreme Court dismissed the Curative Petition. They said that the CBI approached the court after a long period of 14 years and that there were not sufficient grounds to recall their 1996 order (in particular as the order did not prevent the Bhopal CJM from applying higher criminal charges).¹⁸¹

CIVIL CLAIMS IN US AND INDIA

Between December 1984 and February 1985, legal claims for personal injury and death were filed against UCC in US courts¹⁸² and against UCIL, UCC and the government of India in the India courts. By an order of 6 February 1985, all US legal actions filed in 13 different US States were joined and assigned to Judge Keenan of the US district court for the Southern District of New York.

In March 1985, the Indian government passed the Bhopal Gas Leak Disaster (Processing of Claims) Act,¹⁸³ giving the government an “exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim arising out of the Bhopal disaster”. The Act also put the process of categorizing and adjudicating claims directly under the control of the government so that claims would be “dealt with speedily, effectively, equitably and to the best advantage of the claimants”.¹⁸⁴

Although the stated intention of the Processing of Claims Act was to help victims and survivors, it actually deprived them of their right to pursue their own court claims against UCC and UCIL. Moreover, the legislation gave rise to a conflict of interest because many of the suits filed in India alleged the government's joint liability for the disaster.¹⁸⁵

This Act was challenged by several legal actions in the Supreme Court of India on the grounds that it violated fundamental rights and provisions in the Indian Constitution, including the victims not having the opportunity of being heard before the Act was passed and the fact that citizens could not be forced to surrender their rights to the state. These actions also argued that vesting the rights of the victims in central government created a conflict of interest since the state owned a 22 per cent share in UCIL, making it a judge in its own cause.¹⁸⁶ Nevertheless, in 1990, India's Supreme Court upheld the Act's reasonableness and constitutional validity.¹⁸⁷

Meanwhile, in the US, the Indian government took over the civil action and all individual complaints were superseded by a consolidated complaint involving over 200,000 plaintiffs.¹⁸⁸ The

government of India claimed unspecified damages on seven counts: enterprise liability; absolute liability and/or strict liability for ultra-hazardous and inherently dangerous activity; negligence; breach of warranty; misrepresentation and punitive damages.¹⁸⁹ Damages to be used to compensate all victims, reimburse post-disaster relief expenditure, fund medical rehabilitation and research, and:

*deter Union Carbide or any other multinational corporation from the wilful, malicious and wanton disregard of the rights and safety of the citizens of those countries in which they do business.*¹⁹⁰

The Indian government contended that UCC owned, designed, constructed, operated and controlled the plant and therefore should be held liable for the resulting harm and damage. It also claimed that UCC contributed to the disaster by using defective systems, instrumentation, and procedures in its Bhopal plant.¹⁹¹ In addition, the government of India asserted UCC's liability under the theory of "enterprise liability" (see section 1.4.2 *Piercing the corporate veil* in the *Legal Challenges* chapter of this book) which did not rely on a finding of fault.

UCC'S FORUM OBJECTIONS

UCC requested that the case filed against it be dismissed on the grounds of *forum non conveniens*, arguing that the US was an improper forum for the claim and stating that the Indian legal system had the capability to deal with the claims relating to Bhopal.¹⁹² UCC submitted affidavits from two Indian lawyers who confirmed the adequacy of the Indian judicial system and tort law to handle the case.¹⁹³ The government of India argued that the Indian courts and laws were incapable of satisfactorily handling a case of this magnitude, and that litigation in India could last decades.¹⁹⁴ India's expert witness, Professor Galanter, explained that India's courts were overburdened to the point of collapse, that Indian law on mass torts was not sufficiently developed and that its civil procedure could not accommodate such complex proceedings quickly and effectively.¹⁹⁵

In May 1986, Judge Keenan accepted UCC's *forum non conveniens* arguments and dismissed the case.¹⁹⁶ Judge Keenan concluded that, despite some of the Indian system's disadvantages, India would provide an "adequate" alternative venue for the proceedings. He dismissed the contention that litigation in India would result in endemic delays, as the "United States courts are also subject to delays and backlogs".¹⁹⁷ Judge Keenan found that the Indian judiciary was developed, independent and progressive, and had demonstrated capability of circumventing the long delays and backlogs prevalent in the Indian court system by devising special expediting procedures. He also argued that the ability to create representative classes under Indian civil procedure rules made up for the absence of class action procedure. Based on the case of *Piper Aircraft Co v. Reyno*,¹⁹⁸ Judge Keenan stated that as the plaintiffs were foreign nationals their choice of the United States as a forum deserved less deference than would be accorded to the choice of a United States citizen.¹⁹⁹

In making the forum decision Judge Keenan was required to weigh the "public" and "private"

interests involved. Some of the arguments presented by UCC with regard to what was in the public interest suggest the company was willing to apply very different standards when it came to the human impact of its investments.

UCC referred to the interest of US multinational businesses operating abroad and argued:

It would surely be unfair to apply ingrained American approaches to liability or damages to U.S. Corporations owning stock in foreign companies...

The company also stated that:

the practical impossibility for American courts and juries, imbued with US cultural values, living standards and expectations, to determine living standards for people living in the slums or “hutments” surrounding the UCIL, Bhopal, India, by itself confirms that the Indian forum is overwhelmingly the most appropriate. Such abject poverty and the vastly different values, standards and expectations which accompany it are commonplace in India and the third world. They are incomprehensible to Americans living in the United States.²⁰⁰

An amicus brief prepared by the Citizens’ Commission on Bhopal, the National Council of Churches and other US-based groups, urged the court on the public interest factors:

When the magnitude of the injury committed by our corporations rises to the level of a Bhopal, the corresponding moral responsibility of our society and legal institutions to provide justice for the suffering rises proportionately.²⁰¹

Judge Keenan’s opinion was that the public interest considerations weighed heavily in favour of India, that Indian courts should adjudicate the claims of the over 200,000 Indian victims, and that a trial jury in the US would be unduly burdensome on the US court system.²⁰² He said:

the purported public interest of seizing this chance to create new law is no real interest at all. This Court would exceed its authority were it to rule otherwise when restraint was in order.

The Court concluded that:

the public interest of India in this litigation far outweighs the public interest of the United States. This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system. This interest is of paramount importance.²⁰³

On the private interests at stake, UCC argued that “India is the site of the evidence and witnesses needed to determine the critical issues in these cases.”²⁰⁴ This argument relied largely

on the contention that it was UCIL, and not UCC, that was the proper defendant in the case, and that UCC, as a separate legal entity, was not legally liable. UCC argued that: “The Bhopal plant was managed, operated and maintained entirely by Indians in India.”²⁰⁵

The plaintiffs, however, had brought the case solely against UCC on the basis of its liability for the disaster. The question of UCIL’s alleged negligence was essentially irrelevant to the matter of forum under consideration.²⁰⁶

Judge Keenan found that this question of the private interests also weighed heavily in India’s favour, finding that the many witnesses and sources of proof to resolve the case were almost entirely located there, while the witnesses could not be compelled to appear for trial in the US. In his decision, the judge said he was “firmly convinced that the Indian legal system is in a far better position ... to determine the cause of the tragic event and thereby fix liability,” and, with access to more information than the US courts, to fix the appropriate amount of compensation.²⁰⁷

In granting UCC’s forum request the court had three conditions:

- Union Carbide shall consent to submit to the jurisdiction of the courts of India...;
- Union Carbide shall agree to satisfy any judgement rendered by an Indian court ... where such judgement and affirmance comport with the minimal requirements of due process;
- Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure.²⁰⁸

The decision to dismiss the case was appealed and subsequently upheld by the US Court of Appeals for the Second Circuit. However, the appellate court removed the second and third conditions.²⁰⁹ In its appeal against the three conditions imposed by the lower court, UCC completely reversed its view of the Indian judicial system, claiming that:

*Indian courts, while providing an adequate forum, do not observe due process standards that would be required as a matter of course in this country.*²¹⁰

The assumptions which Judge Keenan made in the ruling to dismiss the US civil claims were, however, almost entirely wrong, as more than two decades of desperate struggle by survivors to secure any reasonable settlement, underline.

OTHER LEGAL ACTIONS IN THE US

In **October 1990**, two class actions were filed in Texas against UCC, UCIL and a number of other defendants,²¹¹ seeking compensation for injuries caused by the Bhopal disaster. These cases were transferred to the the Federal District Court in New York, (the US District Court for the Southern District of New York) and were subsequently dismissed on grounds of *forum non conveniens*. Judge Keenan held that the analysis and conclusions of his 1986 decision (see above) were still appropriate.²¹² On appeal, the US Court of Appeals for the Second Circuit upheld the dismissal, but this time on the grounds that the plaintiffs did not have standing to maintain the action in light of the Bhopal Gas Leak Disaster Act 1985.²¹³

CONTINUED...

In **November 1999**, a group of Bhopal victims and their supporters filed a new suit against UCC and its former CEO, Warren Anderson, in the US District Court for the Southern District of New York.²¹⁴ The claim was based on the US Alien Tort Claims Act (ATCA) (see explanation of this in the box *Kiobel and the US Alien Tort Claims Act* in the *Legal Challenges* section chapter of this book).²¹⁵ The lawsuit was amended in January 2000 to include claims for environmental damages caused not by the gas leak itself but by the contamination from the plant. Judge Keenan dismissed both the ATCA-based claims and the environmental claims in 2000 on the grounds, firstly, that the plaintiffs lacked standing to bring the claims because of the Bhopal Gas Leak Disaster Act 1985, and, secondly, because the proceedings were barred by the 1989 settlement.²¹⁶ The Court of Appeals upheld the decision to dismiss the ATCA-based claims, but reinstated the environmental claims on the basis that they had not been separately and specifically considered.²¹⁷ In March 2003, Judge Keenan finally struck out the remaining environmental claims on the grounds that (a) the plaintiffs' personal injury and property damage claims were time barred and (b) the plaintiff organizations lacked the necessary standing to seek compensation on behalf of the victims and (c) it would be ineffectual for the court to order the injunctive relief requested by the plaintiff (for UCC to remediate the soil and groundwater contamination).²¹⁸ The Court of Appeals partially reversed this decision, holding that the property damage claims of the only remaining individual plaintiff ("plaintiff Bi") were not time barred.²¹⁹ In the end, Judge Keenan dismissed Bi's claim on the grounds that she did not actually own the relevant property.²²⁰

In **November 2004**, US claims were filed by Janki Bai Sahu and others²²¹ against UCC and Warren Anderson in the US District Court for the Southern District of New York for damage arising from water pollution alleged to have been caused by the Bhopal plant.²²² The claim against UCC was based on theories of (a) primary liability based on the idea that UCC was a joint tort-feasor with UCIL, (b) secondary liability (that is, conspiracy), (c) agency (that UCC's control over UCIL was so great that UCIL was effectively no more than an agent of UCC), and (d) enterprise liability, that is that UCIL was the "alter ego" of UCC, justifying "piercing the corporate veil" (see more on these theories of liability in *2.4 Theories of liability* in the *Legal challenges* chapter of this book). District Court Judge Keenan dismissed most of these claims in 2005, rejecting the various theories of liability and describing them as attempts to shortcut "veil piercing" requirements.²²³ On appeal, the US Court of Appeals for the Second Circuit reinstated the claims on a technical ground.²²⁴ The case went back to Judge Keenan who, on 26 June 2012, dismissed all the claims.²²⁵ He ruled that UCIL, not UCC, was responsible for the generation and disposal of the waste that polluted the drinking water, and that the liability rested with the state government. He rejected all theories of liability advanced by the plaintiffs to justify UCC's liability and found no grounds to "pierce the corporate veil". On 27 June 2013, the US Court of Appeals for the Second Circuit rejected the plaintiffs' appeal against the US District Court's decision.²²⁶ At the time of writing, a claim in relation to property damage remains outstanding in the US courts.²²⁷ In January 2014, new evidence was submitted in this case as part of a federal class-action lawsuit filed by residents of Bhopal whose land and water remain contaminated by waste from the chemical plant.

THE LEGAL ACTION IN INDIA AND THE 1989 SETTLEMENT

Following dismissal of the US proceedings, on 5 September 1986, the government of India filed a claim against UCC for US\$3.3 billion in the Bhopal District Court. It advanced the same arguments about UCC's liability as it had done in the US claim. Every one of these arguments was refuted by UCC. UCC repeatedly claimed that it was purely a US-based corporation and denied that it had operations in India or elsewhere outside the US,²²⁸ a claim that was completely at contradictory to internal documents on UCC's integrated management approach and its involvement in the Bhopal plant.

On 17 December 1987, the Bhopal District Court ordered UCC to pay INR3.5 billion (about US\$270 million) as "interim relief" in order to "act in aid of justice to distressed gas victims to move ahead towards amelioration". UCC appealed the decision and, for the next three years, the issue worked its way up from the Bhopal District Court, to the Madhya Pradesh High Court and ultimately to the Supreme Court of India.

The Madhya Pradesh High Court took the view that UCC was liable to pay interim relief, finding that:

*it was the defendant-UCC which had real control over the enterprise which was engaged in carrying on the particular hazardous and inherently dangerous industry at the Bhopal plant and as such it was absolutely liable (without any exceptions) to pay damages/compensation to the multitude of gas victims.*²²⁹

However, UCC never paid interim compensation. Out-of-court settlement negotiations between the government of India and UCC/UCIL were by now underway. On 14 February 1989, India's Supreme Court approved a settlement between the two parties that ended all past, present and future claims against UCC/UCIL and quashed pending criminal proceedings (this condition was later revoked).²³⁰ This agreement also brought to an end the pending question of interim relief.

The settlement bestowed sweeping civil and criminal immunity on UCC and UCIL. The Supreme Court ordered UCC and UCIL to pay US\$470 million in compensation:

*to the Union of India as claimant and for the benefit of all victims of the Bhopal Gas Disaster under the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985, and not as fines, penalties or punitive damages.*²³¹

The settlement capped UCC's liability at US\$470 million, even though claims had not yet been fully categorized, and the full extent of damages had not yet been estimated. By the time of the settlement, more than 600,000 compensation claims had been filed, but fewer than 29,000 had actually been processed to confirm the nature and extent of injury.²³² The government of India gave no explanation as to how its initial claim of US\$3.3 billion had been reduced to US\$470 million (less than 15 per cent of that the initial amount), and why this should be regarded as acceptable.

Despite its far-reaching consequences for the rights of Bhopal victims, including their right to remedy, the settlement was negotiated without their participation. Survivors, civil society groups

and others overwhelmingly rejected this settlement as utterly inadequate. Victims' lawyers challenged the settlement in a review petition but, in a final decision in 1991, the Supreme Court upheld its validity, taking the view that it was a "reasonable and pragmatic solution to a difficult and complex situation."²³³ The Supreme Court also ruled that, if the settlement proved insufficient to meet the costs of personal injuries and compensation, the government of India would make up the shortfall. As a consequence of the settlement, the merits of the case were never examined and the issue of where liability rested was never fully decided.

Importantly, the settlement did not take into account damages for environmental pollution generated by the plant's operations. As a result, the award was not calculated to cover or compensate for damage to the environment, life, health or property resulting from plant site contamination. In a letter to the Federal District Court in New York, the government of India was very clear about this:

*it is the official position of the Union of India that the previous settlement of claims concerning the 1984 Bhopal Gas Disaster between Union Carbide and Union of India has no legal bearing on or relation whatsoever to the environmental contamination issues raised in the case at bar.*²³⁴

INADEQUATE COMPENSATION AND ECONOMIC REHABILITATION

The US\$470 million settlement was far less than most estimates of the damage at the time. An intervention filed on behalf of the victims before India's Supreme Court in 1988 had claimed that INR10 billion (around US\$628 million) were needed as interim relief alone.²³⁵ The estimates of independent experts were also far higher than the amount finally settled for by the government. Professor Alfred de Grazia, author of *A Cloud Over Bhopal*, had estimated up to US\$1.3 billion in 1985 for economic losses alone.²³⁶ More comprehensive estimates that included the cost of medical research and treatment, economic rehabilitation and legal costs arrived at a sum of just over US\$4 billion.²³⁷

To calculate the amount of the award, India's Supreme Court had used provisional figures for the dead, disabled and injured used by the Madhya Pradesh High Court to calculate interim compensation. These figures, involving a total of 205,000 victims (comprising 3,000 dead, 30,000 permanent or total disabilities, 20,000 temporary or partial disabilities, 2,000 serious injuries, 50,000 minor injuries, 50,000 cases of loss of belongings and 50,000 cases of loss of livestock) were only estimates.²³⁸ In March 1989 the Supreme Court itself had ordered the distribution of free food grain to 582,692 gas-affected people,²³⁹ a figure far higher than the one used to calculate the compensation amount. By the time of the settlement, more than 600,000 compensation claims had been filed. And by the time the Supreme Court gave its final judgement on the settlement in 1991, the official death toll had risen from the estimated 3,000 to 3,828 (figures which other sources consider to be significant under-estimates).²⁴⁰ The arbitrariness and insufficiency of the award amount became clearer as years went by and the figures kept rising.

Definite figures continue to be contested by all parties concerned, but it is evident that the

initial figure of 3,000 deaths used by the Supreme Court to calculate UCC's compensation amount has been significantly exceeded.²⁴¹ The number of survivors suffering injury and disability has also risen dramatically, from an initial estimate of 102,000 in 1989 to 554,895 in 2003,²⁴² and to 568,293 in 2010.²⁴³ This is more than five times the numbers of injured and disabled people used by the Supreme Court to calculate the settlement award.

THE COMPENSATION MECHANISM

The inadequacy of the US\$470 million was not the only problem with compensation of the victims. The system for disbursing the money was fraught with problems. Once the settlement amount was paid to the government of India, individual claimants faced numerous challenges in proving their claims and the amount of compensation that they should receive.

Claims were adjudicated in courts by Claims Commissioners, Additional Claims Commissioners and the Welfare Commissioner (a sitting judge of the Madhya Pradesh High Court).²⁴⁴ Claimants had to pass through several stages in order to secure compensation.²⁴⁵ Survivors say that the process involved innumerable trips to hospitals, government offices, lawyers, banks and the courts.²⁴⁶ For many struggling and illiterate families, the process itself was prohibitive.

The excessive paper work and complicated procedures also opened the way for opportunistic intermediaries, brokers, lawyers and doctors to extract bribes from the claimants.²⁴⁷ Numerous survivors told Amnesty International about the difficulties they faced in accessing compensation. One, Kiran Jain, a 40-year-old widow who spoke to Amnesty International in 2004, said:

Having all your papers is not enough. You have to pay a bribe for everything even to get a Pension Book or a Below Poverty Line card. If you pay, you get what you want; if you don't, then just suffer.²⁴⁸

Many victims were unable to produce medical records so they were categorized as having no injury, even though they were ill and could prove they lived in the exposed area.²⁴⁹ The categorization process, named the Process of Injury Evaluation, relied largely on three investigations: X-rays, the Pulmonary Function Test (PFT) and the Exercise Tolerance Test (ETT). However, these were not widely administered. A 1989 study showed that while at least 60 per cent of the victims required PFT the claims directorate had only ordered 15 per cent to take the test, whilst only two per cent had been ordered to take the ETT.²⁵⁰ There were a number of other problems with the categorization process: medical assessments did not evaluate how victims' illnesses affected their ability to carry out their normal levels of activity and work;²⁵¹ and serious illness was categorized as "disability", and that disability was understood only as an inability to work - as a consequence, all those who were not engaged in paid work (considered to be at least 70 per cent of the affected population) including elderly people, students, housewives and children, were automatically given the lowest compensation.²⁵²

Thousands of claims were not registered at all. Many of these included children whose claims could not be registered until August 1992 when the Supreme Court ordered that minors had a legal entitlement to be registered. Indeed, children born to gas-affected parents have never been considered for compensation.²⁵³

A comprehensive assessment of the compensation system has never been carried out. Publicly available government data is limited and often out-of-date. However, the accounts of survivors and research by a number of non-governmental organizations, including Amnesty International, consistently highlight that the amounts of compensation paid were not based on any reasonable calculation of the damage suffered.²⁵⁴

ECONOMIC REHABILITATION

The gas leak radically affected the social and economic wellbeing of the impacted communities, entrenching existing poverty and marginalization. Most of those affected were very poor, and the effects of the gas leak caused them to lose their principal or only source of income.²⁵⁵ Many families lost their main wage earners. Livestock owned by families died. Chronic illness and mental distress affected the capacity of many to work and earn their livelihoods. Women often bore the additional burden, sleeping very little due to an increased workload alongside household duties, childcare and care for relatives whose health had been impaired by the gas leak.

The extent of unemployment due to gas-related diseases is unclear. In 2005, local activist groups demanded that information be gathered “to determine exactly how many people are unemployed as a direct or indirect result of gas and ground-water poisoning.”²⁵⁶ Some estimates are in the tens of thousands.²⁵⁷ No monitoring was done by the government.

The Madhya Pradesh government's relief efforts included economic rehabilitation to address the loss of income of many thousands of people affected by the gas leak. The government established some training programmes and built work sheds to help support small-scale enterprises. However, these initiatives were largely discontinued or never fully completed and only a small number of people were able to derive any long-term benefits.²⁵⁸ Government data on the schemes has always been limited and there is no known evaluation of the initiatives.²⁵⁹ There remains a lack of information on the number of people who are unemployed or underemployed as a result of the gas leak. The last estimates, produced by survivor groups around 10 years ago, point to a figure of at least 60,000 families.

PENSION AND OTHER SUPPORT TO WIDOWS

Women widowed as a result of the disaster found themselves in a particularly precarious situation, as they had generally lost the family's breadwinner. The state government built an area (or colony) of around 2,500 houses for gas victims, especially widows. However, it did not ensure adequate living conditions. Access roads to the colony were poor, and dwellings were affected by open drains and gutters, overflowing sewers, piles of rubbish and no access to clean drinking water. In August 2004, the state government admitted that the quality of life in the colony was bad.²⁶⁰ Although some improvements were subsequently made, including in respect of provision of drinking water, living conditions within the colony remains poor.²⁶¹

The state government also instituted a widows' pension scheme. In a 2008 statement, the government claimed that pensions were provided to 1,077 widows at INR200 (US\$4.60) per month.²⁶² However, widows interviewed by Amnesty International in 2004 said they had received

less than that or nothing at all.

Not all of us receive even the paltry INR150 a month [US\$4 at that time] that is doled out to widows. I was refused that on the grounds that I am not 60 years old.²⁶³

Moreover, a 2008 state government Plan of Action suggested that 5,000 widows required financial support for their livelihoods as a consequence of the disaster.²⁶⁴ Despite this estimate being revised upwards, the additional individuals have not received a pension. In a July 2013 interview with Satinath Sarangi, he said that this shows that the pension scheme is grossly inadequate, since almost five times that number should be in receipt of pension support.

ONGOING HEALTH EFFECTS OF THE GAS LEAK

Medical conditions associated with gas exposure include ocular and respiratory illnesses,²⁶⁵ and multi-systemic injuries to organs within the body.²⁶⁶ Chromosomal aberrations have been discovered, leading to expectation of cancers and the possibility of birth defects.²⁶⁷ Other health impacts include neurological and neuromuscular damage,²⁶⁸ immunological impairment,²⁶⁹ and mental health problems such as anxiety, memory loss and depression.²⁷⁰

The health of women and girls has been particularly affected. Many have suffered serious gynaecological and reproductive disorders, including miscarriages, to the extent that the situation has been described as an “epidemic of gynaecological diseases”.²⁷¹ Survivor and activist Shahazadi Bee said:

*After the gas leak both I and my daughters faced difficulties with our monthly cycles and had uterus-related problems. Sometimes my youngest daughter doesn't experience menstruation and sometimes she experiences it two or three times in a month. I have also had the same problem for the last 12 years and I faced it a lot in 1984.*²⁷²

Over the years, these injuries and disorders have led to highly elevated morbidity and mortality rates in the affected communities that continue to this day.²⁷³ Some reports suggest that children continue to be the most adversely affected by the disaster.²⁷⁴ Research currently being conducted of a large sample of the population, by The Bhopal Group for Information and Action, will be the first systematic study of the health consequences of the disaster for the second and third generation of survivors.

The government has offered free health care to gas-exposed people in government hospitals ever since the 1984 gas leak. However, testimonies from patients reveal that standards of care have varied over the years and have not always been adequate.²⁷⁵ Although health care is supposed to be free for gas victims, patients complain of having to pay hidden costs that they cannot afford. Medicines are often not available in government hospitals so patients have to buy them elsewhere.²⁷⁶ There also are bills to pay for procedures such as injections.²⁷⁷ Many people have found the treatment at government hospitals so poor that they have paid for private treatment. According to a 2004 Fact Finding Mission on Bhopal, nearly 61 per cent of compensation money was used for medical expenses even though medical care for those exposed to the gas was

supposed to be free; this is consistent with more recent testimonies by survivors.²⁷⁸

As noted earlier no treatment protocol was ever adopted by the government to deal with the effects of the gas leak. A study by the International Medical Commission on Bhopal in 1994 found that care was largely symptomatic.²⁷⁹ The fact that there were no specially designed protocols appears to stem directly from the lack of information relating to the composition of the gas leak. To this day, the company has not disclosed the chemical composition of the gas leak and other contaminants. But the government has also failed to take independent action to develop an understanding of the medical impacts of exposure to the gas. Neither the state nor central government have done research on the manifestation of illnesses over time.

THE 2010 CURATIVE PETITION TO THE SUPREME COURT OF INDIA

In December 2010, the increase in gas-related injuries led the government of India to file a Curative Petition (Civil) with the Supreme Court of India.²⁸⁰ The petition seeks to “cure”, amend or, if necessary, invalidate and renegotiate the 1989 settlement agreement in light of new information about the scale of injuries suffered by Bhopal communities. It asks for a maximum additional amount of approximately INR78 billion (about US\$1.7 billion at the time) from UCC, Eveready, McLeod Russel India and Dow.²⁸¹ Both Dow and UCC have declared their intent to fight the petition.²⁸² The case is ongoing.

In the Curative Petition, the government of India said that 5,295 people died²⁸³, 4,902 suffered permanent disability, 35,455 suffered temporary disability and 527,894 suffered minor injuries as a consequence of the gas leak. These new figures are still much lower than many other official figures or those put forward by advocate groups. In April 2011, Bhopal advocate groups filed an application to be impleaded in the Curative Petition, in which they contested the government figures and damages claimed (particularly in respect of the costs for remediating the site) and sought much higher damages, in a process that is ongoing.²⁸⁴ They claim that the figures are a gross underestimate,²⁸⁵ and say:

*In its current form the curative petition would only serve to misinform the Supreme Court regarding the extent of damage caused by the corporation and it would thus be an obstruction to the delivery of justice to the Bhopal victims.*²⁸⁶

ONGOING ENVIRONMENTAL POLLUTION AT BHOPAL

The impact of the plant on human rights is not confined to the gas leak. Since the plant opened in 1970, it has been a source of environmental pollution. UCC's engineering department warned back in 1973 that the design of the Bhopal plant, which used solar evaporation ponds for waste effluent, posed a “danger of polluting sub-surface water supplies in the Bhopal area”. It stated that “new ponds will have to be constructed at one to two-year intervals throughout the life of the project in order to address this problem.”²⁸⁷ Inter-company correspondence has also revealed deeply troubling information. For example, in March 1982, UCIL sent a telex to UCE reporting a leak from

one of the solar evaporation ponds and an emergency pond.²⁸⁸ A second telex of April 1982 noted that “continued leakage from the evaporation pond [was] causing great concern.”²⁸⁹

Despite the already devastating impact of the gas leak on the people of Bhopal, UCC walked away from the Bhopal site leaving behind pollution and hazardous material. In 1994, UCC sold its 50.9 per cent share of UCIL, and UCIL was renamed Eveready Industries. UCC stated:

*As a result of the sale of its shares in UCIL, Union Carbide retained no interest in – or liability for – the Bhopal site, and Eveready Industries continued to retain exclusive possession of the land under lease from the state government of Madhya Pradesh.*²⁹⁰

UCC has claimed it did some clean-up before the sale but that access to the site was limited by the Indian authorities. In 1998, Eveready Industries surrendered the lease on the Bhopal factory site to the state government of Madhya Pradesh – apparently at the request of the state government.

Evidence of ongoing and very serious pollution around the Bhopal site has been published by a number of organizations over a period of years. This has included evidence of water and soil contamination.²⁹¹ In 1997, 250 hand-pumps around the plant were painted with new red signs declaring that the water they provided was unfit for drinking.

In 2013, the Centre for Science and Environment (CSE) analyzed the results of 15 previous studies, finding consensus over the presence of contamination at the site. Despite some variation, most of the studies also found that groundwater is contaminated.²⁹²

The exact circumstances that enabled UCC to divest its stock in UCIL without ensuring the Bhopal site was remediated and made fully safe and saw Eveready hand back the lease while the site was still contaminated are not clear. The authorities have never explained why they did not oppose the divestment of UCC or why they took back the lease on the site. Since these events the government has repeatedly stated that the companies UCC and UCIL (now Eveready) are responsible for clean-up of the pollution. But the state facilitated (or failed to oppose) both UCC’s and Eveready’s exit from Bhopal. The consequence of these serious failures has been legal uncertainty and protracted litigation to establish liability. All the while, the people of Bhopal, living with the legacy of the gas leak, have also had to cope with ongoing pollution.

THE IMPACT ON ACCESS TO WATER

Indian courts have long recognized the existence of high levels of contamination in water around Bhopal and the serious risks this poses to the health of surrounding communities. As discussed below, this has led to several court orders to implement decontamination measures as well as to provide safe drinking water to affected communities.

As a response to emerging evidence of water contamination, in 1997, 250 hand pumps around the plant were painted with red signs declaring that the water they provided was unfit for drinking. However, in the absence of any other convenient source, most people in the surrounding communities continued to drink the water from the pumps.²⁹³ Hasina Bi of Atal Ayub Nagar, a neighbourhood near the plant, told Amnesty International in 2004 that she had been drinking the

water from the hand pump near her house for 18 years, adding:

*When you look at the water, you can see a thin layer of oil on it. All the pots in my house have become discoloured ... green-yellow. We have to travel at least 2km to get clean water – to Chola Nakka. My health is so bad that it prevents me from carrying the water I need from there.*²⁹⁴

Many people who were not exposed to the gas leak developed health problems similar to those who had been exposed, including cancers and reproductive health issues among women and girls. Local activists and residents believe that this is due to contaminated drinking water.²⁹⁵

In May 2004, based on a report by the Waste Monitoring Committee,²⁹⁶ India's Supreme Court observed that:

due to indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by the authorities, the groundwater, and, therefore, drinking water supplies [have been damaged].

The Supreme Court passed an order instructing the Madhya Pradesh government to supply fresh drinking water by tankers to people whose potable water supplies were contaminated by pollutants from the plant.²⁹⁷ Following protests by survivors and civil society groups, the number of communities receiving drinking water was increased first from 14 to 18 (in 2012) and then to 22 (in 2013), although three communities remain excluded from the process.²⁹⁸ Despite these welcome breakthroughs, such measures came far too late to make a difference to those who had been drinking contaminated water for over two decades. Moreover, compliance with the court order by the Madhya Pradesh government was slow, inadequate and patchy at best.

A 2009 study commissioned by the UK-based support group The Bhopal Medical Appeal concluded that:

the drinking water supply in the majority of [15 communities surrounding the Union Carbide India Limited (UCIL) plant site] is insufficient or, in many cases, is contaminated with toxic chemicals.

It further added that

*[T]housands of residents are lacking access to clean drinking water as the water supply system, installed by the Bhopal Municipal Corporation, is in poor condition while groundwater from private hand pumps and bore wells is of poor quality and/or contaminated with chemicals.*²⁹⁹

By mid-2012, the state government had yet to fully implement the Supreme Court orders to provide fresh water to the affected communities.³⁰⁰ In August 2013, five survivors' organizations accused the Madhya Pradesh government of "criminal neglect" because of its failure to provide clean drinking water to residents.³⁰¹

THE DOW CHEMICAL COMPANY

In February 2001, UCC became a wholly owned subsidiary of The Dow Chemical Company (Dow). The merger agreement between Dow and UCC omitted mention of any pending criminal prosecution against UCC, despite the ongoing criminal proceedings before the Bhopal CJM. The extent to which Dow is liable for UCC's Bhopal legacy has been fiercely argued for years, both within and outside the courts. Ever since it bought UCC, Dow has maintained that it did not assume UCC's liabilities as part of the 2001 purchase, that UCC remained a separate company with its own assets and liabilities and, that, therefore, it had inherited no liabilities from Bhopal.³⁰² Dow has publicly stated that it did not own UCC at the time of the Bhopal Disaster and, therefore, has no responsibility to those affected by it.

However, as set out in detail above, the issues are not historical. The human rights abuses at Bhopal – both related to the gas leak and the contamination of the site – are unresolved and ongoing. Therefore Dow's assertion that it did not own UCC in 1984 is not relevant; it owns UCC today. UCC is – and was at the time Dow purchased the company – a proclaimed absconder by the Indian courts, a company that did not pay damages commensurate with the harm caused by the gas leak, and a company that divested its interests in India without fulfilling its responsibility to make the Bhopal plant safe.³⁰³

Dow's contention that UCC is a separate entity also fails to stand up to scrutiny. The purchase deal between Dow and UCC, regardless of its formal name, should be regarded as a classic merger, in which the two entities become one, integrating all of their assets and liabilities.³⁰⁴ Indeed, even though UCC continued to exist as a separate legal entity, its corporate identity and all of its business were fully integrated with those of Dow as a consequence of the purchase, as UCC's website confirms.³⁰⁵

A senior US lawyer, representing the victims of the gas disaster in the US, has argued that the merger between Dow and UCC is governed by US law³⁰⁶ and, therefore, all of UCC's civil and criminal liabilities were acquired by Dow by virtue of its purchase on the basis of applicable principles of successor liability.³⁰⁷ Evidence of the extent of the merger can be ascertained by the fact that the accounts of the two companies became consolidated as one and that a proportion of the takeover price was paid in the form of Dow shares.³⁰⁸ Furthermore, the purchase agreement between the two companies recognized a transfer of liability as Dow accepted approximately US\$2 billion of outstanding UCC debt.³⁰⁹

Legal experts and commentators have also argued that Dow engaged in a number of fraudulent or wrongful acts that would justify piercing the corporate veil. One example that has been cited is Dow shielding its subsidiary from criminal prosecution in India by failing to ensure that it appears before the Bhopal criminal court while, at the same time, selling UCC products in India under Dow's own name, thus circumventing court attachment orders still in force.³¹⁰ This has prompted a submission by The Bhopal Group for Information and Action to the Bhopal CJM requesting the attachment of proceeds from Dow's sale of UCC's products and services in India.³¹¹

Dow, however, has consistently denied that there were any pending legal liabilities on UCC at the time of the takeover, or minimized their relevance.³¹²

So far no court has determined the issue of Dow's liability. In 2008, the Ministry of Law of India

gave an opinion stating that “if there was any liability for Bhopal, it would have to be borne by Dow”, and this was “irrespective of the manner in which UCC has merged or has been acquired by Dow Chemicals”³¹³ However, the matter remains controversial even within the Indian government, if not for legal, then for political reasons (see the Dow/Tata attempts to bypass the court system below).³¹⁴

Regardless of whether or not Dow inherited UCC’s liabilities, Amnesty International contends that it is undeniable that Dow exercises effective control over UCC. As a consequence Dow bears responsibility for UCC’s current conduct regarding Bhopal and the ongoing environmental and human rights disaster.

SUMMONS TO DOW TO ATTEND CRIMINAL PROCEEDINGS

In response to an application by The Bhopal Group for Information and Action,³¹⁵ on 6 January 2005, the CJM issued a summons for Dow to attend the criminal proceedings and explain why it should not be asked to produce its fully owned subsidiary and proclaimed absconder, UCC, in court. On request by legal counsel for Dow’s subsidiary in India, Dow Chemical International Private Ltd (DCIPL), the summons was set aside and it took almost eight years until the stay was finally removed, on 20 October 2012. In requesting the stay, Dow’s subsidiary alleged that Dow and UCC were separate legal entities, and that “the production of a particular accused being declared an absconder is the duty of the law enforcing agencies”.³¹⁶ This was alleged despite Dow’s full control and 100 per cent ownership in UCC. Since 2001, DCIPL has also brought four legal actions against Bhopal survivors and activists seeking restraining orders that prohibit them from protesting within 100-200 metres of DCIPL’s premises, as a result of which various interim court orders have been granted (most of the defendants decided not to respond to these actions). DCIPL has also recently applied for leave to sue numerous Bhopal survivors and activists for INR25 million in damages with respect to an April 2013 protest.³¹⁷

On 23 July 2013, Bhopal’s CJM issued the summons for Dow to appear before the court to explain why UCC had repeatedly refused to appear in the ongoing criminal case.³¹⁸ At the time of publication, the court summons was in the process of being communicated to the US government, required for it to be served on Dow’s US-based headquarters in Michigan.

PUBLIC INTEREST LITIGATION IN THE MADHYA PRADESH HIGH COURT

In July 2004, one of the victims’ organizations, the Bhopal Gas Peedith Mahila Udyog Sangathan, filed proceedings in the Madhya Pradesh High Court against a number of defendants, including the government of India, the Madhya Pradesh state government, UCC, Eveready (formerly UCIL) and Dow.³¹⁹ The claim, which is ongoing, seeks damages of US\$3.3 billion for environmental pollution, environmental remediation and medical assistance for victims. Dow had asked for its name to be removed from the list of respondents on the grounds that, as a separate legal entity from UCC, it had nothing to do with the issue under consideration, and that, being a foreign company with no business or assets in India, it could not be subjected to the jurisdiction of the Indian court.³²⁰ This is despite one of its own subsidiaries, Dow Chemical International Private Ltd (incorporated in 1998), appearing one year later to request a stay on the summons issued to Dow in the criminal proceedings.³²¹

Eveready's parent company has also denied responsibility:

*Eveready is neither responsible for the pollution as reported, nor is it liable for the clean up of the toxic material and that the obligation and liability of the clean up, if any, should be that of the erstwhile owners of UCIL viz, UCC USA.*³²²

On 30 March 2005, the High Court directed the government of India to constitute a Task Force for implementation of toxic waste removal,³²³ and the judge's opinion was that the authorities should be asked immediately to start containing the toxic material, irrespective of liability. The Task Force recommended that the toxic waste be removed and disposed of at a facility in Pithampur, Madhya Pradesh, and an incinerator at Ankleshwar, Gujarat. The proposal was opposed by the authorities in Gujarat.³²⁴ Another proposal to dispose of the waste at a facility in Nagpur, Maharashtra, was also blocked following protests from local communities and the Maharashtra government.³²⁵

In the context of this litigation, the Department of Chemicals & Petrochemicals (Ministry of Chemicals and Fertilizers) filed an application in the High Court on 10 May 2005 requesting Dow, UCC and Eveready to deposit INR1 billion (approximately US\$23 million at the time) as an advance for remediation costs.³²⁶ The court deferred a ruling on the merits of that application, reiterating the view that the question of who was responsible could not overshadow the immediate clean-up work requested of the government. As of today, there has been no decision on the request for advance payment. In the meantime, the government of India decided to bear the cost of remediation (presently estimated at INR3.1 billion (approximately US\$ 58 million) "pending restitution from the polluter".³²⁷

In June 2010, the central government announced that it had "approved the setting up of an Oversight Committee in the Ministry of Environment and Forests to co-ordinate and monitor all activities relating to waste disposal, decontamination and remediation."³²⁸ In June 2012, a group of ministers from the central government responsible for overseeing all issues related to the gas leak, gave approval to the Madhya Pradesh government to dispose of 350 tonnes of hazardous waste in Germany.³²⁹ The plan, however, fell through in late 2012, after public concern was expressed in Germany about receiving the wastes.³³⁰

In the meantime, in view of the slow progress and the central government's repeated failures to comply with court directions, on 9 August 2012 (eight years after the case began), the Supreme Court of India gave six months to the central and Madhya Pradesh governments in which to begin to dispose of waste lying in and around the abandoned Bhopal plant.³³¹

In August 2013, the Central Pollution Control Board informed the Supreme Court that, following a series of trials at the facility, the waste could be disposed off at an incineration plant in Pithampur, 200 km from Bhopal. However, this option – which is still under consideration - has also proved controversial. People living near the incinerator are concerned about the environmental implications of waste disposal and also that the authorities' safety testing in relation to the Bhopal waste is insufficient.³³²

Local communities and NGOs have opposed proposals to dispose of the waste without adequate attention to the accumulated soil and water contamination.

The fact that the people of Bhopal have been living with hazardous waste for almost three

decades is not contested. The Supreme Court of India, the Central Pollution Control Board, the group of ministers responsible for overseeing all issues related to the gas leak have all explicitly recognized the existence of the harmful nature of the waste and the need to remove it.

At the time of writing, a final court order is pending and the 350 tonnes of waste remains in Bhopal. It is important to recognize that this material is only a small fraction of the total hazardous waste at Bhopal, most of which lies unsafely buried.

Clean-up has become a blame game in which each party points the finger at the other while none take any action. UCC claims in its website that the Madhya Pradesh government is responsible.³³³ Eveready in turn states that UCC is liable.³³⁴ All the companies concerned, together with the central and state government of Madhya Pradesh, are defendants in a 2004 Public Interest Litigation claim before the Madhya Pradesh High Court for plant site remediation.

While legal battles in India continue, the contaminated plant site continues to endanger the lives and health of surrounding communities. In August 2013, the CSE released an environmental remediation Action Plan collectively developed by a multi-stakeholder expert group which included a number of relevant research institutes, waste management companies, the Central Pollution Control Board, civil society and affected communities, and a former plant operator at UCIL. The Action Plan outlines detailed recommendations for short-, medium- and long-term measures to remediate the site.³³⁵

THE DOW/TATA ATTEMPTS TO BYPASS THE COURT SYSTEM

In early 2007, news broke in the Indian media that the Chairman of India's Tata Group, Co-Chair of the US-India CEO Forum,³³⁶ and Deputy Chair of India's Investment Commission, Ratan Tata, had volunteered to initiate a process of remediation of the Bhopal site to which Dow would allegedly be willing to contribute voluntarily. It was reported that Tata's initiative was a response to concerns expressed by Dow's President and CEO, Andrew N. Liveris, about investing in India after the Department of Chemicals and Petrochemicals had requested that Dow contribute US\$22 million for remediation of the site (see above).³³⁷ Local survivor groups reacted strongly against the news, accusing Tata of acting with the sole purpose of paving the way for Dow's investment plans in India.³³⁸ They claimed that allowing the initiative to go ahead would undermine the "polluter pays" principle and that, once again, they had not been consulted about this initiative. There were demonstrations and boycotts against Tata.³³⁹

Revealing letters from Dow and the Tata Group to high-ranking Indian officials obtained through a Right to Information (RTI) request later came to light.³⁴⁰ In a letter dated 8 November 2006 from Dow to the Indian ambassador to the US, Ronen Sen, the company made explicit demands that the government of India withdraw its request in the Madhya Pradesh High Court for US\$22 million from Dow. The letter states:

I especially appreciated your support in discussing resolution of the Bhopal legacy issue as a tangible, deliverable outcome for the CEO forum. Given the statements made by the

government of India representatives in front of all meeting attendees that Dow is not responsible for Bhopal and will not be pursued by the Gol [government of India], it will be important to follow through to ensure that concrete, sustained actions are taken that are consistent with these statements.

The letter then goes on to specify that action should be taken on remediation, which should be led and funded by the central and state governments, with the support of local industry. On the legal front, the letter states:

Gol leaders need to work with all Ministries of the central government to ensure that their stated position is reflected in any and all of Gol statements, legal files, and dealings with the Indian court system. The Dow Chemical Company has been sued in Public Interest Litigation in the High Court of Madhya Pradesh related to environmental remediation of the site ... and Gol has taken positions adverse to Dow. It follows logically from the Gol's statements regarding the non-liability of Dow, that the Ministry of Chemicals and Fertilizers should now withdraw its application for a financial deposit against remediation costs. Certainly a withdrawal of the application would be a positive, tangible demonstration that the Gol means what it says about Dow's lack of responsibility in the matter.

The letter ends:

Thank you for your efforts to ensure that we have the appropriate investment climate to facilitate forward-looking investment and business partnerships.³⁴¹

In another letter to the Deputy Chairman of India's Planning Commission, Montek Singh Ahluwalia, dated 28 November 2006, Ratan Tata expressed his support for Dow's demands, and drew attention to Dow's demand for the Ministry of Chemicals and Fertilizers to withdraw their application for a financial deposit by Dow against remediation cost, saying: "This is obviously a key aspect and I wanted your assessment as to whether this is possible." The letter then reiterates the "offer for the Tata's to lead and find funding for the remediation of the site".³⁴²

The Dow and Tata letters were widely covered by Indian and other media and caused widespread indignation.³⁴³ They also prompted a request by Amnesty International USA, a co-filer of a Dow shareholder resolution about Bhopal, to the US Securities and Exchange Commission (SEC), seeking an investigation into the company's failure to disclose information to shareholders about potential Bhopal liabilities. Indeed, the attempts to obtain assurances from the government of India on legal issues connected to Bhopal were viewed as evidence that the company was concerned about pending legal liabilities in India but had not disclosed these concerns to shareholders.

Further information was unearthed through another RTI request to the Indian Embassy in the US.³⁴⁴ This revealed that Dow had been lobbying for a cessation of all legal action against it in India through the US-India CEO Forum and other direct communications with Indian officials.³⁴⁵

One such communication from Dow's CEO to the Indian Ambassador, dated 21 September 2005 and entitled "Legacy Issue Resolution Proposal", proposes a number of actions to resolve the "Bhopal matter", and suggests, in particular:

*The Gol will implement a consistent, government-wide position that does not promote continued Gol litigation efforts against non-Indian companies over the Bhopal tragedy. Identified companies, at the request and sponsorship of the Gol, will be invited to discuss their views directly with involved Ministries of the Gol.*³⁴⁶

The proposal includes establishing a Special Commission, members of which would include a "respected industry leader" such as Ratan Tata, to finalise the clean-up.

In a clear attempt to interfere with judicial processes through executive routes, Dow was seeking to enlist the assistance of powerful Indian businesspeople and put pressure on the executive branch to bypass the Indian court system. Other confidential letters reveal that, as part of these efforts, Dow sought a meeting with India's Ministry of Chemicals and Fertilizers to take up the issue of the US\$22 million request directly with them.³⁴⁷ They also sought a meeting between senior executives of Dow, including the executive responsible for handling the Bhopal issue, and the Principal Secretary to the Prime Minister to "further review the legacy issue as well as Dow's plans in India".³⁴⁸

The lobbying by Dow and Tata led to numerous confidential exchanges between various Indian government ministries and departments, which were later also revealed through RTI requests in India. These demonstrate the concerted efforts of India's Ministry of Finance, Cabinet Secretary, Planning Commission, Investment Commission and Ministry of Commerce and Industry to clear the way for Dow's investments in India by ceasing all legal action against Dow and offering the company guarantees of legal immunity.³⁴⁹

India's Minister of Commerce and Industry, for example, wrote to the country's Prime Minister on 7 February 2007, noting that:

Dow Chemicals and the US government are of the opinion that there is no liability of Dow. ... While I would not like to comment on whether Dow Chemicals has a legal responsibility or not, as it is a matter for the courts to decide, with a view to sending an appropriate signal to Dow Chemicals, which is exploring investing substantially in India and to the American business community, I would urge that a Group under the chairmanship of the Cabinet Secretary be formed to look at this matter in a holistic manner. ³⁵⁰

US diplomatic cables made public by Wikileaks further indicate the support for Dow's position by Commerce Minister Kamal Nath and Planning Commission Deputy Chairman Ahluwalia, with both reported as stating that they "did not believe that Dow was responsible" for the clean-up. The cables also provide insight into the pressure applied by the US government, urging the government of India to drop its claims against Dow.³⁵¹

Some government ministries raised concerns about the attempt to bypass the court process.

It appears that, in a meeting between Dow and India's Department of Chemicals and Petrochemicals to address the latter's request to the court for an advanced payment from Dow, the Dow representative was advised to put forward their stand in the court, as the Department saw no valid grounds to withdraw or modify their application while Dow remained a respondent in the litigation.³⁵² An internal note from this department to the Prime Minister's office reveals that the department also objected to Tata's offer, on the basis that the matter was under the supervision of the Madhya Pradesh High Court, which was monitoring the entire process of environmental remediation. In this note, the Department reiterates that, under the provisions of the Hazardous Wastes (Management and Handling) Rules, 1989, it is the polluter who is liable for meeting the cost of environmental remediation.³⁵³

Speculation about possible moves to provide Dow with guarantees of immunity in exchange for investment in India continued over the years. In April 2008, a group of legal practitioners, academics and former judges wrote to a number of government officials, including India's Prime Minister, raising concerns about proposed efforts to:

absolve Dow Chemical of its outstanding liabilities for Bhopal keeping in mind the investments promised by Dow.

The authors recall the numerous communications unearthed through RTI requests in the previous years and emphasize that:

Matters of liability are not a political decision but a legal one to be left to courts to decide.

To this letter, they adjoin a legal opinion pointing at Dow's potential legal liability under the principles of "polluter pays", "successor liability" and "corporate veil piercing".³⁵⁴

The level of political interference and corporate pressure demonstrated by the many confidential communications described above can help explain much of the appalling failure to resolve Bhopal and the shocking fact that, almost three decades after the gas leak, survivors are still struggling to obtain an effective remedy and the plant site and surrounding area remain contaminated.

COMPANY RESPONSES

Before publication, Amnesty International contacted the following companies and provided them with an opportunity to respond to the allegations and findings made in this study:

In a letter dated 21 January 2014, UCC replied denying the allegations put forward by Amnesty International, stating that the organisation's position that UCC deprived the victims of the Bhopal gas disaster of the 'right to an effective remedy' is without any factual or legal basis". The company further stated that "After hearing all objections to the settlement, including those by victim groups, the Court expressly found that the settlement provided the victims with a remedy that was "just, equitable and reasonable" and dismissed their claims against Union Carbide with prejudice."

In a letter dated 21 January 2014, Dow responded, rejecting the allegations made by Amnesty International, stating that they were "simply wrong and misguided." Dow stated that it acquired shares of UCC over 16 years after the gas release in Bhopal and that UCC's liabilities, if any, have not been assumed by Dow.

In an email dated 17 January 2014, Tata advised that "the Tata group's initiative had been misconstrued and wrongly interpreted, as a result of uninformed allegations." The company asked that Amnesty International "appreciate the context in which the remediation proposal was made and conclude that the Tata group's offer of collaboration was without any vested intentionality but for fast and comprehensive remediation of toxic soil and water at the site; incidentally, as per our understanding, this is yet to be completed three decades after the incident."

Tata provided Amnesty International with permission to print their response in full. For the full company responses, see: Annex I.

TO SUM UP

Some three decades after the gas leak, it is clear that those affected have not had access to an effective remedy. The tragedy led to some positive legal reforms, though Bhopal victims have been unable to benefit from them.

They have attempted, and failed, to obtain reparation through the legal system in both the USA and India. A highly inadequate compensation package on which they had no say was imposed on them with many detrimental effects, including the foreclosing of all alternative legal avenues to seek redress for the gas leak. Not only was the amount agreed utterly insufficient, the disbursement process was fraught with inefficiencies, unfairness and corruption, subjecting them to further abuse.

Today, many are still awaiting recognition of their injuries, while others are fighting for an amount of compensation sufficient to cover the full extent of their injuries. Health care provision has been largely inadequate, patchy and fraught with hidden costs.

Comprehensive clean-up has still not been carried out, resulting in continuing damage to the environment, water supplies and people's health. Measures to provide clean drinking water took many years to materialize and, even today, clean water facilities are poorly maintained and do not reach all affected areas.

Criminal prosecutions have neither been timely nor effective. The Indian accused were convicted, but only 26 years after the tragedy, and on charges many find utterly disproportionate with the magnitude of the harm caused. No foreign accused has been held to account. Prosecution of UCE was rendered ineffective due to the company's disappearance, and UCC and Warren Anderson remain "absconders from justice". Despite its dominant position over UCC, Dow has failed to ensure that UCC appears before the criminal court to face charges or takes any action to address pending liabilities connected to Bhopal. No state officials have been held accountable for their own failures related to the gas leak or site contamination.



Protestors outside the Omai Gold Mines Ltd. office in Georgetown, Guyana, 25 August 1995. On 19 August 1995 the tailings dam at the Omai gold mine ruptured, resulting in the escape of 3.2 billion litres of effluent laced with cyanide and heavy metals into the Omai and Essequibo rivers.

2/CYANIDE SPILLS: THE OMAI GOLD MINE DAM RUPTURE IN GUYANA

THE MINE

The Omai gold mine is located 180km inland from the eastern coast of Guyana, at the confluence of the Omai and Essequibo rivers, 160km south of the capital city, Georgetown. Many of the villages along the Essequibo river that are closest to the mine are inhabited by indigenous Guyanese, or Amerindian people.³⁵⁵ Other towns and settlements along the river consist of mixed Amerindian and other Guyanese, including Indian and African Guyanese. Riverian residents rely on the Essequibo river for transport, food harvesting and subsistence fishing, drinking water, animal husbandry, irrigation, bathing and recreation.³⁵⁶

Construction of the Omai mine began in 1991, and it was operated by a Guyanese company, Omai Gold Mines Limited (OGML), created by Cambior Inc (a Canadian company), Golden Star Resources (then a US company) and the government of Guyana. The mine was established under the Omai Gold Mining Project Mineral Agreement (the Mineral Agreement).³⁵⁷

From the beginning Guyana lacked the capacity to regulate the mine effectively. The Minister of Mines, a role carried out by the Guyanese Prime Minister, had no staff and no informed policies to guide the sector.³⁵⁸ Guyana did not have any environmental legislation specific to the mining industry at the time,³⁵⁹ so an Environmental Impact Statement (EIS) completed in 1990 on behalf of OGML became the basis for the company's environmental obligations. Under Clause 6.16 of the Mineral Agreement, the company's compliance with the EIS constituted "compliance with all laws and administrative policies of Guyana relating to environmental matters which are presently in effect". Since no environmental legislation existed in Guyana, the EIS and Mineral Agreement determined the legal regime under which the mine would operate. Clause 6.16 of the Mineral Agreement stated:

*Guyana ... and the Commission hereby agree to take such Corrective Action ... as may be necessary to ensure that any Unilateral Action ... **shall not result in the imposition of more stringent environmental obligations on the project, or on the Private Parties in connection with the Project, than those in effect from time to time in the Province of Quebec, Canada.***³⁶⁰ (Emphasis added)

The Mineral Agreement also included a provision commonly referred to as a "stabilization clause", to indemnify the company if the government of Guyana changed any existing law or policy,

or enacted any new law or policy that would increase the financial costs to the company³⁶¹ (this type of clause is discussed further in *1.1 The need for foreign investment* in the *Dangerous Liasons; corporate-state relationships* chapter of this book).

OGML was financed by a syndicate of international commercial banks,³⁶² and supported by Canada's Export Development Corporation³⁶³ and the Multilateral Investment Guarantee Agency

(MIGA) of the World Bank.³⁶⁴ The mine was the largest-ever foreign investment in the country,³⁶⁵ and part of a plan to boost the nation's economic growth on the basis of foreign investment into its mining and other natural resource sectors.³⁶⁶ As a heavily indebted country,³⁶⁷ Guyana relied on royalties from the Omai mine to help meet its external debt payments.³⁶⁸ By 1996 Omai was responsible for an estimated 25 per cent of Guyana's export earnings and 20 per cent of the country's GDP.³⁶⁹

A NOTE ON THE COMPANIES INVOLVED

Cambior Inc of Montreal, Canada owned a majority of shares with a 65 per cent interest in OGML; Golden Star Resources of Colorado, USA held a 30 per cent share; the Guyanese government held a 5 per cent non-managerial share. In 2001, Cambior acquired Golden Star Resources' share in the mine, bringing its total interest in the mine to 95 per cent. Iamgold, a Canadian gold mining company, bought out Cambior Inc in 2006 and merged Cambior's ongoing projects and licences into its operations.³⁷⁰ Iamgold ran the mine until it closed in 2008.

CONSTRUCTION AND WASTE MANAGEMENT

Although Omai was the first major mining investment in the area, the site itself had a long history of mineral exploration and exploitation. Small-scale mining had been carried out in

the area since the late 1800s.³⁷¹ However, little baseline data existed or was collected on environmental and socio-economic conditions in the Omai and Essequibo areas prior to OGML's operations.³⁷² The company planned to use cyanide leaching to process the crushed ore and chemically extract the gold. The cyanide-laced effluent would then be diluted with water and stored in a tailings pond.³⁷³ The company did not build a treatment facility for its tailings pond. Instead, cyanide in the tailings pond would be left to break down to reach an acceptable level through a combination of exposure to ultraviolet light from the sun and natural oxidization.³⁷⁴ The mine began operations in January 1993.

THE TAILINGS DAM RUPTURE

Around midnight on 19 August 1995, the banks of the tailings dam collapsed into the Omai river.³⁷⁵ The rupture was so severe that OGML did not mobilize equipment to the site because they believed that they would not be able to contain the breach.³⁷⁶ Over the course of four days, 3.2 billion litres of effluent laced with cyanide and heavy metals spewed into the Omai and then the Essequibo rivers,³⁷⁷ turning their waters cloudy and red.³⁷⁸ Many villagers saw the signs of pollution before they heard about the rupture. Some villagers reported noticing changes in colour and turbidity in the Essequibo water, scores of dead fish floating past or behavioural changes in the fish.³⁷⁹ It took the company until 24 August, five days after the spill, to contain the breach and prevent further effluent from entering the Omai and Essequibo rivers.³⁸⁰

THE IMMEDIATE RESPONSE

There was a great deal of confusion in the immediate aftermath of the spill. Noticing the changes in the river, many villagers instinctively stopped using the water or consuming fish. Others reported that their first notification of a problem had come from regional health authorities or OGML personnel travelling by boat along the Essequibo. On 22 August 1995, three days after the breach, President Cheddi Jagan announced that a “major environmental disaster [had] taken place”, declared a 60km stretch of the Essequibo river an “environmental disaster zone”, and appealed to people living between the Omai site and the town of Bartica, 75 miles downstream, “not to drink water or consume fish or other substances from the Omai or Essequibo Rivers in the affected areas”.³⁸¹ The sale and consumption of fish caught between Omai and Bartica were banned.³⁸²

Government and company officials notified some riverian residents of the spill and the ban by helicopter and boat, and distributed bottled water to some residents. The company also helped build some water wells.³⁸³ In his address to the nation, President Jagan appealed to “good corporate citizens and all those with the resources” to help provide drinking water and food to those affected by the spill.³⁸⁴ He admitted that the costs associated with assessing the damage meant that the State was not able to “do what needs to be done with the speed it needs to be done”,³⁸⁵ and he appealed to the international community to send experts and advisers to assist Guyana in this assessment.³⁸⁶

However, on 29 August 1995 the government lifted the water ban following the results of testing, which showed cyanide levels in line with Canadian drinking water standards.³⁸⁷ As will be discussed later, there are serious questions about the quality of the water which have never been studied or answered.

AN EARLIER SPILL

This was not the first time dead fish had been observed in the Omai and Essequibo rivers. A tailings pond spillage had occurred in May 1995, three months before the August dam rupture.³⁸⁸ This occurred at a time when OGML was seeking permission from the government to discharge tailings dam waste into the Omai river on the grounds that the pond had filled to capacity faster than anticipated.³⁸⁹ OGML General Manager, Rejean Gourde, is quoted by local newspapers as having stated that, if the company was denied permission to dump its tailings effluent, by August 1995 it would be forced to shut down and lay off 1,000 workers, the government would lose substantial revenues, and other gold companies may not want to invest in the country.³⁹⁰

OGML was seeking to discharge waste water at much higher concentrations of cyanide – eight parts per million (ppm) – than the previously agreed-to level of two ppm under the 1991 EIS.³⁹¹ Villagers and environmentalists took to the streets in alarm over the threat of cyanide in the Essequibo.³⁹² The government initially denied the company’s application to allow planned discharges into the Omai river.³⁹³ To explain the May 1995 spill, OGML reported that a pipeline safety valve had been accidentally left open, causing tailings pond waste to pour undetected for several hours into the Omai river.³⁹⁴ Controlled releases of effluent from the tailings pond were allowed to begin in 1996.

THE HUMAN RIGHTS IMPACT OF THE 1995 SPILL

According to a Yale School of Forestry and Environmental Studies report:

At the time of the failure, the amount of fluid in storage was eight times larger than the maximum allowable amount specified in the project's 1991 Environmental Impact Statement, which was the only operating plan in existence for the Omai mine project. The impoundment's cyanide content was many times higher than permitted in releases to the river.³⁹⁵

The toxic spill impacted on local people's rights to health, food, water, livelihood and a clean environment.³⁹⁶ All aquatic life in the Omai river was killed,³⁹⁷ while a significant number of fish and other animal species in the Essequibo are also reported to have died as a consequence of the spill.³⁹⁸ The Amerindian villagers along the Essequibo river depended on the river for the vast majority of their subsistence needs, including food and water for drinking.³⁹⁹ It also provided water for cooking, washing and bathing, and opportunities for viable livelihoods, such as agriculture, commercial fishing and animal husbandry.⁴⁰⁰

Following the spill, demand for local produce plummeted. Farmers reported being unable to sell their produce at market due to fears of cyanide contamination.⁴⁰¹ Jamaica and Barbados, two important trading partners for Guyana, banned imports of fish and shellfish from Guyana immediately after the spill. The ban was then enforced across the Caribbean Common Market.⁴⁰² This caused serious economic loss to Essequibo fishermen and their families. In a lawsuit against the mining companies in Guyana, the villagers later claimed that the spill resulted in

an almost total cessation of all economic activity associated with and supported by the Essequibo River ... No one would purchase any fish or aquatic game. The Caribbean Common Market soon thereafter declared an embargo on imports of all fish products from Guyana.⁴⁰³

Villagers did not know the extent of the problem or how long it would last. Although some households could afford to purchase potable water and food from nearby towns to substitute for the decline in fish consumption, poor families reported having to spend longer periods of time searching for alternative sources of potable water and fish.⁴⁰⁴ One of the key demands made by the communities became the provision of long-term sources of potable water. People's fears, and their resulting reluctance to use the river water, continued long after the ban on water and fish consumption from the Essequibo had been lifted.

Concerns about the impact of the 1995 spill were compounded by subsequent discharges that were allowed to begin in 1996. Villagers had no idea that discharges into their river would eventually be allowed. Long after the 1995 spill, they continued to report suspicious red plumes in the Essequibo river, which allegedly coincided with drops in available fish catches,⁴⁰⁵ and so their fear of the river continued. Over the years that followed, many continued to collect water from alternative sources and chose to buy food from outside their villages.⁴⁰⁶ However, residents could not always afford to buy food from outside their villages and therefore remained dependent upon the river for

drinking water and bathing and for fish to eat.⁴⁰⁷

The impact of exposure to the river on people's health has been one of the most controversial issues. Immediately after the spill, residents reported burning skin, itching eyes, skin lesions and gastrointestinal problems, such as vomiting and diarrhoea, after coming into contact with water from the Essequibo river.⁴⁰⁸ People also reported becoming ill after eating fish. While no one appears to have died from the spill,⁴⁰⁹ two people were reported to have shown signs of possible cyanide poisoning.⁴¹⁰

However, a report produced by a Commission of Enquiry later set up by the government to look into the 1995 spill concluded that there had been no serious risks to the health of riverian communities. These conclusions appear to contradict the testimony of eyewitnesses at the time, who claimed to have seen dead livestock and fish in both the Omai and Essequibo rivers, and the many health complaints reported immediately after the spill and over subsequent years.⁴¹¹

A study carried out by a US toxicologist for the Guyana Research Education and Environment Network in 2001 found ongoing complaints of skin and gastrointestinal problems suffered by Essequibo residents, which they associated with water pollution.⁴¹² One of the strongest and most persistent impacts on local residents of the spill and subsequent waste discharges is psychological.

Community concerns about the water quality persisted over the years. In May 2003, Essequibo residents wrote a letter to Cambior President Louis Gignac, stating:

*We are honest and law-abiding citizens. We will use all legal means available to us in order to get clean drinking water and protect our health and safety. Therefore, we respectfully request that Cambior help us ensure that we get an adequate supply of clean water, that our environment is cleaned up and restored, that we get proper medical and scientific attention, and that we get adequate compensation for our injuries.*⁴¹³

Despite the ongoing and serious concerns about water quality and the potential health impacts of cyanide and heavy metal accumulation along the Essequibo river, there has been no meaningful government monitoring and no programmes have ever been put in place to assess the existence and extent of any effects on health.⁴¹⁴ Villagers are not being monitored for health problems related to cyanide or heavy metal exposure as a consequence of using and consuming water or ingesting potentially contaminated food.

The failure to conduct sufficient tests and to carry out monitoring of the river is deeply problematic in light of the scale of the spill and the fact that OGML had been given permission in 1996 to discharge waste into the river.

THE COMMISSION OF INQUIRY

On 2 September 1995, the Guyanese National Assembly announced that a Commission of Inquiry with three technical sub-committees would be established to investigate the disaster.⁴¹⁵ Its purpose was to determine what had happened on the night of 19 August 1995, who was liable for the spill, the effects of cyanide on the environment, and the adequacy of Omai's facilities, safety measures

and procedures, and to submit a report with recommendations.⁴¹⁶ The technical committees were a Dam Review Committee, charged with determining the cause of the failure; a Process Review Committee, whose task was to review the gold mining processes used at Omai, the potential alternatives to cyanide processing, and the company's effluent management system; and an Environmental and Socio-Economic Committee, whose brief was to carry out tests and interviews within the disaster area to determine the extent of the damage to villagers, the economy and the environment, and to produce an Environmental Audit and Socio-Economic Survey.

OGML's operations remained shut down for the duration of the inquiry.⁴¹⁷ Although it publicly welcomed the Commission's inquiry, it actively sought to limit the scope and duration of its work so it could reopen the mine as quickly as possible. In an official brief to the USA, dated October 1995, the government of Guyana said:

Omai head Louis Gignac, in a letter to the Prime Minister reminded him that his company had expressed concerns that the terms of reference of the commission, as currently under discussion were rather broad and not in keeping with the shared objectives of [the Guyana] government and our company.

The same brief reported:

Earlier, another top official of the company expressed the hope that the commission move expeditiously to complete its work so that the mine could resume commercial activity in December.⁴¹⁸

The company put pressure on the government by raising concerns about the financial losses that would result from prolonged closure of the mine.⁴¹⁹ Guyanese Member of Parliament, Dr Rupert Roopnarine, reacted to what he perceived as undue pressure on the government, saying:

Canadians would never tolerate an American company instructing the Prime Minister in this manner. Equally, Guyana does not take kindly to a Canadian company using its economic muscle to exert pressure on our democratic processes.⁴²⁰

In an interview conducted for a documentary, *The Midas Curse: A Tragedy of Mythic Proportions* (1998), Dr Roopnarine said:

I found it overbearing that a sovereign country had to be so docile, subservient, compliant to a foreign country because of an international climate that says we're in desperate economic straits, we made a mess of things in the 1970s and 1980s, our only hope of ... getting ourselves together is to bring in foreign investment and these are the terms of foreign investment and if you give this company a hard time, foreign investors will stay away. This was the atmosphere, the blackmail, under which we were operating.⁴²¹

There is evidence that the World Bank, which played a key role in shaping Guyana's economy during the 1990s, may have opposed significant tightening of environmental regulations following the spill in statements made to Guyanese parliamentarians and the Prime Minister.⁴²² Given Guyana's indebtedness to international lenders, and its reliance on royalties from Omai, such statements would have had a significant impact on political debate in Guyana in the aftermath of the disaster.

On 16 November 1995, the Dam Review Committee submitted a preliminary report on the technical causation of the Omai tailings pond failure. It stated:

*The failure was caused not by some "hidden flaw" but by inadequate application and execution of sound practices for design, construction, supervision, and inspection that are well understood in current embankment dam and tailings dam technology.*⁴²³

A day later, on 17 November 1995, the Process Review Committee submitted its final report. The Committee determined that a zero-discharge policy at Omai was not feasible given the ratio of annual rainfall to evaporation at the mine site, so discharge of effluent would be necessary in this context. It assumed, however, that, as a result of the dam failure, OGML would be required to build a treatment facility to the "highest possible standards" and would minimize its use of cyanide.

The Dam Review Committee issued its final report on 22 January 1996, which said:

*We are at a loss to explain why the design and construction of these critical elements of the dam, whose importance to its safety were evidently recognized and understood, were executed so inadequately. Neither can we reconcile how these flaws, which should have been apparent to any of the several geotechnical engineers at the dam site on various occasions, went unnoticed or without warning, if indeed they did. Until these and other questions are answered, the underlying reasons for the failure will remain unknown even though its technical cause has been established.*⁴²⁴

The United Nations (UN) and the US Environmental Protection Agency (EPA) also examined the dam failure during a joint mission to the country in September 1995. The EPA/UN team concluded that "with proper monitoring and appropriate preconstruction geological information, the dam failure could have been predicted if not prevented".⁴²⁵

The Commission of Inquiry published its final report and recommendations on 5 January 1996. It came to some notable conclusions, including the statement that:

*at no time was the contaminated water a serious threat to life nor was there any credible evidence that the spill in any way posed a hazard to the health of workers or village residents.*⁴²⁶

It also stated that:

*There was no evidence of any impact on the aquatic life in the Essequibo River as a result of cyanide or heavy metals toxicity.*⁴²⁷

The report suggested that any people who reported health problems at the time of the spill were likely to have been considered unhealthy already.⁴²⁸ The basis for this statement is not clear. The final report of the Environmental and Socio-Economic Committee – its findings and recommendations – did not form part of, and was not made available in, the Commission's final report. Indeed, the section on environmental and socio-economic impacts of the spill is the shortest of all.⁴²⁹

The Commission also made several other findings. These included:

- the construction of the tailings dam was faulty (though it could not come to a definitive conclusion about which of the companies involved was liable)
- none of the companies involved could be considered criminally liable
- regardless of who was responsible for the tailings pond failure, OGML was responsible for bringing a noxious substance on to their property and would be liable for all foreseeable damage that directly resulted from the escape of the substance into the Essequibo river
- there was considerable dislocation and loss of access to potable water and food sources to users of the Essequibo river for which OGML would be liable.⁴³⁰

The Commission referred to the August spill as an “unexpected event”.⁴³¹ This appears to contradict conclusions both of the Dam Review Committee, which stated that “the Omai tailings dam as designed and constructed was bound to fail”, and by the experts from the UN and the US EPA, who found serious flaws in the construction and operation of the mine's dam.⁴³²

In its report, the Commission expressed the view that OGML should be permitted to resume regular operations under several conditions. The inquiry did not lead to any further investigations, despite the Commission's own view that more evidence was needed to assign liability. Nobody, individual or company, was held to account.⁴³³ Neither did the inquiry lead to any comprehensive programme of compensation to all the individuals and families whose sources of water, food and livelihood were affected.

THE STATE'S CAPACITY TO ENFORCE NEW ENVIRONMENTAL REQUIREMENTS

OGML was allowed to resume operations on 4 February 1996. The Commission recommended that a number of measures should be put in place by both OGML and the government as a condition for this resumption of operations. These included: that OGML should construct an effluent treatment plant⁴³⁴ and conduct regular tests on stored effluent, as well as on surface and subsurface water; that OGML and the government should initiate a system of joint testing; and that the government should implement environmental protection legislation, including setting up an environmental regulatory agency.⁴³⁵ Both the new tailings pond and the tailings treatment plant were constructed in 1996, and legislation creating the Guyana Environmental Protection Agency (Guyana EPA) was passed in the same year. The company was required to carry out daily monitoring as well as joint monitoring with the newly formed EPA, and to meet regularly with the EPA and the Guyana Geology and Mines Commission (GGMC) to review its activities. This appears to have been done until operations shut down in 2005.

The new measures were a significant step towards increasing protection of the environment in

the context of mining. The main concern in the years that followed related to the capacity of the institutions to perform their regulatory role effectively – an issue that has been raised by many commentators, activists and Essequibo residents. Both the Guyana EPA and the GGMC have suffered from a severe and consistent lack of resources,⁴³⁶ and their lack of both financial and technological capacity resulted in them being dependent for data, equipment and training on the very companies they are supposed to monitor.⁴³⁷

THE STRUGGLE FOR JUSTICE

On 29 August 1995, OGML issued an apology to the government and people of Guyana for what it called “a very serious industrial accident that resulted in a major environmental impact”, and said it would compensate those with “justifiable losses”. Cambior’s president and chair of the board of directors, Louis Gignac, and OGML’s director, David Fennell, took out a two-page advertisement in Stabroek News which stated:

*We are very distressed and embarrassed over what has occurred. Omai fully accepts responsibility for the accident and for any legitimate reparation that is a consequence of it.*⁴³⁸

EARLY INDIVIDUAL SETTLEMENTS

In September 1995 Cambior began offering financial compensation to some of the affected people whose livelihoods in fishing and small-scale mining had been negatively affected. But the company came under fire when it was discovered that it was offering roughly 150 Canadian dollars per person⁴³⁹ (approximately US\$110 at the time), which was little more than twice the official monthly minimum wage.⁴⁴⁰ These amounts were not only considered small, they were given as full and final settlement, and those who accepted the money were required to sign forms absolving OGML from further liability.⁴⁴¹

Canadian lawyer Steve Michelin, who would later represent several thousand villagers in a class action suit against Cambior in Canada, wrote to the company demanding that it stop settling claims with affected residents until the residents had received adequate legal advice.⁴⁴² Illiteracy in riverian communities is high, and concerns were raised that many of those who signed settlements with OGML could not read or write.⁴⁴³

Villagers later expressed concern about the amounts they had received. One woman interviewed at a local fish market in 2003 said:

*After the spill, they came give my father compensation, 20,000 Guyanese dollars [equivalent to around US\$140],⁴⁴⁴ but that didn’t compensate even for the fish that was thrown away.*⁴⁴⁵

A logger interviewed in summer 2002 commented on the inadequacy of the amounts offered:

Presently in Guyana 40,000 Guyanese dollars [equivalent to US\$224]⁴⁴⁶ is a joke. They have

destroyed the river for a life-time and they gave us 40,000 dollars. The money can never compensate for taking away the water from us. Most people in the village are poor and were therefore forced to take the 40,000 dollars. A water tank cost 20,000 dollars and the rest of the money was spent on transporting the tank to the village and guttering of the house. It is still difficult for us not being able to use the river. We have to live with the poison in the water and so does our children and their children and grandchildren.⁴⁴⁷

In its 1999 Annual Report, Golden Star Resources informed shareholders that:

As of December 31, 1999, approximately 1,000 individual claims have been made against OGML in Guyana in connection with the tailings dam failure, of which 282 have been settled for an aggregate dollar amount of less than \$1 million. Of the claims that remain unsettled, legal proceedings have been instituted against OGML with respect to approximately 300 individual claims and one class action (on behalf of 244 claimants).⁴⁴⁸

It is not clear how many individuals eventually received compensation directly from the company and how much they each received. However, most sources put the figure at under 1,000 people.⁴⁴⁹ Whatever the final figure, it is clear that only a small fraction of the total population of the Essequibo, estimated at around 10,000 by the Commission of Inquiry, and certainly of the 23,000 individuals living in the officially declared Environmental Disaster Zone, received any form of compensation.

CANADIAN LAWSUIT INITIATED

In the wake of the disaster, an organization called the National Committee for Defence against Omai (NCDAO) was formed to support the efforts of the Essequibo communities to obtain remedy. NCDAO hired a small Montreal-based law firm, Michelin Cusmariu, to file a lawsuit against Cambior in Canada. There were several factors behind the decision to lodge a claim in Canada. Firstly, the claimants argued that the decisions that resulted in the spill had been made in Canada. Secondly, having access to Cambior's financial resources was vital, as claimants feared OGML would not have sufficient means in Guyana to satisfy an adverse judgement against it.⁴⁵⁰ In addition, residents had raised concerns about the deficiencies of Guyana's judicial system and its ability to provide justice. In 1996, the US Department of Justice had issued a Country Report on Guyana which stated:

Delays in judicial proceedings are caused by shortages of trained court personnel and magistrates, inadequate resources, postponements at the request of the defence or the prosecution, occasional alleged acts of bribery, and the slowness of police in preparing cases for trial. The inefficiency of the judicial system is so great as to undermine due process.⁴⁵¹

On 6 February 1997 a group called Recherches Internationales Québec (RIQ) was set up in Quebec to represent an estimated 23,000 victims of the Omai disaster in a class action suit against Cambior. On 21 February 1997, RIQ filed a Motion for Authorization to Institute a Class Action in

Quebec Superior Court.⁴⁵² RIQ's motion sought compensation for 69 million Canadian dollars for the physical and psychological damage suffered by the claimants,⁴⁵³ as well as the environmental devastation and associated economic losses, and also asked for:

*[a]n order of this Court positively enjoining Cambior (i) to cause the immediate cessation of any further discharge of contaminants, including notably cyanide and heavy metals, into the Omai and/or Essequibo rivers, (ii) to ensure that a reliable potable water supply is restored to the Environmental Disaster Zone, and (iii) to remediate the damage caused by the Spill, including restoring the contaminated environment to its condition prior to the Spill.*⁴⁵⁴

Citing the final report of the Dam Review Committee, the motion argued: that OGML's parent company, Cambior Inc, was responsible for the discharge of cyanide-laced effluent into the Essequibo river in August 1995, and should therefore be liable for its consequences; that the corporate veil⁴⁵⁵ should be lifted; and that liability should be assigned to Cambior⁴⁵⁶ (see 1.4 *Theories of liability* and 2.1 *The corporate veil* in the *Legal Challenges* chapter of this book).

Cambior contested the notion that it carried any responsibility for OGML's actions, arguing that it did not exercise control over its subsidiary, which made its own decisions about its operations and management.⁴⁵⁷ On this basis, it argued that the Quebec Court did not have subject matter jurisdiction (the authority of a court to hear particular types of cases based on the nature of the claim). If the court found that it had jurisdiction, Cambior argued that it should nevertheless decline to exercise jurisdiction, as the courts in Guyana were a more appropriate forum to try the case (the *forum non conveniens* doctrine).⁴⁵⁸ As a consequence of this, the lawsuit then became an inquiry into the adequacy of the Guyanese judicial system to hear a case of the nature of the Omai spill claim.⁴⁵⁹ Canadian professor of law William Schabas,⁴⁶⁰ who testified on behalf of the claimants, noted that the independence of the Guyanese judiciary had been called into question by international bodies such as the UN Human Rights Committee⁴⁶¹ and domestic experts.⁴⁶² After describing a number of serious and systemic problems with the Guyanese judicial system,⁴⁶³ he concluded:

*For all of these reasons I am of the opinion that the Guyanese High Court is not in a better position to decide this litigation than the Quebec Superior Court. Indeed, a refusal by the Quebec Superior Court to adjudicate may well result in the violation of the human rights and a denial of justice for the plaintiffs.*⁴⁶⁴

Kenneth George, retired Guyanese High Court Chancellor and former Chair of the Commission of Inquiry into the Omai spill, acted as expert witness for Cambior. He strongly contested the testimony of William Schabas and defended the integrity, competence and independence of the Guyanese judiciary.⁴⁶⁵

On 14 August 1998, Justice G B Maughan ruled that, while the court was satisfied that it had jurisdiction to hear the case, it accepted Cambior's *forum non conveniens* argument and declined to exercise jurisdiction.⁴⁶⁶ Cambior was ordered not to invoke any ground based on *forum non*

conveniens before the High Court of Guyana if it was sued there.⁴⁶⁷

Although the claimants and their legal team did not believe the Guyanese courts were capable of delivering justice to the victims of the spill, they did not file an appeal. The financial risks to the law firm that had worked largely pro bono on the case had become too great.⁴⁶⁸

THE FIRST LEGAL ACTION IN GUYANA

On 18 August 1998, a motion for representative action against Cambior, OGML and others was filed on behalf of 23,000 riverian residents in Guyana.⁴⁶⁹ The suit sought compensation of around US\$150million⁴⁷⁰ as well as injunctions to prevent the defendants from discharging further cyanide and other heavy metals into the rivers, to direct the defendants to remediate the damage caused by the 1995 spill, and to provide the residents with reliable supplies of potable water. The claim extended the grounds for claiming damages to the pollution resulting from the controlled discharges into the Omai river that were allowed to begin in 1996. The claimants asserted that the health problems they suffered at the time of the spill continued to the date of filing, and alleged that two people died as a result of using contaminated water.⁴⁷¹

The communities had to contend with a very challenging judicial context. By the time the class action was dismissed in Canada, the three-year time limit for filing a tort action in Guyana was less than a week away, and the residents had to act quickly to find legal representation and file an action. There were very few lawyers with the capacity or expertise to manage a claim of this scale in Guyana at the time,⁴⁷² and OGML had allegedly managed to retain the services of nearly every senior practising lawyer in the country.⁴⁷³

After the representative action was filed, a confusing and convoluted legal battle followed. Within months of initiating the legal action, the lawyer hired to represent the communities was dismissed for allegedly being involved in a case of forgery, and the claimants had to assemble a new legal team.

In their response to the claim, both OGML and Cambior requested that the lawsuit be dismissed, arguing that the defendants outside Guyana had not been properly served the Writ of Summons and that the plaintiffs had committed a number of procedural errors in filing papers relating to the case.⁴⁷⁴ At least part of this seems to refer to a request by the plaintiffs to be relieved of the burden of having to serve personal notice of the Writ of Summons to the defendants who resided outside Guyana. The plaintiffs made this request because they could not afford the cost of delivering the writ personally in Canada, and were seeking to deliver it by registered airmail.⁴⁷⁵

The alleged irregularities about whether foreign defendants had been properly served raised concerns about the fate of the entire case. Without the consent of the villagers, and against the express advice of one of the villagers' foreign legal advisors,⁴⁷⁶ the claimants' local legal team filed a motion to dismiss all foreign defendants from the case. On 28 March 2000, the action was effectively dismissed against all the defendants who were outside Guyana, leaving OGML as the sole defendant.⁴⁷⁷

Shocked at the news, the claimants decided to dismiss the full legal team and hire a new attorney.⁴⁷⁸ The villagers had great difficulty in staying in control of the case and maintaining regular communication with their various legal representatives. They had no resources to travel to the

capital city where the legal team was based, and where legal proceedings were unfolding. On 12 February 2002, the Guyana High Court finally dismissed the plaintiffs' action, now pending only against OGML.

The exact reason for the dismissal is unclear. As the High Court of Guyana does not issue written decisions, there is no written record of the reasons for the dismissal.⁴⁷⁹ According to lead plaintiff, Judith David, the court ruled that because some people had signed individual compensation claims with the company the plaintiffs would have to gather a certain number of signatures from riverian residents signalling their agreement to join a representative action before the court. The claimants did not file an appeal.

THE SECOND LEGAL ACTION IN GUYANA

In May 2003, a new legal action was filed against Cambior, OGML, Golden Star Resources and others on similar grounds to those in the first Guyana claim.⁴⁸⁰ This action, however, included new defendants. The government of Guyana was also sued because it had granted the original mine licence and shared in the profits of the mine. So were a number of financial institutions that had provided finance capital to Cambior and OGML to allow the mine to go forward. The action was filed against continuing concerns among villagers about the safety of their river and potential risks to their health.⁴⁸¹

The suit sought: US\$2 billion in damages; injunctions ordering the defendants to provide potable water and meet the costs of medical monitoring of the Essequibo population; the discontinuation of effluent dumping into the rivers; and various measures to ensure that improved management and contingency plans were put in place at the mine. The suit also requested US\$1 billion in exemplary (or punitive) damages:

*based on harm sustained by the Plaintiffs, their crops, their fishing rights that the Defendants knew or ought to have known about and to punish the Defendants for actions calculated to maximize profits of the gold mine at the expense of measures to protect the health, safety, and welfare of the residents and/or maximize profits in the expectation that said profits would exceed compensation payable to the residents affected by the Defendants' hazardous operations.*⁴⁸²

The court was asked to decide on whether and how foreign defendants could be served. The court also examined the extent to which past individual settlements affected the litigation.⁴⁸³ It appears that in October of 2006, three years after the claim was filed, the case was dismissed but the reason for this is unclear. Indeed, the lack of written record of the proceeding makes it difficult to scrutinize so there is some doubt about whether the case was, in fact, dismissed. It appears that the presiding judge, Justice Carl Singh, issued a verbal judgement in which he found the representative nature of the suit "inappropriate" and "bad in law", and ruled that the residents did not share common interest.⁴⁸⁴ Because of this, he could not allow a representative action, and he advised the residents to proceed against OGML in an individual capacity.⁴⁸⁵ As far as Amnesty International could discover, individual claims were never pursued. Lead plaintiff, Judith David, said that the residents were tired and frustrated by this point.⁴⁸⁶ Soon after the action was

dismissed, Cambior merged with Canadian mining company lamgold, and lamgold continued to operate the site until it closed in October 2008.

TO SUM UP

The litigation of the Omai gold mine disaster in both Canada and Guyana did not result in remedy for the victims of the spill. The greatest hopes of the communities resided with the Canadian legal system, but much of their drive and resources dwindled when the lawsuit was dismissed in Canada.

Apart from the small compensation packages received directly from the company by a limited number of victims, most of those affected received no compensation for their injuries. Neither were they provided with long-term alternative sources of potable water, which was their main priority.

The Commission of Inquiry process did lead to some tangible improvements in the mine's environmental monitoring practices, though their success has been called into question in the years since the spill, mostly due to concerns about the State's capacity to monitor mine pollution independently. The key concern remains that no long-term programmes were ever put in place to test the suitability of water for drinking and assess whether pollution had impacted on the health of those living along the Essequibo river.

Perhaps one of the most unsatisfactory outcomes of the victims' struggle for justice is the fact that, despite a number of damning reports, particularly that of the Dam Review Committee, none of the companies involved in the operations of the Omai mine was held to account for the dam rupture and its consequences.

November 8, 1992

Mr. Gerald West
Office of the Vice President, Guarantees
MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)
World Bank
1818 H Street, N.W.,
Washington, D.C. 20433

Dear Mr. West:

We, the undersigned, are villagers living along the banks of the Essequibo river in Guyana, South America.

We have been informed by our advocates that the Omai gold mine has received political risk insurance from MIGA. The Omai mine has received guarantees for compensation in the event of war, currency exchange restrictions, and nationalisation but we have received no guarantees for compensation for environmental disasters and mismanagement. We believe that Omai's profitability has been given greater importance by national and international authorities than our health, safety, and welfare. We welcome development but it must not be at the expense of the lives of our people.

We and our fish, agriculture, and environment are all suffering from Omai's pollution which continues to this very day. The Commission of Inquiry's report regarding the effect of the disaster on our health is not true. There is much more disease and suffering now than before the Omai mine began operations.

We are asking our government, courts, fellow citizens, and the global community to support us in our demand for clean water and a clean environment.

To these ends, we would like to know MIGA's position on the enactment of any new environmental regulations to protect us and our environment and MIGA's help in resolving this problem.

Sincerely,



Sedimentation in the Ok Tedi River System, Papua New Guinea, September 2009. For decades the Ok Tedi mine has been allowed to flood local rivers with harmful waste. The resulting pollution and sedimentation of the riverbeds has led to degradation of the whole river system.

3/MINE WASTE DUMPING: OK TEDI GOLD AND COPPER MINE IN PAPUA NEW GUINEA

... NO FLOODING BEFORE, WHEN ELDERS WERE CHILDREN. WE ARE REALIZING THAT SEDIMENTS ARE TAKING PLACE AND ARE COMING UP ... NOW WE ARE REALIZING UNUSUAL FLOODS JUST COME IN AND ARE VERY HIGH... FROM 1980 GOING UP TO 2009 WE ARE REALIZING THAT THE SEDIMENTS ARE RISING UP, THE BANK SEDIMENTS ARE COMING UP, SOME TREES ARE DYING... THIS IS A PROBLEM WITH THE STREAMS, NOT JUST THE OK TEDI RIVER.

Drimdenasuk community members discussing some of the negative effects of mine waste dumping in the Ok Tedi river, Papua New Guinea, September 2009.

THE MINE

The Ok Tedi mine, operated by the consortium Ok Tedi Mining Limited (OTML), is located on the Star Mountains in the Western Province of Papua New Guinea (PNG). The mine sits at the headwaters of the Ok Tedi river, a tributary of the Fly river, and was developed in the 1980s to exploit the large copper and gold deposits of the area. Around 250 indigenous communities live along the Ok Tedi and Fly rivers, relying on the water, adjacent land and forests for their subsistence.

The Ok Tedi mine was, and remains, economically important for Papua New Guinea, which is one of the poorest countries in the world,⁴⁸⁷ and whose economy is heavily dependent on the export of natural resources.⁴⁸⁸ From the outset, the Ok Tedi mine has been one of the country's most important sources of foreign exchange and has accounted for a large percentage of the country's annual GDP.⁴⁸⁹

Over the span of almost three decades the mine has been dumping its waste directly into the Ok Tedi river. The result has been devastating to the river system, the surrounding environment, and the lives of thousands of indigenous villagers whose main source of food, water and livelihood has been contaminated. Despite many actions attempting to seek redress, including a civil claim in Australia, dumping has never ceased, and villagers continue to suffer the consequences of environmental degradation.

THE DUMPING

Under the original mining agreement,⁴⁹⁵ the waste⁴⁹⁶ generated by the mine was to be stored in a tailings dam. A tailing dam encompasses embankments, dam walls or other impounding structures which retain effluents generated during processing operations at a mine.⁴⁹⁷ As

A NOTE ON THE COMPANIES INVOLVED

Ok Tedi Mining Limited (OTML) was a joint venture led by the Australian company Broken Hill Proprietary Company Limited (BHP) as both majority shareholder and mine operator for a large part of the mine's life span.⁴⁹⁰ In 2002, BHP (by now BHP Billiton⁴⁹¹), transferred its 52 per cent ownership of the company to a newly created Singapore-based company, the PNG Sustainable Development Program Limited (PNGSDP). In 1998 the PNG government increased its interest in OTML to 30 per cent becoming the mine's second largest partner.⁴⁹² A Canadian company, Inmet Mining Corporation, held the remaining 18 per cent.⁴⁹³ In 2011, Inmet sold its stake, and the mine became owned by PNGSDP (63.4 per cent) and the PNG government (36.6 per cent).⁴⁹⁴ On 12 September 2013, the government passed the Ok Tedi 10th Supplemental Agreement Bill 2013, giving it complete ownership of the Ok Tedi mine thereby cancelling PNGSDP's 63 per cent stake.

construction of the dam was under way, a major landslide in 1984 destroyed the foundations of the dam and forced the company to abandon the building work. To keep production on schedule, the government allowed OTML to operate temporarily without a tailings dam, and asked the company to investigate and report on alternative sites for a permanent waste storage facility.⁴⁹⁸ In 1989, OTML submitted an environmental study on which the government would base its decision about which tailings containment option to impose on the mine. The government, subsequently, decided not to impose any tailings containment on the mine.⁴⁹⁹ Since then, OTML has been allowed to discharge all mine waste (waste rock and tailings) – up to at least 80,000 tonnes of mine waste per day since 1984 – into the Ok Tedi river.⁵⁰⁰

HUMAN RIGHTS IMPACT

As mine waste is thrown into the Ok Tedi river, part of it remains in the river bed in the vicinity of the mine, and a large quantity travels downstream into and along the Fly river. The cumulative effect over the years has been devastating for both the environment and the local population.

Thousands of people living along the Ok Tedi/Fly rivers, who are dependent upon local natural resources for the vast majority of their subsistence needs, have been affected.⁵⁰¹ Their rights to health, to an adequate standard of living, to food and water, and to a healthy environment have all been severely compromised.⁵⁰²

Water contamination has caused the death of much of the aquatic life, an important source of food for local communities.⁵⁰³ Increased sedimentation has caused the river bed to rise, and the resulting increase in flooding has led to the deposition of sediments on the adjacent lowlands, killing riverbank plants, including sago trees, the staple food of most communities.⁵⁰⁴ People have been forced to travel long distances from their villages and to work much harder to obtain smaller quantities of sago.⁵⁰⁵ The riverbank lowlands, traditionally used by villagers as farm gardens, have been contaminated, reducing the quantity and quality of crops.

Serious doubts about the safety of the water for human consumption have been raised over the years. OTML maintains that the water is safe for drinking, but the methodology used to reach this conclusion has been criticized. After reviewing OTML's water safety monitoring programme in 2007, scientist Alan Tingay concluded that the results of the water research were meaningless, the

conclusions were misleading and as a consequence there was no reliable information on whether the water was safe for drinking.⁵⁰⁶

No independent tests of the water quality have been carried out, leading to mistrust and fear amongst the local population. Many villagers stopped bathing and washing in the river, and - since the discharge of waste began - have looked for alternative sources of water, such as collecting water from off-river creeks, using rain water tanks or walking ever longer distances to collect water from sources they feel are safe.⁵⁰⁷ In September 2009, Amnesty International met and interviewed villagers living along the river, who reported walking about an hour and a half each way to collect water from distant streams.

A villager from Yeran village told Amnesty International:

*When the company started dumping the rubbish in the river system the water was spoilt ... fish were all dead ... everything died. People used to drink, we used to boil food with the water but ... we can't use the river system now it's already spoilt ... Because of dumping the rubbish chemical in the river people can't use the river. We never wash in the river. We use only the water that is in the pool.*⁵⁰⁸

As riverine waste disposal continues to this day, so have the negative impacts on villagers' lives. Environmental impact studies conducted over the years have proved that the environmental damage is irreversible. As a consequence, the adverse impact is expected to last for decades and even increase and worsen in the future.⁵⁰⁹

ENVIRONMENTAL AND HUMAN RIGHTS TRADE-OFF

Although the PNG authorities allowed the mining company to dump its waste directly into the river, no measures were ordered to mitigate the environmental impact this would have or to rehabilitate the river system. A programme for monitoring the environmental impact was put in place, but it was not designed to monitor the social implications and did not do so directly.⁵¹⁰

The government has defended its decision on the grounds that the need to secure the economic benefits from the mine justified the environmental trade-off. The Minister for Environment and Conservation at the time, Mr Jim Yer Waim, is quoted as saying:

*Everybody [Ministers] were concerned with the effects on the Fly River and everybody was concerned with the welfare of the nation. We decided in favour of the people. It was the best decision any responsible government could take under the circumstances. In any thing there has got to be a give and take. We risked our environment in favour of the people.*⁵¹¹

Many commentators and media reports of the time criticized the government's decision as an unjustifiable sacrifice of the rights and interests of the local population, or an outright capitulation to pressure from the mining company. OTML is said to have consistently resisted the construction of a tailings dam, because the cost would have made the whole enterprise economically unfeasible.⁵¹²

THE STRUGGLE FOR JUSTICE

As damage to the river system became apparent, those living along the riverbanks started to raise concerns and to request preventive and remedial action. In one of the first written petitions to the provincial authorities, dated 1 December 1988, local villagers expressed their concerns about pollution to the river:

*the Ok Tedi and Fly Rivers are polluted. ... When the Ok Tedi mine became operational in 1981, plants and animals in the river and its banks began to die. ... Now you can hardly ever find fish, prawns, crocodiles and turtles, and the river bank gardens have been spoiled by mud and copper medicine dumped into the Ok Tedi River.*⁵¹³

Over the following years, there were more written petitions to government and company officials, letters of complaint, meetings, demonstrations and road blocks, some of which ended in violence and arrests, but none of these efforts bore significant results.⁵¹⁴

THE LEGAL ACTION

As affected communities began exploring legal options, they were advised that no firm in PNG would have the resources to take on a company like BHP.⁵¹⁵ They then decided to seek assistance from Australian law firm Slater & Gordon to bring a suit in Australia, BHP's home country.⁵¹⁶ In 1994, legal claims were filed against BHP, and OTML in both Australia and PNG, on behalf of over 30,000 indigenous Ok Tedi and Fly river villagers. This includes four test cases also were lodged in the Supreme Court of Victoria in Australia. Three of these cases were filed on behalf of 73 landowners from two villages on the Ok Tedi river about 150km from the mine (the Dagi, Maun and Ambetu claims). The claims were based on several legal grounds including intentional and unlawful damage, negligence, private and public nuisance and trespass. The fourth case was on behalf of an Australian whose commercial fishing company on the Fly river had allegedly suffered losses from the decrease of fish stock due to mining impact (the Shackles claim). The remaining claims were filed in the National Court of PNG.⁵¹⁷

Two main reasons drove the decision to sue BHP and OTML in Australia. Firstly, there were concerns that the PNG courts would be ill-equipped to deal effectively with the scale of the claim and the complexity of the mine's environmental and social impacts.⁵¹⁸ Secondly, claimants strongly wished to take the issue to BHP's home country in order to force the company to face the consequences of its conduct in Australia, and to show its shareholders how it was behaving abroad.

The claims in Australia sought a number of remedial actions: civil and exemplary damages against BHP and OTML for AUS\$4 billion (US\$2.84 billion) for the destruction of the claimants' subsistence and way of life; the construction of a tailings dam to prevent further pollution; and a court order to stop further dumping into the river system. BHP argued that the Australian court had no jurisdiction to deal with these matters but the court allowed the claims to proceed. However, on various jurisdictional grounds, the scope of most claims was substantially limited, while one of the claims was dismissed altogether.

The Dagi claim was dismissed in full. The element of the claim based on private and public nuisance and trespass was dismissed on the basis of the Mozambique principle. The element of the Dagi claim based on negligence was struck out on the basis of the “double actionability” principle. The Mozambique principle determines that national courts do not have jurisdiction to hear cases that relate to rights to foreign property.⁵¹⁹ The “double actionability” principle requires claimants who have brought a tort action in one jurisdiction concerning an act committed in another jurisdiction to show that the harm for which they are claiming reparation is actionable under both jurisdictions – in this case, Australia and PNG.

At the same time, some elements of the Maun, Ambetu and Shakles claims were eliminated on the basis of the “act of state” principle. According to this principle, the courts of one State will not sit in judgement on the sovereign acts of another in its own territory. The court allowed these claims to proceed on the much narrower basis of “loss of amenity” – the impact an injury has on aspects of a person’s ability to enjoy certain amenities such as enjoyment of the land.⁵²⁰ Importantly, the claim requiring an order to construct a tailings dam was also struck out, which meant that monetary compensation was the only form of reparation claimants could hope to achieve through the Australian court.

THE EIGHTH SUPPLEMENTAL AGREEMENT: A FAILED ATTEMPT TO CRIMINALIZE THE CIVIL ACTIONS

In response to the legal actions, OTML and the PNG government embarked on negotiations to pass legislation that would block the ability of the claimants to pursue their claims. An agreement was struck between BHP and the PNG government⁵²¹ whereby a compensation package would be offered to those affected by the mine, provided they desisted from the lawsuits.⁵²² The agreement was to be codified in a law that would also make the initiation or continuation of any compensation proceedings against OTML, as well as assisting or giving evidence in any such proceedings, a criminal offence, punishable with a fine. It later emerged that BHP’s PNG lawyers had been involved in drafting the legislation.⁵²³

Because of BHP’s role in the preparation of the 1995 Eighth Supplemental Agreement (a supplement to the original mining (Ok Tedi Agreement) Act 1976, which governs the mine), Slater & Gordon filed a contempt of court action with the Supreme Court of Victoria in Australia.⁵²⁴ Justice Cummins found BHP to have acted in contempt of court, stating in his judgement:

I am satisfied beyond reasonable doubt, that [BHP] has sought to block the actions of these plaintiffs presently before this court... The conduct of [BHP] is to interfere with the due administration of justice by impeding the lawful right of the plaintiffs to law.⁵²⁵

However, this judgement was overturned two months later on the basis that only the Attorney General could prosecute for contempt of court.⁵²⁶

The draft law generated such outrage and widespread criticism⁵²⁷ that it had to be reviewed, despite the fact that it had the approval of the PNG cabinet. Eventually, two pieces of legislation were passed, separately incorporating much of what had been contained in the original single draft.⁵²⁸

THE MINING (OK TEDI RESTATED EIGHTH SUPPLEMENTAL AGREEMENT) ACT 1995: NO RIGHT TO SUE OTML

The new law did not make it a criminal offence to pursue legal claims before the PNG courts, and it gave plaintiffs the apparent option to continue the court action; although in these respects it was less offensive than the original draft, the Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995 (from now on referred to as the Restated Eighth Supplemental Agreement Act) contained a number of provisions that directly infringed the villagers' right to seek redress. While offering a compensation package of around 110 million Kina (US\$93 million)⁵²⁹ to all affected communities,⁵³⁰ the Act eliminated all previously available legal grounds to seek compensation from OTML and its shareholders in the PNG courts, including those used in the existing lawsuits. In particular, the Act excluded the application of any domestic law to the environmental and social impacts of the mine, or to compensation claims arising from these impacts, and limited any claims arising from the environmental impact of the mine to a compensatory regime specifically established by the Restated Eighth Supplemental Agreement.⁵³¹

The Act established that any acts or omissions for which BHP and OTML were being sued (acts which were alleged to be illegal) were non-actionable. Therefore, people could no longer pursue civil claims against the company and consortium for these acts. It further established that the Act could be used by OTML and its shareholders as an absolute defence against any compensation claims against them. The Act established that its provisions would also apply to foreign proceedings, and that any judgement against OTML obtained in a foreign court would not be enforceable in PNG.⁵³² Through this legal regime, OTML and its owners became virtually immune from legal action.

Plaintiffs were given a six-month period in which they could, in theory, decide whether to "opt out" of the compensation package offered by the government. This needed to be done in writing and be executed by a clan leader. Failing this, it would be assumed that they had accepted the compensation package and desisted from the court action in Australia.⁵³³

Within that period, both the lead plaintiffs and local lawyers were further subjected to pressure by company employees or government officials to end the court action in Australia. Amnesty International was told that soon after the passing of the Restated Eighth Supplemental Agreement Act, the lead plaintiffs in the Australian claims were taken by a senior BHP/OTML executive and another individual acting on the companies' behalf to a hotel in Port Moresby, and subjected to an array of intimidating statements and threats.⁵³⁴

These events gave rise to another contempt of court action in the Supreme Court of Victoria against BHP, OTML and individual BHP executives, which was later withdrawn as part of the 1996 out-of-court deal.

THE COMPENSATION (PROHIBITION OF FOREIGN LEGAL PROCEEDINGS) ACT 1995: THE CRIME OF SUING ABROAD

The criminal sanctions envisaged in the original draft re-emerged in the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995, though only with regard to claims in foreign courts. The new law imposed fines of up to 10,000 Kina (equivalent to around US\$8470)⁵³⁵ or imprisonment

for up to five years for anyone who brought proceedings in a foreign court in relation to compensation claims arising from any mining and petroleum projects in PNG.

The law stated that the prohibition did not apply to proceedings “commenced in a foreign court prior to its coming into effect, **and withdrawn, discontinued or abandoned within 60 days of that date**” (emphasis added). It further established the non-enforceability of a judgement made by a foreign court.⁵³⁶

In the words of Alex Maun, one of the lead plaintiffs in the proceedings before the Supreme Court of Victoria:

*We were even threatened that we would be taken to court ourselves and locked up for five years for taking the Ok Tedi case overseas...*⁵³⁷

Two constitutional challenges to the laws were filed in PNG,⁵³⁸ but both were withdrawn before the hearing date when the litigation was finally settled. As of 2013, both laws remain valid in PNG.⁵³⁹ It remains a criminal offence to pursue these types of claims in a foreign court.

Villagers’ legal representatives denied visas

While BHP’s lawyers were drafting laws for the State of PNG, lawyers for the villagers were having trouble contacting their clients in PNG and attending court hearings in Australia. Around a year after the claims were lodged in Australia, two of the Australian lawyers representing Ok Tedi victims were denied entry to PNG. In his account of the event, lawyer John Gordon recalls how, when he arrived at Port Moresby’s airport, his visa was summarily cancelled, he was held in custody and was prevented from contacting lawyers or consular officials before being deported.⁵⁴⁰ Dair Gabara, the local lawyer acting for the landowners, was also impeded from attending court hearings in Australia when the process to obtain his visa was delayed.⁵⁴¹

THE OUT-OF-COURT SETTLEMENT

In June 1996, before the end of the prescribed six-month period and before the constitutional challenges in PNG were due to be heard, an out-of-court settlement between BHP and the Ok Tedi plaintiffs brought all legal proceedings to an end. Under the settlement, BHP committed to paying compensation in the amount of 110 million Kina (US\$86 million)⁵⁴² agreed under the Restated Eighth Supplemental Agreement Act to all villagers along the affected rivers, as well as an additional 40 million Kina (US\$31 million)⁵⁴³ for the most severely affected people of the lower Ok Tedi river.⁵⁴⁴ The company also offered a 10 per cent equity share in the mine to be held in trust by the PNG government for the people of the Western Province, agreed to consider rehabilitation measures and, significantly, committed to implementing the most practicable tailings containment option possible. The plaintiffs retained the right to recommence action in the Supreme Court of Victoria over any dispute related to the settlement.

Feelings about the settlement were divided. While some viewed it as a very poor outcome for the communities, who had been forced to settle under financial constraints and the prospect of a

costly and uncertain legal battle, others regarded it as a victory. One of the main criticisms of the settlement was its failure to force BHP to build a tailings dam.⁵⁴⁵

OTML'S ENVIRONMENTAL FINDINGS AND NEW LEGAL ACTIONS IN AUSTRALIA

After concluding a series of studies on the environmental impact of the mine, in August 1999 OTML announced that: "the environmental effects of the mine would be far greater and more damaging than predicted" and that none of the mitigation options examined would substantially alleviate the destructive process already in train.⁵⁴⁶ Following this BHP stated: "From BHP's perspective as a shareholder, the easy conclusion to reach, with the benefit of these reports and 20/20 hindsight, is that the mine is not compatible with our environmental values and the Company should never have become involved".⁵⁴⁷ According to the company's public statements at the time, the PNG government insisted on keeping the mine open and, as a consequence, BHP (by now BHP Billiton) began a process of divesting its interest in the mine.⁵⁴⁸

BHP's statement in response to the findings of the OTML studies is deeply problematic; the company implies that it is dealing with issues it has little influence on, whereas BHP was both the majority shareholder and operator of the Ok Tedi mine. The failure to properly predict the impacts is a failure that can be squarely laid at the door of the mine operator and the only party to the OTML joint venture that was experienced in mine operations – BHP. Moreover, once the very serious environmental (and by extension, human) consequences were known, BHP should have been focused on how to remedy past impacts and address the predicted future problems. There is evidence that more could have been done than the BHP-led OTML joint venture suggested.

A report subsequently published by the World Bank, at the request of the PNG government, criticized the limited set of options put forth by OTML in 1999 for dealing with the ongoing negative environmental impacts of the mine, stating that some were unrealistic, while other possibilities were not considered. According to the Bank, no mine closure plan or strategy had been drawn up, and no appropriate socio-economic impact studies had been carried out to assess the effect that closing the mine would have on the local population.⁵⁴⁹

Most importantly for the plaintiffs and villagers, OTML had ruled out the implementation of a tailings containment option that would avoid further damage to the river system. Many observers at the time criticized BHP for presenting a picture which had only two possible options: immediate closure of the mine (with the social and economic consequences this would bring), or continued mining operations without substantially mitigating the environmental impacts.⁵⁵⁰ While neither of these options entailed major remedial costs to the company, they both entailed major environmental and social costs to the communities.⁵⁵¹

As a consequence of BHP's announcement, in April 2000 two new legal actions were lodged in the Supreme Court of Victoria against BHP and OTML. They sought to enforce commitments in the 1996 settlement that the companies had allegedly failed to honour, in particular the construction of a tailings containment system to mitigate environmental damage.⁵⁵² But before the case was due to be heard, BHP had secured a new agreement with the government of PNG, endorsing its exit plan and granting the company immunity from further liabilities.

THE MINING ACT 2001 AND BHP'S EXIT PLAN

As the two new legal enforcement actions were pursued in Australia, OTML and the PNG government signed the Ok Tedi Mine Continuation (Ninth Supplemental) Agreement (The Mining Act 2001). Through this new agreement, BHP was authorized to transfer the totality of its shares in OTML to a new company that would be incorporated in Singapore, the PNG Sustainable Development Program Limited (PNGSDP), which would apply the income generated by the mine to development projects benefiting PNG and the Western Province.⁵⁵³

It further provided that a series of Community Mine Continuation Agreements (CMCAs) would be signed with communities to allow the mine to continue operating. These agreements would offer compensation packages to the affected communities if they agreed to opt out of the enforcement proceedings in Australia and desist from any further legal action against the companies (this is explained in more detail below).

Once again, the agreement was endorsed by national law: the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001 (from now on referred to as the 2001 Act). The 2001 Act established that “neither the State nor any government Agency may take, pursue or in any way support proceedings” against BHP Billiton in respect of environmental claims relating to mine operations.⁵⁵⁴ It was also agreed that the company would be protected from private claims relating to environmental damage for the period after its exit (claims which OTML would face).⁵⁵⁵

In 2002, BHP Billiton transferred its 52 per cent ownership of the mine to the PNGSDP.⁵⁵⁶ BHP presented its shareholding transfer as a “responsible withdrawal”, designed to “minimise future environmental impacts” and “maximise the social and economic benefits” brought about by the mine.⁵⁵⁷ However, the transfer of ownership did nothing to end the dumping of mine waste and, by ensuring that all potential routes to claiming compensation from the company were shut down, BHP was able to walk away with near total immunity from legal action for the environmental harm caused at Ok Tedi. In a statement to its shareholders, the company explained how the 2001 Act would provide it with “a series of releases, indemnities and warranties, which protect BHP Billiton from legal liability for the period after its exit.”⁵⁵⁸

The 2001 Act endorsing the exit was widely criticized by NGOs and other groups. Community members reacted to the plans by staging a sit-in demonstration and blockading access to the mine.⁵⁵⁹ A new constitutional challenge questioning the validity of the Act was filed before the PNG Supreme Court.⁵⁶⁰

THE COMMUNITY MINE CONTINUATION AGREEMENTS

CMCAs were agreements between a community and OTML, which stated that the community gave its consent for the mine to continue operating in exchange for compensation for the current and projected damages.⁵⁶¹ Under CMCAs communities would also agree to release BHP Billiton and OTML and its shareholders “from all and any demands and claims arising directly or indirectly from the operation of the mine”, including for “occurrences or circumstances ... more adverse than or in excess of” the predicted environmental damage.⁵⁶²

Signing the CMCAs also carried the obligation to desist from the court proceedings in

Australia.⁵⁶³ The CMCA's were declared to represent the "final and binding agreement" between the parties as far as compensation was concerned,⁵⁶⁴ and payments made pursuant to the agreements were declared to be "in full compensation for all loss and damage contemplated by the environmental predictions suffered or to be suffered by the communities".⁵⁶⁵

Meanwhile, no obligation was placed on OTML to stop the disposal of mine waste into the river system in order to avoid further damage, or to clean up and rehabilitate the river system.⁵⁶⁶ This was despite the ongoing harm that pollution was causing to local people, and the serious future impacts, which, it was predicted, would persist for over 50 years.⁵⁶⁷

Despite the far-reaching consequences for people's human rights and ability to seek redress, the written terms of the agreements and the process through which signatures were obtained severely compromised the ability of villagers to give their genuine and informed consent. The 2001 Act established that "The signature ... by a person representing or purporting to represent a community or clan ... binds all of the members of that community or clan..." to the agreement. According to the Act, this is so even if "there is no express authority for the person to sign ... on behalf of the members of the community or clan..."

The Act further states that "the acts and deeds of [such a person] in respect of any matter referred to in the relevant [agreement] bind each person on behalf of whom that person purports to be acting, and where that person purports to be acting on behalf of the whole of that person's community or clan, that person's acts and deeds bind each existing and future member of that person's community or clan, including, without limitation, children and persons who are subsequently born into, or who subsequently join, that community or clan."⁵⁶⁸ Once a CMCA was signed in this form, it acquired the full force of law and became binding on the whole community, whether members had given their consent or not.⁵⁶⁹

The way in which signatures on CMCA's were obtained has been criticized in later studies of the process, which found that people did not have time to genuinely understand what they were agreeing to.⁵⁷⁰ Eventually, most affected villages signed the agreements.⁵⁷¹ At this stage, the CMCA's were seen as a means of receiving a degree of compensation and benefits that they would otherwise never receive. The final aggregated amount covering all affected regions was about 175 million Kina (equivalent to around US\$46 million)⁵⁷² to be distributed over the lifetime of the mine.⁵⁷³

A few individuals and villages who wanted the 1996 settlement enforced chose not to participate in the CMCA's.⁵⁷⁴ These villages insisted on the need to compel the company to implement a tailings mitigation system and believed the courts would be the only means by which they could force OTML to do so and stop the environmental pollution.⁵⁷⁵ Nevertheless, the ongoing legal actions were eventually also withdrawn.

ONGOING DEMANDS FOR A SATISFACTORY REMEDY

In November 2005, over 500 delegates from communities along the Ok Tedi/Fly rivers gathered to discuss their ongoing concerns. They were worried about the magnitude of environmental effects they were experiencing and the lack of independent and reliable research, information and advice about the impact of the mine on their lives.⁵⁷⁶ In resolutions directed at the government, they

demanded access to reliable and independent information, and expert advice, which was not connected with the mining company. They demanded compensation and benefits proportionate to the past, current and future impacts, which should reach all those affected, and that they be the sole beneficiaries of PNGSDP's 52 per cent share in the mine. They also requested a role in the decisions regarding fund allocation, and to renegotiate all those clauses in the CMCA as well as the 2001 Act that infringed their rights.⁵⁷⁷

COMMUNITY MINE CONTINUATION AGREEMENTS: NEW SET OF COMPENSATION AND BENEFITS

The CMCA included a provision to review the operation of the agreements after five years. Against the background of strong community divisions between those who supported the CMCA and those in favour of legal action, a review was established. Between November 2005 and June 2007, a multiparty negotiation process took place, which included delegates from the affected regions,⁵⁷⁸ OTML, the PNGSDP, the government and civil society. Negotiations were led by what came to be called the Working Group on the 2006 CMCA Review. The purpose of this review was to assess new environmental information and seek a new agreement on compensation and benefits.⁵⁷⁹ The process also attempted to rectify some of the flaws in the previous negotiations⁵⁸⁰ and address some of the concerns raised by communities. Women were, for the first time, granted formal participation in the negotiations through female representatives.

Despite these improvements, it is important to note that the terms of the CMCA themselves were not subject to negotiation, and all final decisions on compensation, benefits and environmental mitigation were ultimately the remit of OTML and its board.⁵⁸¹ However, within those limits, some significant progress was made. OTML acknowledged that the impacts on the environment had been worse than originally predicted in the CMCA, and accepted that, as a consequence, payments should be revised.⁵⁸² In June 2007, a Memorandum of Agreement (MoA)⁵⁸³ was concluded, with a new and enhanced set of cash compensations, benefits, services and infrastructure commitments amounting to 1.1 billion Kina (equivalent to around US\$350 million).⁵⁸⁴

One significant outcome of the process was the commitment to create a new entity, the Ok Tedi Fly River Development Foundation,⁵⁸⁵ which would give communities within the CMCA regions a "high level of ownership and decision-making power over resources, programs and projects arising from this review".⁵⁸⁶ Another important outcome was the recognition of the particular interests and needs of women and children and the allocation of 10 per cent of the agreed money for a special pool of funds for their benefit.⁵⁸⁷

However, despite a more participatory and transparent negotiation process, serious questions remain as to the adequacy of the remedies ultimately provided. These must also be judged in their historical context. They came after at least two decades of continuous community struggle to achieve remedy, during which time mine waste continued to be disposed of into the river system. A key element of remedy under international human rights law is the cessation of the abuse. Dumping of untreated mine waste into the river system has not ceased since it began in 1984. All the communities could ever hope for was the implementation of measures to mitigate environmental

impacts or rehabilitate the river system, but very little happened in this regard. Monetary compensation, and compensation in the form of investment and development projects, ended up being the only means of reparation. And even these generated serious criticism.

The agreement facilitators themselves describe the 2007 deal more as a new ratio of “benefits-to-impacts” than a solution to the underlying problems. In their words:

*the mine is a terrible dilemma: vast economic benefits and advantages standing squarely against decades of environmental degradation and perceived injustice.*⁵⁸⁸

COMPENSATION: LIMITED AND NOT BASED ON HARM SUFFERED

Large amounts of money have gone into the region since compensation was first agreed in 1995. Compensation amounts have varied under the different compensation regimes and from region to region. However, the individual cash payments made to villagers were not related to actual damage suffered. The annual compensation agreed under the Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995, was determined on the basis of a fixed amount per tonne of ore mined or waste excavated. Leonard Lagisa, responsible for Community Relations at OTML during the CMCA negotiations, told Amnesty International that the amounts of compensation agreed with each CMCA region did not follow a specific or standardized formula and, most significantly, were not the result of a full assessment of the actual damage done to them. The final figures, he explained, were negotiated and agreed with each region through a bargaining process. He admitted that community leaders who were educated tended to get a better deal for their regions than those who were not.⁵⁸⁹

Subsequently in 2012 Leonard Lagisa told Amnesty International that compensation varied by region based on population and impact; an individual from the Middle Fly region, for example, may receive 800 Kina (\$384.80)⁵⁹⁰ compared to an individual from the Highway region who may only receive 100 Kina (\$48.10).⁵⁹¹ However, because no individual cash payment breakdowns appear to have been either carried out or published, it is difficult to estimate how much each individual or single family actually received (or has received over the years) by way of compensation.

NO MITIGATION OF THE ENVIRONMENTAL IMPACTS

None of the compensatory packages offered to the communities ever contemplated measures that would significantly mitigate the environmental impact of mine waste disposal.⁵⁹² Impact mitigation or remediation was yet again left out of the 2007 MoA.⁵⁹³ This is despite the findings of an environmental and health study prepared by an independent scientist for the CMCA Working Group, who highlighted the continuing adverse impacts of the mine and warned of the serious risks to the environment and people's health, water and food supplies.⁵⁹⁴

LIMITED SOCIO-ECONOMIC AND HEALTH MONITORING

Since 2001, OTML has had an environmental regime in place.⁵⁹⁵ This regime aims to monitor and report annually on six environmental values related to water drinkability, availability and edibility of aquatic resources, availability and edibility of terrestrial resources, and river navigability.⁵⁹⁶ This

research programme has provided considerable information over the years, enabling a better understanding of the impact of the mine on the environment and communities. It is partly on the basis of its findings that, by the time of the CMCA review process, it was known that the predicted negative environmental impacts had been significantly exceeded. However, it has also been criticized as an inadequate and insufficient means of identifying and gaining an accurate understanding of mine-related health, social and economic impacts on the affected riverine communities. This is largely because the programme is designed primarily as a means of researching and recording environmental changes in order to keep the government periodically informed, and not as a basis for reassessing and revising damaging practices in any significant way.⁵⁹⁷

The negotiating parties agreed that OTML would develop a long-term research, monitoring and reporting programme addressing key health, social and economic impacts,⁵⁹⁸ and produce a State of the Environment Report. To our knowledge, despite these commitments, no comprehensive and ongoing health or socio-economic monitoring programmes have been put in place,⁵⁹⁹ and no State of the Environment Report has been produced.⁶⁰⁰

The government, for its part, has remained totally absent. There is no direct government intervention or collaboration with OTML to design, implement or maintain oversight of monitoring programmes.⁶⁰¹

The mine was originally scheduled to close in 2013. However, it was subsequently agreed to extend the life of the mine until 2025 and the mine is therefore still operating (although see *The January 2014 court ruling* below as to the possible impact of this ruling on the operation of the mine).⁶⁰² The decision to extend the life of the mine required the informed consent of the local communities. In addition according to OTML, the continuation of mining will require the disposal of an estimated 280 million tonnes of waste rock and tailings.⁶⁰³ Community approval was obtained in December 2012 after a process of consultation with representatives of all impacted regions. This was accompanied by the signing of CMCA Extension Agreements.⁶⁰⁴

In a controversial move, on 12 September 2013 the government passed the Ok Tedi 10th Supplemental Agreement Bill 2013, giving it complete ownership of the Ok Tedi mine and, thereby, cancelling PNGSDF's 63 per cent interest in it.⁶⁰⁵ Under its terms, compensation may be payable to those affected, and the amount payable, and to whom, being subject to the Prime Minister's discretion acting on advice of the National Executive Council. It is notable that Article 8 of the Act reversed BHP's immunity from legal action. Article 8 states that there will be no limit to legal proceedings, and any waiver provided to "BHP Billiton Party in connection with any matter relating to or arising from that BHP Billiton Party's involvement in or dealings with OTML or the Ok Tedi mine shall be null and void to the extent of such waiver...".⁶⁰⁵

In September 2013 Prime Minister Peter O'Neill stated:

*This parliament has done gross injustice to our people, denying their right to have access to have their say and have their claims against the damage that was done to the environment and themselves ... This proposed bill now removes that waiver for BHP Billiton, meaning that the land owners or any other affected party are free to bring any action or enforce any right.*⁶⁰⁶

It is yet to be seen what impact this law will have in relation to BHP Billiton's liability for environmental and human rights impacts arising from the mine, and whether new lawsuits will be pursued against the company.

THE JANUARY 2014 COURT RULING

On 24 January 2014, following an urgent application by a group of landowners and two local-level government officials from the southern Fly area, the PNG National Court passed an interim order stating that "Ok Tedi Mining (OTML) and its agents and employees be restrained from dumping anymore mine waste and tailings into the ...Ok Tedi Fly River System pending the substantive hearing or until further Orders of this Court." In the order, the court further stated that scientists and health experts should be retained to conduct research into the extent of environmental pollution in the Fly river and its social, health and economic impacts on the lives of people living in the South Fly Area. It has been reported that the order to stop dumping could lead to the closure of the mine. The government has said that it will appeal the decision.⁶⁰⁷

THE FAILURES

Over almost three decades since the mine began operating, environmental damage has continued unabated. Local communities continue to live with the impacts of pollution on their livelihoods and on their access to subsistence resources. The only form of remedy has been monetary compensation and this has come with significant strings attached and a lack of transparency and clarity as to the relationship between impacts and amounts of compensation.

Efforts by villagers to use the national or foreign courts to obtain redress have been repeatedly obstructed by legislation negotiated between the government and the company. Although BHP (BHP Billiton since 2002), the mine operator and majority shareholder over a span of 15 years, finally acknowledged the severe environmental and human impact of the mine, the company walked away without adequately addressing the damage to which it had significantly contributed. Despite the present and predicted environmental impacts, there are no adequate mechanisms in place to monitor their effects on people's rights to food, water, livelihood and health.

A law passed in 2013 giving full ownership of the Ok Tedi mine to the government and waiving legal immunity previously granted to BHP Billiton in relation to pollution arising from the mine may improve affected villagers' rights to an effective remedy. As of the date of publication, this remains to be seen.



A woman processes Sago on the bank of the Ok Tedi river, September 2009. Since mine waste has led to the degradation of Sago palms along the river, people have been forced to travel long distances and work much harder to obtain small quantities of the starch which is a staple food for communities in the area.



The Akouédo dumpsite, Cote d'Ivoire February 2009. The dumpsite was one of several areas in Abidjan where toxic waste was dumped unlawfully. People live and work close to the site.

4/THE TOXIC WASTE DUMPING IN CÔTE D'IVOIRE

THE DUMPING

On 20 August 2006, the people of the city of Abidjan in Côte d'Ivoire woke up to the appalling effects of a man-made disaster. During the night, hazardous waste had been dumped in at least 18 different places around the city, close to houses, workplaces, schools, fields and the city prison. The waste belonged to a commodities trading company called Trafigura. It had been generated by Trafigura by using caustic soda to 'wash' onboard a vessel at sea an extremely sulphurous petroleum product called coker naptha (a process called 'caustic washing'). It arrived in the country on board a ship, the *Probo Koala*, chartered by Trafigura. Trafigura had previously tried, unsuccessfully, to dispose of the waste in the Netherlands.

Although Trafigura was well aware of the hazardous nature of the waste, it contracted a small Ivorian company, Compagnie Tommy, to dispose of it.⁶⁰⁸ Tommy was newly licensed,⁶⁰⁹ and did not have the means or expertise to handle hazardous waste.⁶¹⁰

The contract between Trafigura and Compagnie Tommy was a one-page hand written note that stated that Compagnie Tommy would "discharge" the waste in a place called "Akouédo". No mention is made of treating the waste. Akouédo is an open dumpsite for domestic waste, located in a poor residential district of Abidjan. It does not have facilities for storing or processing hazardous waste.⁶¹¹ The contract also gave a price of just under US\$17,000 to dispose of the waste. This contrasted sharply with a price of €544,000 quoted by a specialist disposal company to dispose of the waste in the Netherlands. Trafigura was aware this price was very low and would be seen as such; it later asked Compagnie Tommy to falsify an invoice which showed a far higher charge for the waste disposal.⁶¹² On the evening of 19 August 2006, the waste was unloaded on to the trucks of drivers hired by Compagnie Tommy and dumped untreated in Akouédo, as well as in various locations around the city.

The impact on the people of Abidjan was immediate and profound. On the morning after the

A NOTE ON THE COMPANIES INVOLVED

Trafigura is the world's third largest independent trader of crude and oil products.⁶¹⁵ Established in 1993 as a private company, the company has 81 offices in 56 countries.⁶¹⁶ Its clients include BP, ConocoPhillips, ExxonMobil, Total, Shell and Chevron.⁶¹⁷ Trafigura Beheer BV (TBBV) is the group holding company, incorporated in the Netherlands. Trafigura Limited, a wholly owned subsidiary of TBBV, is incorporated in the United Kingdom and based in London. It acts as the coordinating entity for a substantial proportion of the group's oil operations, including those relating to this dumping incident in Côte d'Ivoire. Puma Energy Côte d'Ivoire (Puma CI) was (at that time) TBBV's wholly owned subsidiary and local agent in Côte d'Ivoire.⁶¹⁸ In 2012, Trafigura's annual turnover was US\$120 billion.⁶¹⁹ This study refers to these interrelated entities, collectively, as the Trafigura Group or Trafigura.

dumping, a foul and suffocating smell spread from the dump sites. In the weeks that followed, medical centres and hospitals were flooded with thousands of people suffering from nausea, headaches, breathing difficulties, stinging eyes and burning skin.⁶¹³ They did not know what was happening; they were terrified. More than 100,000 people were treated, according to official records, but it is likely that the number affected was higher as records are incomplete. The authorities reported that between 15 and 17 people died.⁶¹⁴

HOW THE WASTE ARRIVED IN ABIDJAN

In early 2006, Trafigura bought substantial quantities of an unrefined petroleum product called coker naphtha from the Mexican State-owned petroleum company. The coker naphtha contained high levels of mercaptan sulphur, giving it a very strong odour.⁶²⁰ Trafigura intended to use the naphtha as a cheap blendstock for gasoline, which it would then sell for a considerable profit to markets such as West Africa.⁶²¹ In order to use the naphtha in this way, Trafigura first needed to find a way of refining it.

Company executives had identified two processes by which the coker naphtha could be refined: one called mercaptan oxidation (known as the “Merox process”), and another known as “caustic washing”. Both processes involve mixing caustic soda with the coker naphtha to capture the mercaptans (which creates a waste by-product). The Merox process includes a crucial second step whereby the waste is transformed into stable, and less harmful, disulphides through oxidation. This additional step is normally undertaken in a specialized facility. Trafigura considered establishing a facility to carry out a Merox-style process. One Trafigura executive noted that this option “would not be cheap, but it would work”.

However, for reasons that are not clear, Trafigura decided not to proceed with the Merox process but instead to undertake caustic washing. Initially Trafigura carried out caustic washes on land. However, after encountering problems at on-land facilities, Trafigura moved its operations offshore. Trafigura washed the coker naphtha on board the *Probo Koala* in the Mediterranean.⁶²²

By the end of June 2006, more than 500m³ of waste was stored in the ship’s slop tanks, and Trafigura had still not found a way to dispose of it. After unsuccessfully approaching a number of different locations in Europe,⁶²³ in July 2006 a Dutch specialist waste disposal company, Amsterdam Port Service (APS), agreed to receive the waste.⁶²⁴ However, when APS sampled the waste it found the material was more contaminated than it had expected based on information Trafigura had supplied.⁶²⁵ As the waste needed very specialized treatment APS increased its quote for dealing with the waste from €27 (US\$34) per m³ to €1,000 (US\$1,300) per m³ (approximately 37 times the original price).⁶²⁶ Trafigura refused to pay the increased charges, asked for the waste to be returned to the *Probo Koala*,⁶²⁷ and told the Dutch authorities that the waste would be “disposed of at the next convenient opportunity”.⁶²⁸ After sailing to Estonia, to Nigeria and around the West-African coast, that “convenient opportunity” ended up being Abidjan.

HUMAN RIGHTS IMPACT

The effects of the illegal dumping of the toxic waste were borne by the people of Abidjan whose rights to health, including a healthy environment,⁶²⁹ and work⁶³⁰ were abused as a result. People

living or working near the sites where the waste had been dumped were directly exposed to the waste,⁶³¹ and few of them were in a position to relocate.⁶³² The World Health Organization (WHO) reported that symptoms included “nosebleeds, nausea and vomiting, headaches, skin lesions, eye irritation and respiratory symptoms”, and stated that “[t]hese are consistent with exposure to the chemicals known to be in the waste”.⁶³³

National records show that some 100,000 people sought treatment for exposure to the waste.⁶³⁴ There is evidence that many more people were affected than recorded on hospital records. For example, a survey by the Centre Suisse de Recherches Scientifiques en Côte d’Ivoire (CSRS), found that not everyone whose health was affected sought treatment at a health facility.⁶³⁵ The CSRS survey found anecdotal evidence to suggest that some people went to traditional healers and that others may have been unable to attend the treatment centres. A nurse in one of the most affected areas also noted that they:

*did not treat many very elderly people, but this may simply be because they could not make it to the hospital to receive treatment or did not have the strength to stand in the queues all day to receive medications.*⁶³⁶

As noted above, the government of Côte d’Ivoire sought international assistance to deal with the medical emergency that resulted from the waste dumping. However, despite major national and international efforts, the demand for treatment frequently outstripped the availability of medical personnel and equipment. Medical teams report being “overwhelmed” by the numbers of patients.⁶³⁷ The Ivorian authorities also recorded a number of deaths resulting from exposure to the waste. However, there are gaps in the information on the number of people who died, and the causes of death. Official reports have variously stated that between 15 and 17 deaths were caused by exposure to the toxic waste.⁶³⁸

The government of Côte d’Ivoire was faced with a large scale medical emergency at a time when the country had just recently emerged from a period of armed conflict. To its credit, thousands of people were given free medical treatment in numerous medical access points around the city.⁶³⁹ However, in some cases, the government failed to respond to requests for help for several weeks. These delays meant that many affected individuals did not receive timely medical attention.⁶⁴⁰

AN ONGOING DISASTER

To this day, the people of Abidjan have not been made aware of the exact composition of the waste, nor do they know exactly where it was dumped or in what quantities. Trafigura has claimed that the waste could not result in deaths or long-term injuries, but the company has refused to make public scientific data that it holds so it could be subjected to independent scrutiny.

In 2009, the UN Special Rapporteur on Toxic Waste called on the government of Côte d’Ivoire to “[e]nsure full access to information for those affected on measures taken to address possible long-term adverse effects on health and the environment of the incident”.⁶⁴¹ To date, however, this remains to be done. Various local and foreign agencies did carry out a number of tests on the waste.⁶⁴² However, many questions remain as to its exact composition and impact on human health.

Many factors could have affected the impact of the chemicals on people living or working near the dump sites, and to understand the implications would require a full assessment of the variables.⁶⁴³

No State has forced Trafigura to provide the information it holds on the waste, and since 2006 there has been no ongoing health monitoring, research or analysis by the Ivorian government into the possible long-term implications of exposure. The lack of complete disclosure about the waste has left a legacy of uncertainty for many victims, who are worried about long-term health impacts.⁶⁴⁴ Doctors have told Amnesty International that a lack of information about the impacts of the waste has prevented them from giving their patients effective treatment.⁶⁴⁵

The government took initial steps to remove the toxic waste and assigned clean-up operations to a French company called Tredi International. Those in charge of the decontamination faced a number of challenges. Firstly, the waste had been dumped at a number of locations and it was not clear where all of it ended up. Secondly, each dumping site had different characteristics, requiring cleaning methods specific to that location.

Tredi removed 9,322 tonnes of contaminated soils and liquids from the district of Abidjan, which were taken to France and incinerated at a special factory owned by Tredi. This was far greater than the volume of polluted material originally estimated for removal by the government and initially agreed.⁶⁴⁶ The contract was later amended to take account of the larger quantities of contaminated material that required removal.⁶⁴⁷

However, even with the removal of more than 9,000 tonnes of contaminated material, decontamination was not complete. In October 2007, a Tredi spokesperson commented that more than 6,000 tonnes of heavily polluted material was still present.⁶⁴⁸ In August 2008, the UN Special Rapporteur on Toxic Waste expressed concern that the sites had not yet been decontaminated and that they “continue to pose a threat to the health of thousands of people”.⁶⁴⁹

So several sources have documented serious failures in the government's initial efforts to decontaminate the dump sites. This is despite the fact that a substantial part of the settlement money that Trafigura paid to the government was designated for clean-up and decontamination. Amnesty International visited the dump sites in 2009 and found that many of the contaminated sites were inappropriately sealed or not sealed at all. Just outside Djibi village, bags of toxic soil remained that had been left unsealed and exposed to the elements. These were also inadequately cordoned off and guarded.⁶⁵⁰

In an interview with Amnesty International in February 2009, the government acknowledged that the clean-up had been incomplete. In a follow-up meeting held in December 2013, government representatives were unable to confirm that all dump sites had been decontaminated. Delegates were advised that de-pollution works had restarted after the 2011 crisis and were still ongoing.

THE STRUGGLE FOR JUSTICE

In the immediate aftermath of the dumping and in the following years, many avenues for legal redress and accountability were explored in Côte d'Ivoire and in Europe. The outcome of these efforts was only partially successful and victims encountered numerous serious obstacles.

THE NATIONAL COMMISSION OF ENQUIRY

As a response to the dumping, on 14 September 2006, the then Prime Minister announced his decision to create a National Commission of Enquiry (the Commission of Enquiry) on the toxic waste dumping in Abidjan.⁶⁵¹ After interviewing 78 victims and witnesses, the Commission of Enquiry published its report on 21 November 2006. Its findings included systemic failings by Ivorian institutions and officials, such as facilitating the departure of the *Probo Koala* after the toxic waste dumping, the failure to enforce licence requirements, inspect the ship or properly regulate the Akouédo dump site, and wider administrative failures.

As well as focusing on public officials, the report made key findings in relation to corporate actors including:

- Paul Short and Jorge Marrero, two employees of Trafigura, could not have ignored the technical incapacity of Compagnie Tommy. Trafigura, through the behaviour of those two employees, breached the Basel and Marpol Conventions.⁶⁵²
- Trafigura executives, Jean-Pierre Valentini and Claude Dauphin, had been aware that Côte d'Ivoire did not possess the required facilities to process the waste.
- N'zi Kablan, the head of Trafigura's then subsidiary in Côte d'Ivoire (Puma CI), had played an "active part in the... illicit transfer of toxic waste...".
- Salomon Ugborugbo from Compagnie Tommy, was the "principal author" in the dumping of the waste.⁶⁵³

The Commission had neither sanctioning nor remedial powers so, despite its strong findings, it was unable to secure the accountability of those identified as responsible for the dumping or provide redress to the victims. The government was not required to follow up the Commission's findings, and as a result subsequent action was limited. As such, the Commission of Enquiry completed an investigation and published a report but its key findings with respect to why the dumping happened and who was responsible were not pursued for reasons that remain unclear.

THE CRIMINAL PROSECUTION IN CÔTE D'IVOIRE

In September 2006, Ivorian State prosecutors arrested and charged a number of individuals who were alleged to have played a role in the dumping of the toxic waste. These included local port and customs officials, employees of the local companies implicated in the dumping,⁶⁵⁴ and three executives and employees of the Trafigura Group. The latter included Claude Dauphin, the CEO and founder of Trafigura, Jean-Pierre Valentini, an employee of Trafigura Limited and N'zi Kablan, an employee of Puma CI and Trafigura's local Ivorian representative.⁶⁵⁵ The charges brought against the Trafigura executives and employees included poisoning and being an accessory to poisoning, as well as breaches of public health and environment laws under national and international regimes.⁶⁵⁶ The State of Côte d'Ivoire, three victims' groups and representatives of two deceased individuals attached their civil claim for damages to the prosecution as *parties civiles*. The corporate entities themselves, including TBBV, Trafigura Limited and Puma CI were not charged for committing criminal acts. This is because, under Ivorian criminal law, corporate entities cannot be held criminally liable unless a provision of the relevant law allows for this.⁶⁵⁷ The corporate entities

could not be held directly criminally liable for the specific charges that were brought against the individuals.⁶⁵⁸ Establishing criminal liability for an offence in the course of business presents additional legal challenges for the prosecutor, who must “pierce the corporate veil” and determine which individuals are responsible for making specific corporate decisions.⁶⁵⁹

On 22 December 2006, the Trafigura executives and employees obtained a court order granting them provisional release on bail. However, the public prosecutor appealed this order with the result that the executives and employees remained in detention.⁶⁶⁰

In parallel with the prosecution, the Ivorian government was negotiating a settlement with Trafigura (see next section). On 13 February 2007, the government and Trafigura signed a full and final settlement agreement. As a term of the Ivorian settlement, and in exchange for compensation, the government agreed that it: “waives once and for all its right to prosecute, claim, or mount any action or proceedings in the present or in the future” against the Trafigura Parties.⁶⁶¹ The implication of this clause is that all members of the Trafigura Group received and will continue to enjoy in the future a blanket immunity from any legal action relating to the toxic waste dumping in Côte d’Ivoire.

On 14 February 2007, one day after the settlement agreement had been signed, the Ivorian court granted the three Trafigura Group executives and employees immediate release on bail. That same day, Dauphin and Valentini left the country and did not return during the course of the outstanding criminal proceedings in relation to the dumping of the toxic waste.

Trafigura denied that a link existed between the release of the three individuals and the settlement agreement. However, this is not credible in light of the settlement’s provisions. Money was provided to settle all of the disputes referred to in the settlement agreement (which included the criminal charges). In addition, a “Note” to the settlement agreement explicitly stated that among the “necessary documents” that had to be presented to the bank before the money would be released was a statement from a court official certifying the actual release of the executives, their boarding of an airliner and the take-off of the said airliner, all in the presence of a bank representative. This same condition was also included in the bank credit letter issued by the Côte d’Ivoire International Bank for Commerce and Industry, under which it was stated that the money would only be paid to the Ivorian government upon presentation of the document confirming that the Trafigura executives had been released.⁶⁶²

One year later the prosecution against the three Trafigura executives and employees – Dauphin, Valentini and Kablan – was discontinued following a finding by the court that there was insufficient evidence to proceed with the charges that had been brought against them.⁶⁶³ This was despite the Commission of Enquiry having found that Trafigura executives and employees carried responsibility for the dumping.⁶⁶⁴

In contrast, the Ivorian court found that there was sufficient evidence to proceed to trial against 12 other non-Trafigura individuals, including State officials, who were implicated in the dumping.⁶⁶⁵ The criminal case came to trial on 29 September 2008 and ended on 22 October 2008. Ultimately, two individuals were convicted: Salomon Ugborugbo, the head of Compagnie Tommy, and Essoin Kouao, a shipping agent from WAIBS (West African International Business Services), the port agent

used by Trafigura who had recommended Compagnie Tommy. They were sentenced to 20 years and five years in prison respectively. All the State officials were acquitted and no responsibility was imputed to the State of Côte d'Ivoire.⁶⁶⁶

THE SETTLEMENT AGREEMENT BETWEEN CÔTE D'IVOIRE AND TRAFIGURA

In February 2007, as the prosecution was under way, the State of Côte d'Ivoire and Trafigura entered into a settlement agreement under which Trafigura agreed to pay to the State of Côte d'Ivoire US\$200 million (CFA95 billion). This money was intended to compensate the State and the victims, and to pay for clean-up of the waste.

The agreement was entered into without prior consultation with the victims and before the State had fully determined the harm to victims or the total number of people and businesses affected. At the time, the State lacked a full appreciation of the short-, medium- or long-term human rights and environmental impacts of the dumping that were necessary to accurately assess the compensation needed to cover all the damage.

As noted above, among other provisions agreed to under the settlement, the State waived its right to pursue legal proceedings or prosecutions in the present or the future against the "Trafigura Parties" (which included TBBV, Trafigura Limited, their subsidiaries, directors and employees). It also provided Trafigura with a guarantee that it would accept responsibility for any further claim relating to the dumping.⁶⁶⁷ The agreement was signed as final and conclusive. As such, it foreclosed all future opportunities for the State and victims to seek redress from the Trafigura Group in Côte d'Ivoire. The broadly defined "Trafigura Parties" provided any individual and corporate entity linked to the Trafigura Group with immunity from any form of legal action involving the toxic waste dumping within Côte d'Ivoire, including prosecutions for criminal actions. Despite the State agreeing to accept responsibility for any future claim relating to the dumping and to take all appropriate measures to compensate victims, no mechanism or steps were subsequently taken to enable further action by victims.

Victims protested that the government had settled their claims without having had the mandate to do so. Of particular concern was the fact that the State ceded the right of victims to bring civil actions against Trafigura without their consent. Indeed, victims were not even aware that their rights were being waived by the government.⁶⁶⁸ As a consequence of the settlement, the State formally withdrew its legal action for damages against Trafigura.⁶⁶⁹

INSUFFICIENT COMPENSATION

Following the settlement agreement, the government drew up a list of 95,247 victims on the basis of the registration forms medical teams had completed. The scheme allocated different levels of compensation for those who had died, those who were hospitalized and those who had suffered illness and been seen by one of the medical teams in the aftermath of the dumping.⁶⁷⁰ Compensation was also allocated to people who had suffered economic prejudice,⁶⁷¹ for example those whose land had been directly contaminated by the waste and were no longer allowed to use it.

The government list was posted in public areas and published in the newspapers so that victims

who found their names on the list could present themselves at paying stations. However, many victims did not appear in the list.⁶⁷²

The emergency response of the Ivorian authorities was commendable under the circumstances, but over-stretched and under-resourced. As a consequence, many affected individuals did not have access to medical centres in the immediate aftermath of the dumping. Therefore, any negative health impacts they suffered were not officially recorded. Those who had not seen a doctor, or who sought treatment privately or from traditional healers, were also automatically excluded from the scheme. Even when forms were available, medical staff under pressure during the emergency had often not had the time to complete them properly.⁶⁷³ Many victims also had difficulties in proving their identity. Even if their names appeared on the official list, some people did not have official identity cards to prove they were the ones on the list,⁶⁷⁴ while others discovered that their compensation had already been collected by another individual with the same name.

Those who received compensation maintain that the sums given only represented a partial indemnification of the damage suffered, whether to their health or their livelihoods. The amounts were arbitrary and did not take into consideration the severity of the harm suffered, nor did they include an assessment of long-term consequences.⁶⁷⁵ While businesses and self-employed individuals were (to some extent) compensated, some employees of businesses that were forced to close during the crisis received no money, though they had lost their sources of income.

Victims protested against the inadequacies of the scheme, especially about the many people who had been left out, the low payouts, and the government keeping the bulk of the settlement money. Concerns were also expressed about the lack of transparency surrounding the compensation process.⁶⁷⁶

According to the last available government figures, as of October 2008, 63 per cent of the sum allocated to health victims had been paid out, while over 90 per cent had been paid to those who had suffered economic loss.⁶⁷⁷ On 19 August 2009, the government announced the suspension of the payment process because of problems of identification in the payment documents and reported identity fraud. Since the government has not provided any official information since October 2008, it is not clear how many people on the official list of victims had yet to receive their compensation when the scheme was suspended. To this day, there is no clear information about the money, how it has been spent, how much is left or how those with outstanding claims will be able to access the scheme that was suspended in August 2009.

IMPUNITY IN CÔTE D'IVOIRE

The decision, reflected in the settlement agreement between the government of Côte d'Ivoire and Trafigura, to waive the right to investigate and prosecute all Trafigura parties in relation to the dumping of the toxic waste, raises questions about the court's decision that there was insufficient evidence to proceed with the charges against the three Trafigura executives and employees. In reality, no meaningful attempt was made to prosecute any of the Trafigura executives and employees after the agreement was reached.

By waiving the right to prosecute the Trafigura parties, the government breached its international

human rights obligations to provide victims with an effective remedy, which require it to investigate and prosecute in a fair and accountable manner the crimes alleged against the parties at hand.

THE CIVIL ACTION IN THE UNITED KINGDOM

On 10 November 2006, a legal action was initiated in the UK High Court against Trafigura Limited (TBBV was joined as a party in February 2007).⁶⁷⁸ The claim was brought by more than 30,000 people from Abidjan who sought damages for personal injuries, which they alleged were caused by exposure to the toxic waste, and for economic loss. The UK law firm Leigh Day & Co undertook to represent them on a “no win no fee” basis. This essentially meant that, if their case was unsuccessful in court, the claimants would not be required to pay legal costs. Despite the large number of claimants, these 30,000 represented fewer than a third of the people estimated to have been affected by the dumping of the waste.

On 16 September 2009, almost three years after the claim was filed and just weeks before going to trial, the claim was settled out of court. Under the settlement Trafigura agreed to pay the claimants approximately £30 million (US\$49 million). Given that there were 30,000 claimants, this total amounted to approximately £1,000 per claimant.

In exchange for the compensation, a number of terms were agreed by the parties:

- There would be no admission of liability by Trafigura for the harm alleged by the claimants.
- The claimants and their lawyers would keep information and materials confidential and would not publicly comment on the case.
- Independent experts who had examined medical and other evidence would keep all their information confidential.
- The claimants’ law firm, Leigh Day & Co, would not participate in any further actions that may be brought by other victims affected by the toxic waste.

In addition, the parties agreed a joint public statement, which made a number of points about the case. It stated that:

Leigh Day & Co, in the light of the expert evidence, now acknowledge that the slops could at worst have caused a range of short term low level flu like symptoms and anxiety. ⁶⁷⁹

As children were involved in the claim, the settlement had to be approved by the court. Despite the fact that the joint statement represented a negotiated text resulting from an agreement for which the facts and underlying reasons remain undisclosed, the High Court judge took the unusual step of endorsing the overall statement, stating:

*I knew from my own reading of the papers that the experts were quite clear. The slops could not give rise to the sort of symptoms and illness which was being claimed in some of the press reports. I hope that the media will take account of the joint statement and will put things right and put things in perspective. I need say no more, except to underline that, from where I sit and from what I have seen of the [court] papers, the joint statement is 100 per cent truthful.*⁶⁸⁰

These comments by Mr Justice MacDuff, which are strong statements of conclusion, were made without the due process of a full hearing and legal argument. They were also made without consideration of the evidence that had been sealed as a result of the settlement agreement.

Confirming that this endorsement went too far and that the joint statement reflects agreed negotiated text, during the costs hearing on 5 February 2011, Master Hurst, the Senior Costs Judge, made the following comment:

*I further accept [counsel for the claimant]'s submission in relation to the agreed joint statement. It was not a judgement, nor any form of determination, but an agreed text for a public statement that was the result of a long and hard fought negotiation.*⁶⁸¹

THE LIMITS OF THE UK CLAIM

Despite the limitations of the settlement agreement process with respect to the UK claim, the settlement provided some measure of justice for those who received the individual compensation amounts. In a context in which full reparation had, up until then, been denied to most victims, and where prospects of receiving any form of compensation in the future were next to none, the outcome of the UK claim was significant. It is proof that access to the courts of the home State of multinational corporations involved in human rights abuses abroad can provide an opportunity for redress that does not exist anywhere else.⁶⁸²

However, the shortfalls of the UK claim and final settlement are also evident. The claim did not represent all the victims of the toxic dumping but rather a limited group of people who were able to produce the documentary evidence needed to back up their claim. Many people affected by the operations of companies struggle to get hold of the documents they need to pursue a legal case – this issue is discussed in the *Lack of Information* chapter in this book.

As with other settlement agreements and with civil claims more generally, the settlement focused on financial compensation only. Other key elements of remedy, such as health care provision and decontamination (or rather the money needed to pay for these), were not included in the agreement.

Furthermore, because of the case management agreement between Leigh Day and Trafigura, it was determined from the outset that the court would not consider the issue of liability (of whether Trafigura owed a duty of care to the victims of the waste and whether that duty had been breached). Of course, Trafigura made no admission of liability in the final settlement.

The settlement agreement also included a number of clauses highly detrimental to victims' rights. The broad confidentiality provisions mean that the medical expert evidence cannot be seen by other victims who were not party to the action, and cannot be challenged or used to aid effective health interventions. While they apply to the claimants and the claimants' lawyers, who agreed not to disclose any information or evidence revealed or generated by the proceedings, they do not apply to Trafigura. Independent experts who had examined medical and other evidence were similarly bound not to disclose expert findings. Despite Trafigura being able to disclose information, such as expert reports, the company has never done so.⁶⁸³ This continues to hinder the right of victims to receive information relating to the environmental and health effects of the toxic waste.

The requirement that Leigh Day & Co do not act for other victims is significant. In reality, few firms in the UK are willing to take cases of this type – on behalf of victims and against large multinationals for wrongs committed abroad.

ALLEGATIONS OF WITNESS INTIMIDATION

In early 2009, Leigh Day & Co alleged that Trafigura and its lawyers, Macfarlanes, improperly approached lead claimants in an attempt to make them change their testimonies. In particular, it was alleged that Macfarlanes paid for a claimant witness to travel to Morocco, where he was met by one of Macfarlanes' partners who questioned him for two days. The witness alleges that he was offered financial inducements to change his story and was intimidated and put under considerable pressure to do so.⁶⁸⁴ Evidence presented to the UK court by Leigh Day led the court to issue a temporary injunction in March 2009 barring the defendants' lawyers from contacting claimants in the case.

Both Trafigura⁶⁸⁵ and Macfarlanes⁶⁸⁶ denied the allegation that they acted improperly. Macfarlanes admit to having met the claimant witness in Morocco and paying for his "travel and related costs" to get there.⁶⁸⁷ But they deny having offered any inducements or having acted unethically. They stated that they had "valid and exceptional legal reasons for agreeing to meet the individual referred to", adding "we ... had the right, and indeed duty, to investigate by interviewing the claimants, as their evidence would be likely to have a fundamental bearing on the case."⁶⁸⁸

FRAUD IN THE COMPENSATION DELIVERY PROCESS

When it came to receiving their compensation awarded in the out-of-court settlement in the UK, the claimants faced further challenges. The distribution process established by the claimants' lawyers in Abidjan was derailed when a group calling itself the National Coordination of Toxic Waste Victims of Côte d'Ivoire (CNVDT-CI), falsely claimed to represent them and tried to secure control of the compensation fund.⁶⁸⁹ The group obtained a court order in Côte d'Ivoire, firstly to freeze the money and then for it to be transferred to its bank account for distribution to the claimants.⁶⁹⁰

In an effort to prevent all-out fraud, the UK law firm agreed to a joint distribution process with CNVDT-CI. The process was plagued by irregularities and, although some people were able to access their money, the process eventually came to a halt, leaving some 6,000 people unpaid. The millions of dollars remaining in the fund disappeared.

An investigation into the misappropriation of the compensation money was opened in 2011. In February 2013, the legal criminal procedure was put in front of a 'juge d'instruction'. However, no conclusion has yet been reached in relation to the compensation matter.

THE CRIMINAL PROSECUTION IN THE NETHERLANDS

In June 2008, the Dutch Public Prosecutor brought charges relating to the illegal export of waste from the Netherlands to Africa and other criminal offences against Dutch-based TBBV, Naeem Ahmed, one of Trafigura Limited's London-based employees, and Captain Chertov of the *Probo Koala*.⁶⁹¹ Also charged were APS and its director, and the Municipality of Amsterdam.⁶⁹²

Two years later, on 23 July 2010, the Dutch Court of First Instance handed down guilty verdicts

against TBBV, Naeem Ahmed and Captain Chertov.⁶⁹³ TBBV was found guilty of exporting waste to an African state in contravention of Section 18 Paragraph 1 of the European Waste Shipment Regulation (EWSR).⁶⁹⁴ TBBV and Naeem Ahmed were also found guilty of having delivered goods to APS in the knowledge that these goods were hazardous to human life and concealing the hazardous nature of the goods (contrary to s174 of the Dutch Penal Code).⁶⁹⁵ Naeem Ahmed was held to have “provided the actual supervision for this act”.⁶⁹⁶ The court found Captain Chertov guilty of being complicit in forgery under s225 of the Dutch Penal Code,⁶⁹⁷ in relation to the information provided on port documents related to the ship’s waste and complicit in the delivery of hazardous goods.

APS and its director were found to have violated the Dutch Environmental Management Act by transferring the waste back to the *Probo Koala*. However, the court also found that APS had “made an excusable error of the law” because it was entitled to rely on the advice provided by the Environmental and Buildings Departments of the Amsterdam Municipality (DMB) regarding permission to return the waste.⁶⁹⁸ On this basis, the court accepted an “absence of all guilt” defence by APS.⁶⁹⁹ Finally, the court found that the Municipality of Amsterdam was immune from prosecution.

TBBV was fined €1 million,⁷⁰⁰ and Captain Chertov was given a five-month suspended prison sentence.⁷⁰¹ Naeem Ahmed was given a six-month suspended prison sentence and a fine of €25,000.⁷⁰² The court noted that TBBV’s violation of the EWSR was “the most serious offence”⁷⁰³ and criticized Trafigura for its actions.⁷⁰⁴ The judgement highlighted: TBBV’s failure to have a proper plan for disposal of the waste when creating it; its failure to check that Abidjan possessed the proper facilities to process the waste before discharging it; and criticized the circumstances surrounding the contract with Compagnie Tommy. The judgement was particularly critical of TBBV for accepting a price of US\$35 per tonne of waste from Compagnie Tommy after having been quoted a much higher price by APS, and remarked that the solution chosen by Trafigura was made “on the basis of commercial considerations”.⁷⁰⁵

TBBV, Naeem Ahmed and the Public Prosecutor all appealed the verdict. On 1 July 2011, the Court of Appeal annulled the verdict against Naeem Ahmed on the basis that the first instance court did not have jurisdiction once the economic offences (forgery) were lifted.⁷⁰⁶ The Public Prosecutor appealed this decision. On 23 December 2011, the Court of Appeal upheld the €1 million fine against TBBV.⁷⁰⁷ Both TBBV and the Public Prosecutor filed a notice to appeal the decision to the Supreme Court.

In addition, in 2008, Claude Dauphin, Trafigura’s chairman, had been charged with a number of offences, including the illegal export of waste from the Netherlands. The charges did not progress at the time. However, on 30 January 2012, the Amsterdam Court of Appeal decided that separate legal proceedings could continue against Claude Dauphin.⁷⁰⁸ He appealed this decision.

On 16 November 2012, the Dutch Public Prosecutor and TBBV, Claude Dauphin and Naeem Ahmed reached an out-of-court settlement that ended all legal proceedings. The Public Prosecutor, TBBV and Dauphin agreed to withdraw their pending appeals to the Supreme Court. For this reason, the ruling of the Court of Appeal became final, obliging TBBV to pay the €1 million fine. In addition, TBBV agreed to pay a further €300,000 as compensation for assets acquired through the illegal export. Claude Dauphin was asked to pay a €67,000 fine, which, in the words of the Public Prosecutor, was “equal to the maximum fine that can be imposed for illegal export of waste”. Naeem

Ahmed was required to pay a fine of €25,000. In a public statement, the Public Prosecutor expressed the view that the settlement was “a fitting ending to a series of prolonged proceedings” and that the “cases will be concluded in a way that makes clear violation of international regulations for hazardous waste will not be tolerated.”⁷⁰⁹ The company stated that: “None of the executives of Trafigura have accepted any conviction, nor made any admission of liability or guilt as part of this settlement.”⁷¹⁰

LIMITS OF THE DUTCH PROSECUTION

The Dutch prosecution confirmed that TBBV acted illegally and committed breaches of European and Dutch law. It was, however, limited in that it only examined legal breaches and actions that had occurred in the Netherlands and did not address offences committed in Côte d'Ivoire. Under the Dutch penal code, a Dutch national (including a company with Dutch nationality) can be prosecuted for any act committed abroad, provided it is an offence both in the Netherlands and in the country where that act took place (“the double criminality rule”).⁷¹¹ However in pre-trial court hearings in June 2008, the Public Prosecutor made clear that he had decided not to include potential crimes committed in Côte d'Ivoire in the investigation as it “appeared impossible” to conduct an investigation in Côte d'Ivoire.⁷¹²

In 2009, Greenpeace brought a complaint against the Public Prosecutor's decision not to prosecute Trafigura (TBBV and Puma Energy International BV), Claude Dauphin and other employees for criminal offences related to the dumping in Côte d'Ivoire.⁷¹³ However, on 13 April 2011, the Court of Appeal rejected Greenpeace's complaint. The court asserted that the Public Prosecutor had a margin of discretion in deciding which offences it was in the public interest to investigate and prosecute, and that the Prosecutor has sole authority to decide which cases to pursue. The court found that Greenpeace had an “insufficiently direct interest” to request a prosecution for some of the illegal acts at stake and, therefore, lacked legal standing on these issues.⁷¹⁴

The Court of Appeal also agreed with the Public Prosecutor that it would not be feasible or expedient to investigate alleged acts in Côte d'Ivoire. To support this view, it cited the potential difficulties in gathering evidence from outside the territory,⁷¹⁵ the fact that many of the accused had already been prosecuted in the Netherlands, that there had been a prosecution in Côte d'Ivoire, and that payments had already been made under the UK civil claim and Ivorian settlement agreements.⁷¹⁶ This was despite the fact that much of the evidence was already available to the Public Prosecutor following the detailed investigation conducted into the illegal export of hazardous waste to Côte d'Ivoire. In addition, the prosecutions in the Netherlands had related to different offences from those committed in Côte d'Ivoire, and the prosecution in Côte d'Ivoire had concerned individuals and not the companies themselves. Even regarding the individuals, all charges against Trafigura executives and employees in Côte d'Ivoire had been dropped as a consequence of the Ivorian settlement agreement.

The decision of the Court of Appeal is regrettable given the obligation of the Netherlands to take responsibility for the events that took place within its territory and resulted in the illegal export of waste to Côte d'Ivoire.⁷¹⁷ The decision also restricted the ability of victims from Côte d'Ivoire to attach civil claims for damages to the criminal prosecution of Trafigura in the Netherlands.⁷¹⁸

CORPORATE NATIONALITY FOR PURPOSES OF PROSECUTION

Allegations of witness bribery by representatives of Trafigura emerged in 2010 when several of the drivers involved in dumping the waste in Abidjan contacted Greenpeace Netherlands with information and evidence.⁷¹⁹ Trafigura denies these allegations. On the basis of the evidence gathered, Greenpeace asked the Dutch Public Prosecutor to open an investigation against TBBV. In June 2012, the Public Prosecutor informed Greenpeace that they would not start investigations, stating that, while TBBV was registered in the Netherlands, it was only a formal registration for tax reasons and that actual business did not take place from the Netherlands. TBBV could not be said to have Dutch nationality (as required by Article 5 of the Dutch Penal Code) on this sole basis, and for this reason, among others, “any connecting factor for jurisdiction of the Dutch courts” was lacking.⁷²⁰

This view appears to suggest that a company can be considered a Dutch entity for some purposes but not for others. But Article 51 of the Dutch Penal Code explicitly states the Code is applicable to natural as well as legal persons. The Penal Code also covers the parameters under which crimes committed abroad may be subject to Netherlands jurisdiction, stating in Article 5 that the Code applies to nationals of the Netherlands who commit crimes abroad.

The prosecutor’s view appears to apply a restrictive interpretation of Article 5 as referring only to natural persons and legal persons who carry out some commercial activity in the Netherlands. Where corporate accountability for human rights abuses is concerned, this position is problematic. If this were the case, Trafigura, and companies like it, would have the tax and other benefits offered by the Netherlands while remaining immune from prosecution for acts for which other legal and natural persons in the Netherlands could be held to account.

Amnesty International and Greenpeace have argued that a company incorporated in the Netherlands must be said to have Dutch nationality; jurisdiction over a legal person cannot hinge on the level of that entity’s activity in the country.

THE UNITED KINGDOM’S FAILURE TO INVESTIGATE

UK-based Trafigura Limited was directly involved in key decisions relating to the caustic washing, the delivery of the waste to Amsterdam and the subsequent delivery of the waste to Côte d’Ivoire. The involvement of the UK company raises questions about whether illegal actions were carried out within the UK’s jurisdiction. Although there has been a call in parliament for an investigation into the issues, no such investigation has been opened. Amnesty International and Greenpeace consulted a lawyer whose view is that there is sufficient evidence in the public domain to investigate whether Trafigura Limited was complicit in or facilitated the dumping of hazardous waste.

THE TOXIC TRUTH

In September 2012, Amnesty International and Greenpeace released the report, *The Toxic Truth - About a Company Called Trafigura, A Ship Called The Probo Koala, and The Dumping Of Toxic Waste in Cote D’Ivoire*, which contains an in-depth account of the facts and failures relevant to this case study as well as the struggle for justice pursued by the victims. On 15 August 2012, Amnesty International contacted TBBV to present our findings and conclusions. On 27 August 2012, TBBV

responded disagreeing with these. The company's full reply can be found at: www.trafigura.com/media-centre/probo-koala/statements/26659/?lang=GBR. A full copy of their response can also be located in Annex 1 of this report.

THE REMEDY

The events involved in the toxic waste dumping were truly transnational in nature. The generation, transport and dumping of the toxic waste spanned the world and the waste was transported by Trafigura from the Mediterranean to the Netherlands, to Estonia, to Nigeria and to Côte d'Ivoire. The effects of this illegal transport of the waste by Trafigura and the dumping of the toxic waste by Compagnie Tommy, the agents of Trafigura, were borne by the people of Abidjan whose rights to health, including a healthy environment, and work were abused as a result.

The States involved, notably the Netherlands and Côte d'Ivoire, but also others, failed not just in preventing the illegal transboundary movement and dumping of toxic waste, and in regulating a multinational company to ensure that it did not abuse these international standards, but also failed in collectively providing an effective remedy to the victims whose human rights were abused by Trafigura. The abuses were transnational but the remedies were not and the victims and groups working on behalf of the victims have had to go from pillar to post in Côte d'Ivoire, in the Netherlands, and in the UK, seeking justice and effective remedies.

What they have faced are multiple barriers to remedies, and piecemeal processes which only look at part of the story and which place the onus on victims to prove the abuses and to even enforce the remedies and claim the compensation that they were awarded.

The Netherlands and Côte d'Ivoire also failed to engage in international cooperation with each other to ensure effective remedies for the victims, including through prosecution and a full investigation of Trafigura for its illegal acts across multiple jurisdictions. There was a total absence of co-ordination and international cooperation to prosecute those responsible for the criminal acts in Côte d'Ivoire. Criminal charges were only ever brought against executives and employees of the Trafigura Group in Côte d'Ivoire, but not against the corporate group. Options to prosecute Trafigura executives and employees who acted in a decision-making capacity were also not properly exercised because of the terms of the settlement reached between the government and Trafigura and the departure of the concerned individuals from the country. No other State has pursued prosecutions against any of the corporate entities involved in the criminal acts in Côte d'Ivoire. This means that, up to now, the Trafigura Group is yet to be prosecuted for their involvement in the illegal acts that unfolded in Côte d'Ivoire.

The success of the UK claim was partial, as it dealt only with a narrow question of causation and reached settlement without any admission of liability by Trafigura. No State officials in the Netherlands or Côte d'Ivoire have been held accountable for their failures. The Dutch prosecution, though to some extent successful, was limited in scope and has provided no avenue for victims to seek compensation. In addition, no prosecution has yet been brought against UK-based Trafigura Limited, despite its executives making key decisions which led to the dumping of the waste in Côte d'Ivoire.



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Protesters outside the Dow headquarters in Mumbai demonstrate against the continued contamination of the old Bhopal factory site, December 2002.

4/THE OBSTACLES

INTRODUCTION

All four case studies featured in this book illustrate a number of obstacles to justice and reparation. These obstacles represent problems that are encountered by victims of corporate-related human rights abuses across the world.⁷²¹ They range from practical problems, such as difficulties in finding legal representation or lacking the financial means to pay legal costs and fees, to legal obstacles and jurisdictional challenges such as the *forum non conveniens* doctrine.⁷²²

Drawing from the case studies, this book will focus on three key categories of corporate-related obstacles to remedy. Amnesty International has selected these obstacles because they were not only significant in these particular cases, but also because they appear to be recurrent, prominent and often decisive in securing justice and reparation generally in cases of corporate human rights abuses.⁷²³

These three key categories of obstacles are:

- The **legal hurdles to extraterritorial action**, particularly the issue of parent company liability and the application of the principle of *forum non conveniens*.
- The **lack of information** that is essential to support a claim and obtain adequate reparation.
- **Corporate-state relationships**, being the power and influence of multinational corporate interests that result in governments being unable or unwilling to hold corporations to account.

Chapter 1 of this section will focus on the first category: legal hurdles to extraterritorial action. Before delving into this in-depth analysis, the corporate form and structure are briefly discussed, as well as the enabling legal environment and prevailing theories of parent company liability. These provide the background context for considering the modern day corporate human rights abuse paradigm, as well as for devising strategies to overcome obstacles and improve access to remedy. This is followed by an examination of the specific obstacles, drawing on the case studies.

Chapter 2 of this section focuses on the issue of lack of information, and Chapter 3 on the issue of corporate-state relationships.



Lawyers for Trafigura at the district court of Amsterdam for proceedings resulting from the illegal export of waste in 2006 from the Netherlands to Cote d'Ivoire, 1 June 2010. Increasingly, cases of human rights abuses involving multinational corporations are being brought to court in the company's home State.

1/LEGAL CHALLENGES

1. CORPORATE STRUCTURE AND LEGAL STATUS

Suing a corporation for its alleged involvement in human rights abuses can be very challenging. Many corporations today act through a network of separate entities often located in different national jurisdictions and carrying out the same or complementary operations. These multinational corporations can operate through a chain of wholly-, majority- or minority-owned companies. Some operate through franchises, distribution agreements or joint ventures with other companies (which may themselves be members of a separate corporate group). Others operate through a network of branches that respond to a centralized decision-making office or headquarters.

These networks of entities and arrangements, and the way in which they interrelate, can be transparent or highly opaque. This is a particular issue when a group is privately held and operates through a variety of shell companies, using nominee shareholders, or jurisdictions that do not provide publicly accessible details of directors and beneficial owners. In these instances, an individual affected by the operations of entities involved in these networks or arrangements would face additional difficulties in obtaining a remedy. Lines of command and control within and between the arms of the multinational corporation are often obscure and deliberately blurred.⁷²⁴

1.1 COMPLEX CORPORATE STRUCTURES

One of the most common ways in which multinational corporations are structured is through separately incorporated but interconnected companies, based in two or more national jurisdictions. Control is usually exercised over these companies through the ownership of all or a majority of their shares, with the voting rights generally being proportionate to the number of shares owned. Where a company (the parent company) holds all or a majority of the shares in another (the subsidiary), this will typically give it a deciding vote in those decisions of the subsidiary that are reserved for the shareholders and therefore the ability to control key aspects such as the appointment and removal of directors who manage the day-to-day operations of the subsidiary.⁷²⁵

The possible control arrangements within a corporate group are, however, diverse. This reflects the sophistication of national legal systems, which have evolved to allow these variations – largely for taxation, financial reporting and other related purposes. While a majority shareholding commonly gives one company control over another, companies with a minority share (or sometimes no shares at all) can also maintain control over other members of the group or aspects of their activities through other arrangements. For example, control relationships within corporate groups can be established through intra-group managerial or operational arrangements, whereby members of the group are placed under the supervision or management of another company within that group,

even though they might not be connected through any shareholding.⁷²⁶ Control can also derive from contractual or other arrangements, granting one company such prerogatives as the right to appoint another company's directors or key managers.⁷²⁷

Whatever the arrangements, most multinationals tend to operate as a single economic unit, strategically co-ordinated, managed and controlled by one or a small number of entities within the group. Furthermore, to the layperson, affected individual or community, these multinationals would be described and/or recognized as one mega company operating with a global reach, across borders. Controlling relationships are often not apparent, and it takes considerable examination of the corporate structure to disentangle them.

This book focuses primarily on the relationship between different entities within a multinational group and the responsibility of the parent or controlling company for the acts or omissions of the entities under their control. The term “parent” company in this book is used in a broad sense to refer not only to shareholders with decision-making power that hold all or a majority of the shares in a company but also to “controlling” companies – that is, companies that, for whatever reason, exercise effective control over the activities of another member of the corporate group, whether through shares or other arrangements.⁷²⁸

1.2 THE PRIVILEGES OF THE CORPORATE FORM

The corporation typically enjoys a number of legal privileges and protections under most, if not all, developed legal systems around the world. The rationale, as established under company law, is to provide a business advantage – to encourage economic activity while reducing risk to those who invest in the business. Under the doctrine of “separate legal personality” or the “corporate veil”, a shareholder is considered to be distinct and separate from the company in which it owns shares.

This holds true even if it controls all or a majority of the shares in that company. Under the doctrine of “limited liability”, a shareholder will also not be liable for that company's own debts and liabilities (and shareholder liability is therefore limited to the amount paid by the shareholder for its shares in that company).

These principles apply whether the shareholder is a corporation or an individual. In a corporate group it means that, even though they may own shares in each other, each separately incorporated member within the group is considered a distinct legal entity, which holds and manages its own separate liabilities. The liability of each parent company for the debts and liabilities of each subsidiary is limited to the amount it paid for its shares in that subsidiary. The effect of these doctrines is that the liabilities of one member of a corporate group will not automatically be imputed to another, merely because there is an equity relationship between them.

The privileges attaching to the corporate form may have been historically justified as serving a public purpose: the ability of individuals to invest their capital in a company while remaining protected from its liabilities provided the necessary incentive for individuals to take risks and invest in those companies and for those companies to grow, bringing innovation and progress to societies. However, these privileges and protections have become open to abuse in modern times. As demonstrated in the case studies, corporate actors have used their form to evade liability for social

wrongs, including human rights abuses.

The doctrines of “separate legal personality” and “limited liability” are deeply rooted in company law in both common and continental law systems.⁷²⁹ Unless there is a specific legislative exception,⁷³⁰ judges and regulators tend to apply them strictly. Companies routinely use these doctrines as a challenge or defence against court claims,⁷³¹ to limit their contractual obligations and even as an argument to deflect public criticism.

1.3 THE LIABILITY OF THE PARENT OR CONTROLLING COMPANY

There are many reasons why individuals may seek to hold the parent or controlling company of a multinational group liable for human rights abuses in a host State caused by, or involving, its subsidiaries, by bringing a case before the courts of the parent company’s home State. For example, the parent may have been actively involved in the abuses (for instance by giving orders or instructions); they may have contributed to the abuses by failing to exercise reasonable oversight, develop preventative measures or act when problems came to light; abuses may have been carried out on their behalf; or they may have benefited from abusive practices. In such cases the parent may be considered the proper defendant to the claim and/or jointly liable with its subsidiary.

There are also practical reasons for bringing a claim against a parent company in its home State rather than against the subsidiary in the host State where the abuse occurred. As the main office, the parent company may have a fixed, longer-term presence; it is likely more substantial in size, investment and equity. By contrast, local operations can dissipate assets and disappear quickly, without a trace, thus leaving plaintiffs in the host State without recourse for legal justice. In the case of Bhopal, for example, it was clear that Union Carbide India Limited (UCIL)’s assets in 1984 were insufficient to meet the scale of reparation required by those affected by the gas leak.⁷³²

Technically, plaintiffs can launch proceedings against the parent company in the courts of the host State where the abuse occurred. However the prospects of securing justice and reparation against a foreign corporate defendant – particularly where the host State is a developing economy – may be bleak. A range of practical and legal obstacles exist. For example, the parent company may not be subject to the court’s jurisdiction in the host State.⁷³³ Or much of the documentary and other evidence required to prove the liability of the parent company may not be located in the host State, but in the home State. In these circumstances, plaintiffs, lawyers and courts in the host State would struggle to get hold of this evidence. The challenges are well exposed in the Bhopal case: in ongoing civil and criminal cases the US-based Union Carbide Corporation (UCC) has been able to evade Indian jurisdiction by remaining outside the US and by removing assets from India (see the heading *The criminal case in India* in *The Bhopal gas leak disaster in India* case study in this book).

Plaintiffs’ choice to bring a legal action in a company’s home State courts may also be based on an assessment that they are more likely to achieve justice and reparation in the home rather than the host State. This is particularly the case where the host State’s justice system suffers from corruption, inefficiency, severe delays, lack of independence or other factors that undermine justice. By contrast some home State courts may offer procedural advantages, such as the possibility of

forming a class action,⁷³⁴ or financial support, such as access to legal aid or the option to be represented on a “no-win, no-fee” basis,⁷³⁵ which are not available in the host State.

Plaintiffs may also believe that they are more likely to be awarded a substantial amount of compensation and that the judgment is more likely to be enforced if they pursue action in a company’s home State. They therefore see it as in their best interests to pursue action against the parent company in the home State.

In addition to the legal and practical reasons to pursue a claim in the home State of the parent or controlling company, there is also the consideration of the meaningful accountability of multinational corporations. As the cases referred to in this book demonstrate, parent companies can benefit from and substantially control the operations of subsidiaries or joint ventures but can evade accountability when things go wrong. They do this by closing off or evading the jurisdiction of courts: in Bhopal, Ok Tedi and Côte d’Ivoire the parent companies did deals with the host State government and secured immunity from civil and criminal action (see the heading *The legal action in India and the 1989 settlement in The Bhopal gas leak disaster in India* case study; the headings *The Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995: no right to sue OTML and OTML’s environmental findings and new legal actions in Australia* in the *Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study; and the heading *The settlement agreement between Côte d’Ivoire and Trafigura* in *The toxic waste dumping in Côte d’Ivoire* case study in this book).

Only in the Côte d’Ivoire case was there some action to hold Trafigura to account, and this action was in two European countries – the Netherlands and the UK – where Trafigura is registered and has its coordinating office (see the heading *The struggle for justice in The toxic waste dumping in Côte d’Ivoire* case study in this book).⁷³⁶

The prospect of an adverse legal finding provides an incentive for the parent or controlling company to put systems and measures in place to ensure that no human rights abuses occur in the context of their worldwide operations. This could be one of the most significant factors in bringing about effective global corporate accountability.

1.4 THEORIES OF LIABILITY

A number of legal theories exist which could be used to attribute liability to a parent company. As a means of differentiating between those theories, this book refers to them under the shorthand of primary liability, secondary liability and piercing the corporate veil.⁷³⁷ To assert the civil liability of a parent company for human rights abuses arising in the context of its subsidiaries’ operations, courts and regulators will generally look for exceptional circumstances and require high thresholds of evidence.⁷³⁸ This places a heavy burden on individuals and communities seeking to hold the parent company accountable for such abuses. In addition, the legal standards to assign liability to a parent company remain undeveloped in many jurisdictions.

1.4.1 Primary and secondary liability

It could be argued that a parent company is liable on the basis of its “primary” role in the relevant wrongdoing.

What needs to be proved in order to hold a parent company liable on this basis will vary across national legal systems. One route (which has been used in the English courts) is to bring a so-called “direct negligence” claim against a parent company on the basis that the parent company itself (as opposed to any of its subsidiaries) owed a “duty of care” to the plaintiff and that this duty has been breached.⁷³⁹ In some cases, the existence of a duty of care is well established – for example in the relationship of employer and employee or doctor and patient. However, a subsidiary’s duty of care (for instance, the duty of care owed by a company operating a factory that pollutes the environment) will not automatically be imputed to a parent company. In these cases, therefore, the plaintiffs must prove that the parent company owed a duty of care to those affected by its subsidiaries’ operations by reference to applicable legal provisions or tests within the relevant national legal system.⁷⁴⁰

Some significant national court decisions have been issued which recognize that a parent company can have a duty of care to individuals affected by the operations of a subsidiary.⁷⁴¹ One such decision before the English courts is *Chandler v. Cape plc*,⁷⁴² a direct negligence claim against a UK parent company, Cape plc, for harm caused by asbestos exposure at a factory of its UK subsidiary, Cape Products. The Court of Appeal found that, under the specific circumstances of the case, Cape plc owed a duty of care towards employees of its subsidiary (Cape had essentially already admitted that, if it did owe a duty of care, that duty had been breached).⁷⁴³ Giving the leading judgment in the claimant’s favour, Lady Justice Arden stated:

*In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees.*⁷⁴⁴

The Court of Appeal thus confirmed the findings of the High Court, which, in April 2011, had concluded:

*The Defendant employed a scientific officer and a medical officer who were responsible, between them, for health and safety issues relating to all the employees within the group of companies of which the Defendant was parent. On the basis of the evidence as a whole it was the Defendant, not the individual subsidiary companies, which dictated policy in relation to health and safety issues insofar as the Defendant’s core business impacted upon health and safety. The Defendant retained responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos. In reaching that conclusion I do not intend to imply that the subsidiaries, themselves, had no part to play, certainly in the implementation of relevant policy. However, the evidence persuades me that the Defendant retained overall responsibility. At any stage it could have intervened and Cape Products would have bowed to its intervention. On that basis, in my judgment, the Plaintiff has established a sufficient degree of proximity between the Defendant and himself.*⁷⁴⁵

While *Chandler v. Cape* is an English tort case, it has been used to support human rights-related

cases in other jurisdictions including civil law jurisdictions. For example, the decision was used by the plaintiff in the *Oguru* case before the Dutch courts to argue that Royal Dutch Shell plc owed a duty of care to the plaintiff.⁷⁴⁶

It could also be argued that a parent company is liable on the basis of its “secondary” role in the relevant wrongdoing.

For example, both the English and US courts recognize that a person may be liable for “aiding and abetting”, “conspiring in”, “inducing”, “assisting in” or “authorizing” a tort committed by another.⁷⁴⁷ In civil law jurisdictions, such as the Netherlands, a person can be sued in tort for committing a “tortious act” against another (see Article 6:162 of the Dutch Civil Code). Under this Article of the Dutch Civil Code, a “tortious act” includes a breach of a “statutory duty”. Under the Dutch Criminal Code, it is an offence to induce others to commit a crime or to be complicit in or assist a crime. Article 51 of the Dutch Criminal Code confirms that, in principle, a legal person can commit any of the offences in the Criminal Code. On a broad interpretation of “statutory duty”, and provided the other requirements for establishing a tort are met, a parent company could be sued in tort for inducing or assisting its subsidiary to commit a crime.

It has also been argued before English and US courts that a parent company should be “vicariously” liable for the acts of its subsidiary on the basis that the subsidiary was acting as its “agent”.⁷⁴⁸ Vicarious liability is a tort doctrine that imposes liability on one person for the failure of another (even though the former was not at fault) because of a special legal relationship between the two (such as that of employer and employee). As such, under this legal principle, if the negligence of the “agent” (in this case, the subsidiary) is proven, liability would be automatically imputed to the parent as “principal” (it would not therefore require a finding of “fault” on the part of the parent company). However, the judicial tests for “agency” are very stringent and will be found to arise only in exceptional circumstances. A subsidiary trading on its own account, with the power to make its own business decisions, would not fall within the definition of an “agent” for these purposes. Furthermore, while it has gained more traction before US courts, it is not yet a well established legal principle under either English or US law that a principal is automatically vicariously liable for the acts of its agent.⁷⁴⁹

This principle of “no fault” liability is well established in civil law jurisdictions. For example, a combined reading of Articles 43 and 1113 of Argentina’s Civil Code provide for the liability of legal persons for damage caused by their “dependants”. There is no need for a finding of fault on the part of the legal person and, for this reason, this is considered a form of “objective” liability. “Dependants” has been interpreted as including a company’s employees, agents and other representatives who act under the instructions or direction of the company.

“Primary” and “secondary” liability are theories for circumventing rather than piercing the corporate veil (in the sense that, even in the case of vicariously liability for example, the separate legal personality of the companies is still respected). The following section discusses theories for piercing the corporate veil (in the sense that the separate legal personality of the parent company and subsidiary is completely disregarded) as well as certain statutory exceptions to the corporate veil and limited liability doctrines.

1.4.2 Piercing the corporate veil

There may be exceptional circumstances under which the corporate veil is disregarded completely by the courts, and the subsidiary and the parent company treated as one and the same for the purposes of the relevant liability. This approach received support in the case of the Bhopal gas leak disaster in a 1988 decision of the High Court of Madhya Pradesh. Here, the judge cited “equitable considerations” in favour of a lifting of the corporate veil to increase the victims’ chances of being able to recover the sums needed to meet their claims.⁷⁵⁰

Specific national laws have created legislative exceptions to the corporate veil and limited liability. For example, in certain circumstances, national insolvency laws allow for a parent company to be held liable for the debts of its subsidiaries. Under the New Zealand Companies Act 1993, for instance, the courts have the discretion to make orders requiring contributions from other group members based on factors such as the extent to which those other companies were involved in the management of the insolvent company, and to which their own conduct gave rise to the insolvency.⁷⁵¹ Under UK insolvency law, a parent company can be made liable for the debts of an insolvent subsidiary where it has been shown to have acted as a “shadow director”.⁷⁵² Under the German Joint Stock Corporation Act 1965, a parent company may be jointly liable with its controlled subsidiaries for the debts of its subsidiaries.⁷⁵³

Such legislative exceptions to the corporate veil and limited liability are also used to avoid fraud or injustice. For example, under Argentina’s company law, shareholders cannot use the corporate veil as a defence when a company in which they hold shares has been used as a means to breach the law, public order or the good faith or rights of third parties. If these circumstances are proven, the shareholders or controlling company may be liable for the harm caused. In South Africa, the Companies Act creates exceptions to limited liability for reckless or fraudulent actions. In China, company law establishes that shareholders who abuse their rights must compensate the company or other shareholders for any losses caused by such abuses, and that shareholders who use a company to try to avoid debts will be held jointly and severally liable for the company’s debt.⁷⁵⁴

As to piercing the corporate veil, “enterprise” or “group” liability theories have been raised in various jurisdictions to try to persuade the courts to disregard completely the separate legal personality of a parent company and its subsidiaries. For example, under the US ‘alter ego’ doctrine, a court could disregard the legal barriers between parent and subsidiary if, firstly, there is such a unity of interest and ownership that the separate personalities no longer exist and, secondly, if failure to disregard the separate personalities would result in fraud or injustice.⁷⁵⁵

It has also been argued that, where the activities of a corporate group are highly integrated and interconnected (to the extent that each unit can be seen as performing a function conducive to realizing the group’s common economic purpose), then it may be appropriate to disregard completely the formal separation between the units and impose liability on the parent, regardless of which members of the group were actually responsible.⁷⁵⁶ The practical effect would be that a judgment could be enforced against the parent company, and liability would not be limited to those companies directly involved in the wrongdoing.

There have been cases in which courts have been prepared to apply “enterprise” concepts in

order to hold a parent company liable for the acts or omissions of its subsidiaries.⁷⁵⁷ In the *Amoco Cadiz* oil spill case, the US parent company, Standard Oil Co, was found liable for environmental damage caused by a subsidiary's oil spill off the coast of France. Judge McGarr of the US District Court of Illinois said:

*As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploitation, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities ... Standard exercised such control over its subsidiaries... that those entities would be considered to be mere instrumentalities of Standard. Furthermore, Standard itself was initially involved in and controlled the design, construction, operation and management of Amoco Cadiz and treated that vessel as if it were its own.*⁷⁵⁸

However, there is generally a lack of support in case law for piercing the corporate veil on the basis of these doctrines.

2. LEGAL HURDLES TO EXTRATERRITORIAL ACTION

Increasingly, cases of human rights abuses that involve multinational corporations are being brought to court in the company's home State, or States other than the one where the victims suffered harm.⁷⁵⁹ This is commonly referred to as "extraterritorial action".

While there are clear reasons to bring such cases (see *The liability of the parent or controlling company* above), the challenges of pursuing legal action against a parent company in its home State are considerable. The legal standards to assign liability to controlling members of the corporate group remain undeveloped in many jurisdictions. Finding legal representation is an enormous challenge, as is securing access to information held by the company and to experts to support legal actions. Furthermore, if people manage to gather the necessary resources, find appropriate legal representation and successfully launch a legal claim in a foreign jurisdiction, their claim may still be dismissed on preliminary grounds before there is a chance to discuss its merits. In those scenarios where legal action in the home State may have been the only remaining route to seek justice and reparation, as illustrated in the cases featured in this book, dismissal of the claim may, in practice, end all hopes for remedying the abuses caused by the multinational corporation.

2.1 THE CORPORATE VEIL

As noted earlier, the doctrine of "separate legal personality" is widely accepted in both common and civil law systems. As the cases discussed in this book demonstrate, parent company control and influence over a subsidiary or joint venture can be clearly evident in documents and practice. Despite this, only in exceptional circumstances have courts disregarded the corporate veil completely and imposed liability on the parent company.⁷⁶⁰

Beyond these narrow circumstances, the plaintiffs must instead rely on statutory exceptions or circumvent the corporate veil by demonstrating that the parent company is liable on the basis of “primary” or “secondary” liability, as discussed above. For example the claimant could attempt to prove that the parent company owed a duty of care to people affected by the subsidiary’s acts or omissions. The concept of duty of care is reasonably well developed in most common and civil law countries. However, the idea of a duty of care falling on a corporate actor for the acts of its subsidiary is far less developed. While this has been accepted in some cases, there is little clarity as to what a plaintiff would need to establish to persuade the court to find that a duty of care exists and circumvent the corporate veil. Too few such cases have been considered fully by the courts and therefore there is only limited jurisprudence on the issue.

2.1.1 The Omai case

In the Omai litigation in Canada, Cambior raised the corporate veil defence to contest the jurisdiction of the Québec Court (see the heading *Canadian lawsuit initiated in the Cyanide spills: The Omai Gold Mine dam rupture in Guyana* case study in this book). The company argued that it was not responsible for any acts of negligence by its subsidiary Omai Gold Mines Limited (OGML), because Cambior and OGML were not “one and the same”.⁷⁶¹ They justified this on two grounds: that responsibility for the design, construction and management of the mine, including the tailings pond, rested with OGML; and that Cambior did not make the principal decisions affecting the daily operations of the mine. However, some of these statements are inconsistent with how the group was structured and managed.

Under OGML’s Articles of Association, Cambior had the right to appoint and modify the majority of board members and to designate the board’s Chair and Deputy Chair.⁷⁶² Significantly, Cambior was also the appointed manager of OGML and its operations in connection with the mine for as long as OGML continued to operate the mine (or Cambior resigned or ceased to hold a majority of the shares in OGML).⁷⁶³ So although shareholders are not normally allowed to carry out day-to-day managerial functions, Cambior could do so in its capacity as appointed manager. This included extensive powers, such as assisting:

*the officers and other employees of the Company in the management, direction and control of Operations and of all day-to-day activities related to the conduct of Operations.*⁷⁶⁴

Cambior argued that, despite being OGML’s majority shareholder and “managing member”,⁷⁶⁵ OGML operated as a distinct corporate entity and although Cambior appointed four of the six members of OGML’s board (frequently an indicator of effective control over a subsidiary), each was required to act in OGML’s best interest.⁷⁶⁶ The company further argued that:

*no matter what the written documentation says, as [OGML] evolved, it acquired the personnel, expertise and ability which allowed it over time to assume the duties which the mineral agreement assigned to Cambior.*⁷⁶⁷

The plaintiffs used the following arguments, among others, to assert that Cambior was liable: Cambior had financed the mine's economic feasibility study containing a basic design concept for the tailings pond, which later failed; Louis Gignac was president and chair of the board of both Cambior and OGML; and Louis Gignac made all strategic decisions relating to OGML's operations.

The Québec Court said that available evidence “might enable the court to draw certain preliminary conclusions regarding Cambior's liability as principal, for the acts of [OGML], as agent”.⁷⁶⁸ However, it concluded that it would be premature and unfair to do so at a stage where the issue under consideration by the court was the most appropriate forum to hear the case. As this and all subsequent claims attempted against Cambior were eventually dismissed for jurisdictional reasons, the question of Cambior's liability was never examined and decided upon by the court.⁷⁶⁹

2.1.2 Union Carbide Corporation and Bhopal

US-based UCC has consistently claimed that it cannot be held accountable for the gas leak at Bhopal since it exercised no control over its Indian subsidiary, UCIL, which, it claims, operated the Bhopal plant independently (see the headings *UCC's Forum objections* and *The legal action in India and the 1989 settlement* in *The Bhopal gas leak disaster in India* case study in this book). UCC has pursued this line to reject both legal claims and public criticism.⁷⁷⁰ However, UCC's position conflicts with the ample available evidence showing its extensive managerial and operational control over UCIL at the time of the disaster. This evidence ranges from UCC's own written policies to its global management practices at the time of the disaster and written agreements with UCIL.

UCC pursued a policy of control over its subsidiaries. UCC's Corporate Charter stated:

*The UCC management system will be designed to provide centralized integrated corporate strategic planning, direction and control; and decentralized business strategic planning and operating implementation.*⁷⁷¹

UCC's Corporate Policy Manual spelled this out even more explicitly:

*Except for certain special situations, it is the General Policy of the Corporation to secure and maintain effective management control of an affiliate. Normally this is accomplished through ownership of 100% of affiliate equity where this is consistent with the laws, policies, and customs of the host country.*⁷⁷²

A December 1973 finance plan attached to the proposal to set up the methyl isocyanate (MIC)-based chemical plant in Bhopal reveals UCC's efforts to retain an equity holding in UCIL that would guarantee the parent company effective control over its subsidiary:

This proposal is subject to the success of these negotiations... Our specific objective is not to accept any conditions which would reduce our equity below 51%.⁷⁷³

UCC held 50.9 per cent of UCIL.

UCC exercised control over UCIL through board arrangements. UCIL reported to Union Carbide Eastern (UCE), which was a wholly-owned subsidiary of UCC based in Hong Kong but incorporated in Delaware, United States. UCE in turn reported to UCC. Some UCIL divisions reported to product line management of UCC: the Bhopal plant reported through Union Carbide Agricultural Products Company (UCAPC), another wholly owned subsidiary of UCC based in the United States.⁷⁷⁴ The chair of UCE, who was also a corporate vice-president of UCC, and three officials of UCE were on the board of UCIL. Another executive vice-president of UCC and member of its executive management committee in Connecticut also sat on UCIL's board.⁷⁷⁵ These executive arrangements enabled UCC to heavily influence, if not completely control, UCIL's management decisions.

UCC was responsible for the design, and technical and operational control of the Bhopal plant.

A 1973 UCE Memorandum on the MIC plant proposal notes:

To the extent feasible UCC will provide the necessary technology and process design and will review any technology developed outside UCC. In addition to responsibilities for these activities, UCC has also agreed to start up support and training outlined in this proposal.⁷⁷⁶

The memorandum clearly indicates that, from the very outset, the project was to rely on UCC for technical and design support, and that UCC would also review any technology developed by UCIL. UCC's plant in West Virginia in the United States served as the model for the MIC plant in Bhopal, and experts in West Virginia provided the technical support required to set up and run the Indian plant.⁷⁷⁷ Former UCIL employees also confirmed the extent of operational control that UCC exercised over UCIL's plant. One of them stated:

To my personal knowledge, each design modification and every significant change in operating procedure at UCIL was ratified and approved by Union Carbide officials in the United States ...Unlike the Sevin plant, most of the equipment and instruments of the MIC plant were imported from the United States. Senior plant personnel had been given training in the Institute plant in West Virginia.⁷⁷⁸

Another former UCIL employee said:

Any design change made in India had to be approved by the US. Any change in material of construction of various equipments had to be approved because, you see, they had experience in dealing with MIC – we didn't. We were dependent on them for recommendations.⁷⁷⁹

Foreign Collaboration Agreement between UCC and UCIL. In 1973, UCC and UCIL entered into a Foreign Collaboration Agreement, comprised of a Design Transfer Agreement and a Technical Services Agreement for the manufacture of MIC-based pesticides.⁷⁸⁰ In mid-1982, UCIL applied for a renewal of this agreement. The application shows UCIL's dependence on UCAPC and UCC in key technical and operational areas:

Manufacture of MIC is known to involve some extremely hazardous processes with complexity in areas of efficiency, material balance, corrosion and safety. In view of this we have to work more closely with the foreign experts towards assimilating technology inputs. [W]e need continued assistance from UCAPC ... As a result of experience in handling toxic chemicals over several years, UCAPC could develop effective procedures and facilities on Plant safety. Current knowledge and experiences in handling highly toxic materials will be continuously available to UCIL. Highly professional activities are involved in dealing with emergency situations like toxic gas release sometimes accompanied with fire endangering the safety of the community. Continuous availability of data in this area will assist UCIL in fully protecting the plant personnel and properties.”⁷⁸¹

UCIL's application for renewal was accepted by the government of India, and the Foreign Collaboration Agreement was in effect at the time of the gas leak in December 1984.

In dismissing the Bhopal case from the US courts on the grounds that the Indian courts were the most suitable forum (to whose jurisdiction UCC must consent to submit), the US District Court for the Southern District of New York stated that it “expressly declines to make findings as to actual liability at this stage of the litigation”.⁷⁸²

However, an interesting precedent was set by the Madhya Pradesh High Court which, in ruling that UCC was liable to pay interim relief, found that UCC had real control over UCIL; as such, it was “absolutely liable” (due to the inherently hazardous nature of the activity) to pay compensation.⁷⁸³ As we saw in the Bhopal case study, this decision was appealed, and the 1989 out-of-court settlement ended the proceedings before a final resolution on the matter could be reached. In deciding the criminal culpability of UCIL in the ongoing criminal proceedings in Bhopal, the Chief Judicial Magistrate stated:

Before discussing the detailed evidence adduced by the prosecution in this case it is very much relevant to point out the facts which are either not disputed, or, are, at this stage, beyond the pale of controversy...

UCC USA has been a majority shareholder with 50.9% in the UCIL Bhopal. UCC had nominated its own director to the Board of Directors of the UCIL and was exercising financial, administrative and technical control over the UCIL.”⁷⁸⁴

The US and Canadian courts dismissed the Bhopal and Omai cases on the basis of forum

principles. The fact that such cases do not progress to the merits stage is one of the reasons why understanding of the parameters of parent company liability in relation to subsidiaries is so limited. This issue is explored in the next section.

2.2 EXERCISING JURISDICTION: FORUM PRINCIPLES

In extraterritorial claims against parent companies, the jurisdiction of its home State courts needs to be established. It is well established that States can exercise jurisdiction over individuals or companies that are nationals of that State. Tests of “corporate nationality” can vary from country to country, and from context to context, but for the purposes of civil litigation, corporate nationality is generally defined by reference to the “place of incorporation” or the “real seat” of the company.⁷⁸⁵

However, the fact that a court has jurisdiction does not mean that it will exercise it in practice. In a number of jurisdictions, civil claims against parent companies for their alleged involvement in, or responsibility for, harms suffered abroad continue to be vulnerable to dismissal on grounds such as *forum non conveniens*. Other common grounds to dismiss a claim are the “Act of State”,⁷⁸⁶ the “Mozambique”⁷⁸⁷ and the “International Comity”⁷⁸⁸ doctrines, which together with *forum non conveniens* affected the determination of the Bhopal, Omai and Ok Tedi claims featured in this book (see the heading *UCC’s Forum objections* in *The Bhopal gas leak disaster in India* case study; the heading *Canadian lawsuit initiated* in the *Cyanide spills: The Omai Gold Mine dam rupture in Guyana* case study; and the heading *The legal action* in the *Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study in this book). This section will focus primarily on the issue of *forum non conveniens*, since its use was so decisive in two of the cases covered.

Forum non conveniens is a doctrine that allows courts to decline jurisdiction on the basis that the venue chosen by the plaintiff is not the most appropriate one for the proceedings. The doctrine exists only in common law countries and is not used in civil law countries.⁷⁸⁹ However, because such a high proportion of multinational corporations are based in common law countries, it represents a significant hurdle for victims of corporate human rights abuses who wish to bring a claim against a parent company in its home State. When a claim is dismissed on *forum non conveniens* grounds, the plaintiffs can, in theory, re-launch their claim in another court – most likely the domestic courts of the country where the harm occurred (if they have not already done so).⁷⁹⁰ However, as shown by the Omai and Bhopal cases, the assumptions underpinning the dismissal of claims on the grounds of *forum non conveniens* can be erroneous and leave plaintiffs with no possibility of securing an effective remedy.

Most European Union (EU) countries which share a civil law tradition do not recognize, and therefore have never applied, *forum non conveniens*. England has, however, traditionally applied *forum non conveniens* as part of its common law rules on jurisdiction. The English courts apply a two-part test to determine whether they should retain or decline jurisdiction.⁷⁹¹ The first part of the test requires the defendant to show that there is another available forum which is “clearly more appropriate”. If this is proven, the second part of the test offers the claimant the opportunity to show that considerations of justice nevertheless require the English courts to keep jurisdiction and adjudicate the matter there.⁷⁹² If the claimant cannot do so, the action is “stayed” (halted). As

discussed below, the ability of the English courts to apply this *forum non conveniens* test has been severely limited – by EU legislation and cases.

EXTRATERRITORIAL OBLIGATIONS AND EXTRATERRITORIAL JURISDICTION

Extraterritorial Human Rights Obligations

Extraterritorial human rights obligations refer to the responsibility of States for acts and omissions of the State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory as well as obligations to engage in international co-operation and assistance for the realization of human rights, as set out in the Charter of the United Nations and a number of human rights treaties and standards.⁷⁹³ The scope of the State's responsibility for human rights beyond its borders is being defined by expert legal opinion and analysis. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were articulated and adopted by a group of experts on international law in 2012. They are drawn from international law and aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights.

Extraterritorial Jurisdiction

States exercise jurisdiction based on international legal rules. Jurisdiction sets out the limits of the State's entitlement to make and enforce rules with regard to the conduct of natural or legal persons.⁷⁹⁴ The most common and widely accepted basis for State jurisdiction is territorial jurisdiction. However, States are permitted to exercise jurisdiction extraterritorially or put in place laws that have an effect beyond their borders in a number of circumstances. The parameters for the exercise of extraterritorial jurisdiction are subject to international legal rules, which prevent one State from unduly interfering in the territory of another State.⁷⁹⁵

As discussed previously (see the discussion on “corporate nationality” in the first paragraph of this section), the EU Brussels I Regulation gives national courts of EU States jurisdiction over companies “domiciled” in their jurisdiction. The English courts had previously interpreted this as allowing them to decline jurisdiction if another non-EU jurisdiction was more appropriate. In a landmark decision of the Court of Justice of the European Union (CJEU) in *Owusu v. Jackson*⁷⁹⁶ in March 2005, the CJEU declared that the application of *forum non conveniens* in cases brought against defendants domiciled in the UK for events that had occurred outside the EU was incompatible with Brussels I.⁷⁹⁷ Since then UK courts have not been able to apply *forum non conveniens* as grounds for staying civil claims against UK-domiciled defendants (meaning that defendants can only argue *forum non conveniens* if they are not UK-domiciled).⁷⁹⁸

In Canada, the test for staying a claim on *forum non conveniens* grounds is whether there is another forum that is “clearly more appropriate”. Unlike the UK approach, there is no second stage in the assessment of the appropriateness of the alternative forum, so all factors, including considerations of justice, are assessed at one stage. In making its decision, the court's primary consideration must be the existence of “some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice”.⁷⁹⁹

US courts generally approach the question of *forum non conveniens* by applying a “balance of interests” test, involving both the private interests of the parties and public interests of the court and society at large to decide whether the action should be stayed in favour of an alternative forum.⁸⁰⁰ In practice, significant deference is usually given to the plaintiff’s choice of forum. However, the US Supreme Court has added an extra hurdle for foreign plaintiffs: in *Piper Aircraft Co. v. Reyno* the court held that a foreign plaintiff’s choice of US courts for legal action deserved “less deference” than local plaintiffs.⁸⁰¹

In Australia, the doctrine of *forum non conveniens* is less of a hurdle for plaintiffs. Under Australian practice, the defendant has to persuade the court that there is a more appropriate forum elsewhere, and that the Australian forum is “clearly inappropriate”,⁸⁰² before the court will agree to dismiss an action on grounds of *forum non conveniens*. The difficulty of meeting this standard probably explains why *forum non conveniens* was not raised in the Ok Tedi proceedings before the Supreme Court of Victoria. When applying to have the proceedings dismissed, the defendants in the Ok Tedi case relied on the “Mozambique principle” and the “Act of State” doctrine instead⁸⁰³ (see the heading *The legal action in the Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study in this book).

The Ok Tedi case demonstrates the benefits of the restrictive approach to interpreting *forum non conveniens*. Given the characteristics of the case (foreign plaintiffs; the damage occurred in PNG; and much of the evidence was located in that country) the claim would most probably have been dismissed on *forum non conveniens* grounds in the US and possibly in Canada. Despite the many problems associated with the Ok Tedi litigation and settlement, considerable compensation was achieved through the pressure exerted by the legal action. It is highly likely that, without the legal actions undertaken in Australia, no compensation would have been received at all.

The following sections review, in more detail, a number of cases involving corporate abuse of human rights where *forum non conveniens* has been used.

2.2.1 Closing the doors of Canadian courts to Omai victims

In the Omai case, the Québec court decided that, although it clearly had jurisdiction over the case, jurisdiction ought nevertheless to be declined on the basis that the Canadian courts were not the best venue to hear the matter (see the heading *Canadian lawsuit initiated in the Cyanide spills: The Omai Gold Mine dam rupture in Guyana* case study in this book). In reaching its decision, the court weighed a number of factors to determine in which forum justice – including the “interest of justice” – would be better served. Applying the formula used in the English *Spiliada* case,⁸⁰⁴ the court said that it would be prepared to retain jurisdiction if it was clear that the plaintiffs would not get justice in Guyana. Ultimately, though, the court was unconvinced by the plaintiffs’ arguments regarding the poor state of the Guyanese legal system, and took the view that the justice system in Guyana was adequate for the purposes.

Subsequent events in Guyana proved that considerable deficiencies and hurdles existed, which had the potential to undermine the ability of Omai victims to successfully pursue their claim domestically (see the headings *The first legal action in Guyana* and *The second legal action in Guyana*

in *Cyanide spills: The Omai Gold Mine dam rupture in Guyana* case study in this book). By the time they filed the first claim in Guyana, the Essequibo residents were seriously under-resourced, to the point where they could not afford the cost of serving notice of the claim on the foreign defendants outside of Guyana. They had to find independent legal representation in a country where the pool of experienced lawyers was very small, and – as described in the case study – the plaintiffs faced significant challenges in finding reliable legal counsel. These problems were compounded by a series of procedural errors by the plaintiffs' lawyers and opportunistic gamesmanship by the defendant companies in a case where, without active oversight and direction of proceedings by the court, the parties were virtually left to their own devices. Both legal actions attempted in Guyana failed. It is difficult to assess the soundness of the courts' decisions, as no written record of proceedings exists. This fact alone casts serious doubt on the adequacy of the Guyana judicial system.

2.2.2 Closing the doors of US courts to Bhopal victims

In the Bhopal claim, brought in 1985, Judge Keenan of the US District Court for the Southern District of New York, felt that the “balance of interests” test pointed towards India, where the evidence and witnesses were located, as the more appropriate forum (see the heading *UCC's Forum objections* in *The Bhopal gas leak disaster in India* case study in this book). The judge took the view that India would provide an “adequate” alternative venue for the proceedings, and on that basis dismissed the case. The judge was particularly concerned not to take on a “regulatory” role in respect of health and safety and environmental standards in India.

In that case, the plaintiffs were concerned about the role played by, and the responsibility of, the US parent company, UCC, in relation to the events that led to the gas leak in Bhopal. The claim before the New York court relied precisely on the inadequacy of the Indian legal and judicial systems at that time to handle the matter. Other characteristics of the case, including the insufficient resources that the Indian subsidiary company, UCIL, had available to meet an eventual compensation award,⁸⁰⁵ also – from the plaintiff's perspective – strongly favoured the US as the most suitable forum.

However, both Judge Keenan and, later, the US Court of Appeals found that the case should be dismissed in favour of the Indian courts. A claim was subsequently filed in India but, as the case study demonstrates, it fell far short of providing victims with timely, fair and adequate reparation. (see the heading *The legal action in India and the 1989 settlement* in *The Bhopal gas leak disaster in India* case study in this book). Although the government of India had originally claimed US\$3.3 billion in damages, it ended up settling, out of court, with UCC for the much smaller amount of US\$470 million, a sum considered by the victims and their supporters to be utterly insufficient. The terms of the 1989 settlement are currently being challenged in the Indian Supreme Court by the government of India (see the heading *Curative Petition* in *The Bhopal gas leak disaster in India* case study in this book).

The assumptions made by the US courts about the capacity and ability of the Indian justice system in the mid-1980s to handle a case involving a foreign multinational and hundreds of thousands of plaintiffs were almost entirely wrong. By declining to exercise jurisdiction in a case involving a US company, the courts left the government of India and the Indian courts to negotiate with a powerful actor over which it had no meaningful jurisdiction.⁸⁰⁶ Even leaving aside the evidence

that UCC was directly implicated in the safety failures at Bhopal, the subsidiary, UCIL, was clearly not in a position to pay any meaningful compensation unless this was agreed with UCC, the US-based parent company. And the US courts had removed a condition initially imposed on UCC to:

*satisfy any judgment rendered by an Indian court ... where such judgment and affirmance comport with the minimal requirements of due process.*⁸⁰⁷

India as a forum was convenient only for the foreign corporate actor involved. It significantly disadvantaged the Bhopal survivors and the decision to decline US jurisdiction was one of the most significant factors in the subsequent decades of ongoing human rights abuses affecting thousands of people.

2.2.3 Jurisdiction and *forum non conveniens* in the Kilwa Massacre case

On 8 November 2010, a group of Congolese citizens launched a class action against the Canadian company, Anvil Mining Limited (Anvil), in Québec, Canada, for its alleged contribution to serious human rights abuses committed in the town of Kilwa in the Democratic Republic of the Congo (DRC) in 2004. Anvil was alleged to have provided logistical support to a Congolese army operation during which the army committed acts of rape and murder in Kilwa. Anvil Mining has admitted to providing the army with trucks, food, lodging and other logistical support but claims it was requisitioned by the authorities and denies any wrongdoing.

Anvil argued that the Québec court had no jurisdiction to hear the case but that, should the court decide that it did have jurisdiction, it should nevertheless decline it on *forum non conveniens* grounds. The company alleged that the DRC (where the harm occurred) or Australia (where Anvil's head office was located) were the more appropriate forums. Earlier attempts by survivors to seek justice in the DRC and Australia had met considerable hurdles and ultimately failed.⁸⁰⁸ In 2006, a military court in the DRC acquitted all defendants on all charges related to the Kilwa incident. The DRC military trial was strongly criticized by human rights experts, including Louise Arbour, then the UN High Commissioner for Human Rights.⁸⁰⁹ Lawyers representing people from Kilwa had filed a complaint in Australia in 2005. An investigation was opened but, in August 2007, the Australian authorities announced that they would not pursue the case.

On 27 April 2011, the Québec Superior Court found that it had jurisdiction to hear the case and rejected the *forum non conveniens* arguments raised by the defendant.⁸¹⁰ Article 3148 of the Québec Civil Code establishes that:

In personal actions of a patrimonial nature, a Québec authority has jurisdiction where ... (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec...

The Superior Court found that it had jurisdiction under the Québec Civil Code because Anvil had an establishment in Québec and because its activities there were necessarily linked to the management

and exploitation of the DRC mine, since this was Anvil's principal – if not its only – activity.

The court specified that it was not necessary for the decisions that led to the alleged offence to have taken place in Québec, merely that the activities undertaken there should relate to the dispute. The Court furthermore expressed the opinion that *forum non conveniens* should apply restrictively and only in exceptional cases, where another forum was clearly more appropriate and where the defendant would face severe injustice should Québec be chosen as the forum. In this case, it stated that Anvil had not demonstrated which alternative forum (DRC or Australia) was the more appropriate. On the contrary, the court found that if it rejected jurisdiction “no possibility would exist for the victims to be heard by civil justice” (translation).⁸¹¹

On 25 January 2012, this decision was reversed by the Québec Court of Appeal which, despite expressing sympathy for the obstacles faced by the victims, found that the Québec court did not have jurisdiction to hear the case.⁸¹² In a much narrower interpretation of the requirements of the Québec Civil Code, the Court of Appeal considered that the dispute was not related to the company's activities in Québec, which concerned investor relations and were not linked to the management of the mine in the DRC.⁸¹³

Because the court found it had no jurisdiction to hear the case, it considered that it was not necessary to decide on *forum non conveniens*. However, it did consider whether, despite not having jurisdiction, it should still assume it on the basis of “necessity” – that is, if the plaintiffs could demonstrate that justice would not be possible anywhere else.⁸¹⁴ Contradicting the first judge's view, the Court of Appeal found that the plaintiffs had not proved the impossibility of accessing justice in another jurisdiction.⁸¹⁵ The plaintiffs requested leave to appeal this decision to the Supreme Court of Canada but, in November 2012, the Supreme Court rejected the application, allowing the Court of Appeal's decision to stand.⁸¹⁶

To suggest, as the Court of Appeal did, that remedy was still feasible in other jurisdictions, was to ignore the reality the DRC plaintiffs faced. Neither the DRC nor Australia was a viable option, and Canada had been their last hope. The plaintiffs – including family members of those who had been executed at Kilwa – had spent six years desperately trying to secure a hearing of their case. The decision failed to recognize the significant hurdles they had already overcome to access the Canadian legal system.

KIOBEL AND THE US ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act (ATCA) is a United States federal statute enacted in 1789, which allows a “civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁸¹⁷ Since 1979, foreign victims of human rights abuses have used ATCA in US district courts to sue the alleged perpetrators of those abuses, including multinational companies.⁸¹⁸ By explicitly considering certain human rights abuses to be grounds for bringing a civil claim, and in contrast to traditional tort litigation (see box *Cause of Action* below), it enables foreign plaintiffs to bring forward an action alleging human rights violations, including when committed outside the United States.⁸¹⁹

Although several cases against multinational corporations have been brought under ATCA, no case

CONTINUED...

has reached the merits stage. In addition, if an ATCA case is filed against the parent company of a multinational corporate group (as they usually are, often together with a number of other defendants including any relevant subsidiaries), the plaintiffs will still need to establish the liability of the parent company by establishing its primary or secondary liability for the abuses, by using a specific statutory provision or by piercing the corporate veil between it and the relevant subsidiary.

Some plaintiffs have succeeded in securing the jurisdiction of US courts to hear their claims under ATCA or have obtained a degree of reparation through out-of-court settlements. For example, in the landmark case of *Doe v. Unocal*⁸²⁰ (which confirmed that corporations can be sued under ATCA), a settlement was reached with the defendant in a case that alleged its complicity in human rights violations by the Myanmar military. The settlement included a humanitarian fund to help the people of the affected region.⁸²¹ A settlement was also reached in *Wiwa v. Shell*.⁸²² The claim alleged that Shell was complicit in supporting military operations against the Ogoni people of Nigeria, including the execution of peaceful Ogoni protesters. In June 2009, Shell agreed to settle for US\$15.5 million to compensate the plaintiffs and establish a trust for the benefit of the Ogoni people.⁸²³ In both cases there was no admission of liability.

The potential to use ATCA in cases of alleged human rights abuses by corporations has, however, come under threat in recent years due to court decisions questioning the extraterritorial application of ATCA and its application to corporations.

In September 2010, the United States Court of Appeals for the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum* that customary international human rights law does not recognize the liability of corporations and, as a consequence, multinational corporations could not be held liable under ATCA.⁸²⁴ In October 2011, the US Supreme Court admitted a petition to consider whether corporations can be sued under ATCA.

On 28 February 2012, the US Supreme Court heard arguments on both sides. Shell argued that ATCA could not be applied to corporations, because corporate liability was not recognized under international law and therefore the claim could not proceed against it.⁸²⁵ The plaintiffs argued that there is no principle of international law which limits the power of States to enforce customary international law by imposing civil tort liability against corporations over which they have jurisdiction. Indeed, international norms require accountability for violations of international law, whether they are committed by States or by private actors such as corporations.⁸²⁶

The governments of the UK and the Netherlands submitted a joint *amicus curiae* brief in which they argued, firstly that corporations are not directly liable under international law, and secondly that cases brought under ATCA engage too broad an assertion of extraterritorial civil jurisdiction by US courts, allowing people who are not US citizens to sue non-US defendants for alleged activities outside of the US. They argued that such exercise of jurisdiction is contrary to international law and creates a substantial risk of jurisdictional conflicts.⁸²⁷

On 5 March 2012, the US Supreme Court decided to re-hear the case and ask a second question: whether ATCA could apply outside the US at all. The US government filed an *amicus* brief on this question, arguing, amongst other things, that:

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*the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could.*⁸²⁸

On 17 April 2013, the Supreme Court issued its final decision.⁸²⁹ The court did not rule on the question of whether international law recognized corporate liability and, as a consequence, whether corporations could be sued under ATCA. Instead, it focused on the second question on the extraterritorial application of ATCA. In a majority decision, the court found that:

*the presumption against extraterritoriality applies to claims under ATS [the Alien Tort Statute or ATCA], and nothing in the statute rebuts that presumption.*⁸³⁰

The court held that this presumption could only be displaced where claims “touch and concern the territory of the United States” and do so “with sufficient force”.⁸³¹ Given the fact that “all the relevant conduct took place outside the United States” and that no circumstances existed that were sufficient to overturn the presumption against extraterritoriality, the Supreme Court agreed with the Court of Appeals judgment that the Kiobel claim must be barred.⁸³² The Court went on to specify that:

*Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.*⁸³³

A number of features of the Kiobel case are important in understanding the potential for remedy in cases alleging abuse involving multinational corporations: the positions argued by Shell and some States and the implications for advancing corporate accountability in Europe; the fact that the court did not make any statement on the issue of whether international law recognized corporate liability; and the implications for future cases.

The positions argued by the UK and Dutch governments (Shell's home States) run counter to the efforts over a number of years to expand the options for victims of corporate-related human rights abuses to have their case heard, and would appear inconsistent with both governments' commitment to the UN Guiding Principles on Business and Human Rights.

The argument that international law does not recognise corporate liability is incorrect, while the assertion that companies are not directly liable under international law is irrelevant. The position of the Dutch and UK governments fails to distinguish between international law and domestic law that gives effect to international law.

International human rights law requires States to protect against human rights abuses by third parties, such as companies, including through the enactment of national laws to prevent and redress such abuses. Both natural and legal persons can, and are, directly subject to such laws. Companies can therefore be held liable in court for breach of those laws. ATCA is a domestic statute, and therefore there is no question of directly applying international law to non-State actors. ATCA merely uses international law to define the issues that US district courts can consider (that is, to give US district

courts “subject matter” jurisdiction in respect of those issues).

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Both the UK and the Netherlands recognize that corporate actors can be held liable under national laws for a variety of wrongful acts, including acts that amount to human rights abuses. In addition there are various international treaties under which States are expected to enact national laws to regulate the behaviour of corporations.⁸³⁴ For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal requires the regulation of natural and legal persons under the jurisdiction of the State party in relation to the generation and/or management and/or transport of waste.⁸³⁵ The Convention specifically requires States to “introduce appropriate national/domestic legislation to prevent and punish illegal traffic”.⁸³⁶ Contrary to the position asserted by the two governments the concept of non-State actor liability is far from unknown in international law.

In respect of the UK and Netherlands’ jurisdictional argument, the exercise of personal jurisdiction in this and other cases is based on the company having sufficient minimum contacts with the forum State. This is only one of a number of bases traditionally used for establishing personal jurisdiction over certain defendants (others include nationality or domicile, physical presence, business ties, citizenship and the effects of the defendants’ actions). There is no prohibition in international law on the exercise of extraterritorial jurisdiction in civil matters, so long as there is a recognized basis of personal jurisdiction over the defendant.

The UK and the Netherlands claimed that the broad exercise of jurisdiction under ATCA constitutes interference with another State’s sovereignty. However, what ATCA allows is a civil action between two private actors that can result in an order for the defendant to pay damages to the plaintiff. Where the defendant is a corporation (in which case a State should have no obligation to reimburse that defendant; as it may, for example, when the defendant is a public official), this can in no way be seen as amounting to interference with another State’s sovereignty. In a business context, such private legal actions occur frequently, including in forums outside the State where the wrongful act is alleged to have occurred.⁸³⁷

The Supreme Court did not elaborate on its test for displacing the presumption against the extraterritorial application of ATCA. This allows lower US federal courts to interpret and decide when the presumption can be overturned, leaving the Supreme Court’s decision open to overly broad interpretation.

The first key case to consider the *Kiobel* decision was *Al Shimari v. CACI International Inc., et al*, brought against CACI (a private US company) by the Centre for Constitutional Rights on behalf of four Iraqi torture victims. The claim was brought under ATCA and US common law on the basis that CACI directed and participated in illegal conduct at Al Ghraib prison in Iraq, including torture. CACI had been hired by the US government to provide interrogation services. In June 2013, a US District Court dismissed the ATCA claim on the basis that ATCA did not apply to violations of international law outside the US.⁸³⁸

This misrepresents and too widely applies the decision of the majority in *Kiobel*, which clearly stated that the presumption against extraterritorial application could be displaced in cases that touched and concerned US territory with sufficient force. This case involved a company that was

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incorporated and had its headquarters in the US. The relevant illegal conduct was directed from the US. The conduct also occurred when the US had effective control over much of Iraq, including the prison where the torture allegedly occurred.⁸³⁹ Several ATCA claims involving multinationals have since been dismissed on the basis that the alleged conduct took place outside the US.⁸⁴⁰

The extent to which victims of corporate human rights abuses outside the US can bring claims under ATCA is now, to a large extent, in the hands of lower federal courts. Their task will be to interpret when and under what circumstances cases of human rights abuses committed outside the US can proceed under the new principles.

2.3 CHOICE OF LAW

Even when a national court accepts jurisdiction over a claim for harm that occurred abroad, there remains the separate issue of deciding which law will apply to the dispute. Generally, the law applicable to a dispute involving a foreign tort will be the law of the place where the damage occurred, not the law of the forum State.⁸⁴¹ Within the EU, this issue is governed by a Council Regulation known as “Rome II”.⁸⁴² The general rule is that liability should be governed by the “law of the country in which the damage occurs” unless there are very strong reasons for applying the law of another country.⁸⁴³

There may be no significant objections to the law that is chosen to apply in a given dispute, where the laws of the home and host States are significantly similar. This is generally the case where both States share the same legal tradition – for example when a case involves two common law jurisdictions.⁸⁴⁴ The choice of law may also be largely irrelevant where the laws of the home and host States, though providing different grounds for a claim, essentially require proof of the same facts.⁸⁴⁵

However, in some instances the choice of law rules can be a significant problem for foreign plaintiffs. For example choice of law can have significant consequences for a plaintiff’s ability to seek reparation if claims are barred or restricted by the law of the host State. This occurred in the Bhopal case where the Bhopal Gas Leak Disaster Act 1985 was cited in US courts to deny standing to plaintiffs (see the box *Other legal actions in the US* in *The Bhopal gas leak disaster in India* case study in this book).

Choice of law can also have a significant bearing on the level of compensation that can be sought. Different laws can provide for considerably smaller or larger amounts of compensation for the same injury, and some laws might consider certain injuries as “non-compensable”. Under the EU’s Rome II regulation, damages must be assessed in accordance with the law where the harm occurred (the law of the host State).⁸⁴⁶ In many instances, these laws will only allow for small compensation amounts, on very narrow bases.⁸⁴⁷ A choice of law that affords only a small amount of compensation to the plaintiffs can act as a significant deterrent to initiating an action in a foreign court, particularly in light of the extraordinary costs involved in transnational litigation.

These problems can be alleviated to some extent by the existence of a “public policy” exception to the choice of law rules, whereby the forum State courts are able to refuse to apply a provision of host State law where to do so would be “manifestly incompatible with the public policy” of the

forum State.⁸⁴⁸ Given the international human rights obligations of States, courts should carefully assess the compatibility of host State laws with human rights.⁸⁴⁹

There are cases in which a law might not be so manifestly contrary to human rights, but in which its application to a human rights case might lead to serious consequences for the plaintiff's ability to uphold their human rights. Courts should also examine these cases carefully. For example, certain legal grounds to claim reparations might exist under one law but not another; or limitation periods (that is, the period within which a claim must be filed) might differ significantly from one jurisdiction to another.⁸⁵⁰ The choice between the two alternative laws in these cases can ultimately determine whether a person can or cannot seek reparation for a human rights abuse.

Almost all of the cases referred to in this book have involved civil actions on the basis of recognised causes of action such as torts. Beyond ATCA claims, the basis for the claims has not been human rights abuses. Abuses of rights to health, food and livelihood, are presented as, for example, a claim in tort for negligence. For the most part courts can only use international law as the subject matter basis for a claim if this is implemented into domestic law in some way.

This forces claimants to fit their claims within certain restrictive legal parameters, and it privileges only those violations that one recognizes as causes of action under tort or other types of law.

The extent to which this reality impacts on the ability of people whose human rights are affected by companies (or indeed other actors) to seek legal redress has not been given much consideration to date.

CAUSE OF ACTION

2.4 LEGAL REPRESENTATION AND EQUALITY OF ARMS

We wanted to take action and take legal steps. We abandoned the idea because of the costs involved. We do not have the financial means to do it.

Chief James Tela, Bodo, Nigeria, May 2011⁸⁵¹

In addition to the technical legal issues described above, one of the most common problems confronting victims of corporate-related human rights abuse is a lack of available lawyers with the capacity, expertise and willingness to take on such cases. Even if lawyers are willing in principle to represent plaintiffs in cases of corporate human rights abuse, the complexity, duration and uncertainty typical of this sort of case often makes financial risks too high. Without public funding, lawyers will generally have to work on a “no-win, no-fee” basis. This means they will have to cover costs in advance that their clients are unable to meet, and will only be reimbursed, and paid for their work, if the case is successful. Alternatively, plaintiffs without financial means can try to secure “pro-bono” legal support or legal aid, both of which are extremely scarce.

The difficulty in securing legal advice can deter individuals and communities from pursuing a claim against multinationals, who have extensive in-house legal teams and whose external lawyers are likely on retainers and paid regardless of the outcome of lawsuits. Moreover, the court process tends not to take account of the very great financial and power imbalances between the parties involved. While poor plaintiffs will often face some disadvantage when bringing a claim against a

wealthier entity, few will experience the disparity that exists between a multinational company and a poor community from a developing economy. Not only does the company have far greater financial and legal resources, it also often holds the information people need to prove their case.

The ability of parties to a legal action to act on an equal footing is a basic premise of due process. This is often termed “equality of arms”. A State’s failure to address significant disparities between parties to a legal action may itself constitute a human rights violation. This was clearly established by the European Court of Human Rights in *Steel and Morris v. the United Kingdom*.⁸⁵² The case considered the UK’s obligation to guarantee the right to a fair trial under Article 6 of the European Convention on Human Rights in a defamation claim brought by McDonald’s against two environmental activists who had circulated a leaflet critical of the company. The Court found that the UK had violated the applicants’ rights by not ensuring “equality of arms” between the parties. The Court stated:

The disparity between the respective levels of legal assistance enjoyed by the applicant and McDonald’s ... was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness...

...the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald’s. There has, therefore, been a violation of Article 6(1).

Legal aid becomes a more controversial issue when the applicants are foreign plaintiffs, seeking financial support to bring legal action against a company for harms that occurred outside of the jurisdiction where the legal aid is being sought. Yet without legal aid or other provisions that specifically recognize the massive financial disparity between companies and those whose rights they affect, justice may frequently be denied.

REFORM OF THE UK CIVIL LITIGATION COSTS AND FUNDING SYSTEM

A law passed in 2012 in the UK has put at risk the ability of foreign plaintiffs to pursue legal claims for alleged corporate human rights abuses in the UK courts. The Legal Aid, Sentencing and Punishment of Offenders Act eliminates a number of financial arrangements that had, until now, made these claims financially viable. Two reforms will have an impact on foreign victims seeking to access UK courts:

- the elimination of “success fees” payable by the losing defendant (and a cap of 25 per cent on any success fees)
- the non-recoverability of “after the event” insurance premiums from defendants who lose.

Cases brought by foreign plaintiffs against UK companies for their alleged involvement in human rights abuses abroad have generally been taken on by UK lawyers on a “no-win, no-fee” basis. This means that lawyers are paid only if they win. All costs involved in the litigation must therefore be paid by the lawyers during the case, which can last many years and require considerable resources.

The incentive for lawyers to run this risk was, up to now, their ability to charge a “success fee” if they won. The success fee was paid on top of the lawyers’ basic costs and could be up to 100 per cent of these

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costs. The level of the success fee reflected the risk to the plaintiffs' lawyers in running the case. However, if the success fee were set too high, a court could reduce it when assessing the costs at the conclusion of the case. UK lawyers working on a "no-win, no-fee" basis were therefore able to obtain an additional sum over their costs from successful cases in order to fund the costs and expenses of those that did not go forward or were unsuccessful. In practice, for every case against a multinational corporation that is run, there are several that are investigated and abandoned for which no fees are received.⁸⁵³ This additional fee was payable by the unsuccessful defendant and not by the plaintiffs.

The new law eliminates the ability of lawyers to recover success fees from the defendant. Success fees are now capped at 25 per cent of the plaintiff's award and, if they are charged at all, they must be deducted from the plaintiff's award.⁸⁵⁴

In parallel to the system of success fees, an insurance system called "after the event" insurance was developed to address the risk to plaintiffs of having to pay the costs of the defendant if they lost their case.⁸⁵⁵ This provided a further incentive to plaintiffs who would otherwise feel reluctant to pursue a claim in case they were faced with a huge bill if their case failed. "After the event" insurance means that the insurance covers the defendant's costs if the case fails. Up until now, the premiums were recoverable from the defendant if the case succeeded. Under the new law, premiums are no longer recoverable from the losing defendant.

The result of these changes – the inability to recover success fees and insurance premiums from defendants – has been widely recognised as undermining the capacity of law firms in the UK to take on corporate cases.

The UK government was strongly criticized for the changes,⁸⁵⁶ but the proposed reforms went ahead, despite serious warnings on human rights grounds. The UN Committee on the Elimination of Racial Discrimination stated:

[that it regretted] the introduction of a legislative bill in the State party which, if passed, will restrict the rights of foreign plaintiffs seeking redress in the State party's courts against [such] transnational corporations...

and warning against introducing obstacles in the law:

*that prevent the holding of [such] transnational corporations accountable in the State party's courts when such violations are committed outside the State party.*⁸⁵⁷

Prior to this, the former UN Special Representative on Business and Human Rights, John Ruggie, had written a letter to UK Minister of Justice warning that the reforms could:

*constitute a significant barrier to legitimate business-related human rights claims being brought before the UK courts in situations where alternative sources of remedy are unavailable.*⁸⁵⁸

At the same time as the UK government was publicly expressing its full support for implementation of the UN Guiding Principles on Business and Human Rights, which include a specific focus on access to remedy, it passed a law that substantially undermines the ability of foreign plaintiffs to seek justice in the UK. Indeed, this move and the UK government's submission to the US Supreme Court in the *Kiobel* case (discussed above) call into question the UK government's stated commitment to advancing protection of human rights in the context of business activity.

2.5 LEVELLING THE PLAYING FIELD

The previous sections have outlined some of the obstacles that victims of corporate-related human rights abuses face when attempting to bring civil claims forward in the home States of the parent or controlling company of a multinational group. In some cases the obstacles are so significant as to undermine the human right to effective remedy. This section provides a brief restatement of the obligations of the home and host States to prevent human rights abuses by non-State actors, and to ensure effective remedy if abuses occur, before discussing how some of the obstacles identified above are inconsistent with human rights law. It concludes with proposals for reform.

All States have a clear duty to ensure both corporate accountability and access to an effective remedy for abuses committed by companies within their territory. However, the evidence shows that, when dealing with multinational companies, many factors operate against this duty being discharged in practice - including incompatible political and economic interests, particularly the need to secure foreign investment, which can undermine the willingness of host States to act in the interest of victims of abuse.

States other than the one in which human rights abuses were experienced also have obligations. The home States of multinational companies are obliged to act to prevent abuses by corporate actors, including abuses that occur outside their territory, when they have the legal and practical capacity to do so.⁸⁵⁹

The home State's obligations – or the obligations of States other than the host State – are parallel and complementary to those of the host State and respond to different rationales. Whereas the obligations of a host State are based on their ability to exercise effective control over their national territory, the obligations of other States are based on, and will be shaped by, other factors, such as their ability to take action, in both legal and practical terms, under the circumstances.

The home State's obligation to prevent abuse outside its territory gives rise to an obligation to ensure remedy when abuses are a foreseeable result of the home State's acts or omissions. In the case of dumping of toxic waste in Abidjan, for example, the Netherlands failed to fulfil its obligations under regional and international law to prevent the illegal export of hazardous waste from Amsterdam to Côte d'Ivoire (see the box *The remedy in The toxic waste dumping in Côte d'Ivoire* case study in this book). This failure had a foreseeable impact on the right to health of those affected by the dumping in Abidjan. Consequently, by failing to prevent the illegal export of the waste, the Netherlands breached the right to health of the people of Abidjan and should remedy this abuse within the scope of international law.

Where a non-State actor has caused harm to human rights, the State should also ensure victims can claim a remedy directly from the non-State actor. Where the actor in question is a company, the State where that company is headquartered should ensure victims can bring legal actions in that State – even when the State itself was not in a position to prevent the abuse. This position has been increasingly articulated by human rights treaty bodies. For example the Committee on the Rights of the Child (CRC)'s General Comment 16 on children's rights and the business sector specifies that:

*States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.*⁸⁶¹

States generally accept foreign claims; most home States allow civil action (especially tort-based claims) for harmful conduct committed abroad to be brought before their courts against companies domiciled within their territory. Even States that apply *forum non conveniens* accept in theory that, as a minimum, there should be an “adequate” alternative forum.

However, as all of the cases in this book have demonstrated, a core obstacle stems from the fact that each member of the multinational group has a separate legal personality. The acts and omissions of the parent company are – in many cases – experienced through the subsidiary. Consequently, on one view, the parent is not the actor involved in the abuse. This view is erroneous, as the cases documented in this book show. The parent companies were substantially involved in each case; they directly supervised the activity or failed to prevent abusive action, even when they were aware of the abuses.

Theories of liability for circumventing or piercing that corporate veil (as described in *1.4 Theories of liability* in this chapter) remain largely untested in relation to foreign claims against parent companies. Moreover, even when courts consider the parent company, existing approaches do not address the reality of the parent or controlling company’s role in the abuse or its relationship with the relevant subsidiary. Much depends on the responsibility of a parent company to act preventively – to put in place robust systems and policies that take due account of the operating contexts and risks associated with its subsidiaries. At present the jurisprudence that exists in this area is too limited and the level of uncertainty facing plaintiffs is significant. However, more judicial rulings may not address the problems documented in this text, given that the parameters which courts use when deciding on the liability of the parent company do not take account of the reality of the parent’s role in the abuse or the parent-subsidiary relationship.

To view the issue from another perspective, we must look at what effective remedy means from the perspective of victims of abuse. All victims of human rights violations and abuses have a right to an effective remedy. This right lies at the very core of international human rights law. It also stems from a general principle of international law that every breach gives rise to an obligation to provide a remedy.⁸⁶² Substantial work has been done by human rights bodies and legal experts to clarify the essential elements of effective remedy and reparations (measures to repair the harm caused to victims of human rights violations).⁸⁶³

Reparations can take many forms and depend to a substantial degree on the context. The touchstone of reparation, however, is that it must seek to remove the consequences of the violation and, as far as possible, restore those who have been affected to the situation they would have been in had the violation not occurred. Reparations can and should be used to redress underlying systemic problems; this is vital to protect the human rights framework and to prevent others experiencing violations and abuses.

When individuals or communities suffer human rights abuses because of the actions or failures

of a company that is part of a multinational group, in many (although not all) cases the right to effective remedy cannot be upheld unless the parent or controlling company is involved in the remedial process. As noted previously, this will be the case when the parent company is the actor responsible for the abuse suffered (for example by giving orders or instructions). This book has argued that the right to remedy would also be undermined in cases where the parent company failed to exercise proper and effective oversight of a subsidiary or failed to act when it was aware of abuses.

Moreover, numerous elements of the right to effective remedy – adequate financial compensation, funded means of rehabilitation, guarantees of non-repetition, disclosure of the truth – may depend on action being taken by the parent company.

One reason why this book has focused on four cases in considerable detail is to expose how the current approach leads to clear injustices and outcomes that are not in the public interest of any of the States involved. In many of the cases detailed in this book the interests of the plaintiffs and defendants have not been given equal weight by the legal systems of the different States in which people have sought access to justice. The law has repeatedly favoured the corporate defendants – not in relation to the merits of the case, but on the preliminary procedural issues. Laws intended to guard against frivolous legal actions, prevent “forum shopping” and clarify jurisdiction are being used to frustrate legitimate claims and prevent them from even being heard.

To remedy these and other imbalances, certain widely held legal doctrines and presumptions must be challenged. In addition, greater attention must be paid to how people are enabled and empowered to use the law to achieve justice.

This next part of this section therefore argues for fundamental legal reforms. It argues that these reforms are not merely desirable but constitute an obligation on States under international human rights law. Where corporate or other laws undermine human rights law, these laws must change.

In arguing for fundamental reforms this book does not suggest that legal protection should be withdrawn from corporations or that the basic ability of companies to operate should be compromised. All of the proposed reforms would leave in place substantial safeguards to prevent frivolous claims against companies. While the proposals that follow may appear radical, in each case we can point not only to clear human rights arguments for why they should happen, but also to examples of where very similar action has been taken, albeit in an ad-hoc fashion. The majority of what is proposed below is an expansion or scaling up of existing models, and is radical only in that it proposes that what has been shown to work sometimes should be made to work systematically to protect human rights.

Unpacking some of the legal issues involved in bringing forward a civil claim against a parent or controlling company – as we did in the first part of this chapter – highlights the importance of bringing clarity to how the liability of the parent or controlling company, in particular in relation to harms caused in another country and/or by its subsidiaries, will be established, and how this can be done in a manner that is consistent with human rights obligations.

The absence of a clear framework for establishing parent company liability in either the home or host State courts deprives plaintiffs of any reasonable degree of certainty about the possibility of

having their case heard. The current patchwork of approaches, many of which rely on the plaintiffs attempting the almost impossible task of untangling the internal corporate *modus operandi*, needs to be addressed. As such, while this book has focused on cases involving human rights abuses committed or contributed to by subsidiaries, any such framework would also need to apply to human rights abuses committed or contributed to by the relevant parent company.

The solutions offered in the following paragraphs are to establish a clear framework for making parent companies legally responsible for human rights abuses arising in the context of their global operations (including when committed or contributed to by their subsidiaries), to eliminate *forum non conveniens* and to improve international cooperation and assistance in human rights cases.

2.5.1 Parent company legal responsibility

At present, as the discussion in this chapter has shown, the legal and policy framework for corporate accountability internationally is both incoherent and fraught with contradiction. On the one hand there is widespread acceptance amongst governments of the responsibility of companies to respect human rights throughout their operations; on the other hand, parent companies, even when fully aware of a risk or an ongoing negative impact, can rarely – and often with great difficulty – be held liable. This has allowed a situation to exist whereby the headquarters of multinational companies can profit from known abuses in their operations without concern. While international standards have increasingly reflected an understanding of the reality of multinational corporate groups and the parent as an actor that influences group policy and practice globally, this reality is rarely reflected in law. This must change. In moving forward, targeted efforts are required to ensure that national laws and policies adequately reflect international standards for corporate responsibility.

Creating a clear framework for making parent companies legally responsible for human rights abuses arising in the context of their global operations will require legal and policy change. Three key recommendations to consider and develop further in order to create this framework are:

- Placing parent companies under an express legal duty of care towards individuals and communities whose human rights may be or are affected by their global operations, including by the activities of their subsidiaries (domestic or foreign). The standard of care needed to meet this requirement would be defined by reference to international due diligence standards (as set out below).
- In certain situations, for example instances of large-scale human rights disasters or of severe or systematic human rights abuses arising in the context of their global operations, establishing a rebuttable presumption that the relevant parent company is legally responsible. As such, if victims could prove that they suffered harm, the parent company would have the burden of proving that it should not be held legally responsible or was not legally responsible for that harm. The standard of proof needed to rebut this presumption would again be defined by reference to international due diligence standards (as set out below). However, depending on the cause of action, the burden of proof would also be shifted for other elements required to prove that claim. For example, in a negligence claim, the parent company would not only need to prove that it did not breach its duty of care towards those individuals and communities (by reference to the due diligence standard) but

also that any breach did not cause the harm suffered by the victims.

The standard of care in both cases would be defined by reference to international standards relating to human rights due diligence processes that focus on the prevention of human rights abuses and are implemented in a robust, transparent and participatory manner.

- Clarifying other modes and standards for establishing the liability of parent companies with respect to the activities of their subsidiaries, in particular through specific legislation with extraterritorial effect (for both civil and criminal acts).

Affirming the duty of care

The first element of this framework is to place the parent company under an express duty of care with respect to individuals and communities whose human rights may be or are affected by their global operations, including by the activities of their subsidiaries. The standard of care required to meet this duty would be defined by reference to international due diligence standards.

This express duty of care, and the due diligence standard needed to meet this requirement, would apply regardless of whether any claim had been made. However, it would also apply when any claim is made concerning corporate-related human rights abuses for the purposes of determining the liability of the parent company for those abuses.

Such a standard of care, and the requirements for meeting it, have their basis in various international standards as well as recent court decisions.

Under tort law principles, individuals and corporations already have a legal duty to take reasonable care to avoid causing harm to others. Developments in international standards on business and human rights are now helping to inform existing tort notions of “duty of care”, “reasonable care”, “foreseeable harm” and “due diligence” in relation to corporations. These standards also provide a basis for shaping the scope of parent company duty of care in relation to their global operations, including the activities of subsidiaries and joint ventures.

Over the last decade a number of international multi-stakeholder processes have established standards for how business should consider its human rights impact. These standards – such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights – have a number of important features in common:

- In general, they treat the multinational corporate group as a whole: the UN Guiding Principles on Business and Human Rights apply “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”⁸⁶⁴ The OECD Guidelines and ILO Tripartite Declaration speak directly to “multinational enterprises”.⁸⁶⁵ The Voluntary Principles on Security and Human Rights were set up by the home States of multinational extractive companies, along with the companies themselves and international non-governmental organizations, specifically to address concerns about the impact of companies’ security arrangements in host States.⁸⁶⁶
- They have the endorsement of States – in most cases that endorsement is official. For example,

the UN Guiding Principles were endorsed by the UN Human Rights Council and many countries have adopted national plans to implement the Principles. The Voluntary Principles on Business and Human Rights were founded by four governments – the UK, the USA, the Netherlands and Norway – and new States have joined the process over the years.

- All of the standards have a wide acceptance internationally, with many States and companies having in place specific systems to recognize them.⁸⁶⁷
- They are generally based on a due diligence framework. The UN Guiding Principles on Business and Human Rights stipulate that, in order to ensure that companies respect human rights, they should implement a process of “human rights due diligence” to identify, prevent, mitigate and account for how they address their impacts on human rights.⁸⁶⁸ The OECD Guidelines were developed to follow the UN Guiding Principles and explicitly reference human rights due diligence. The Voluntary Principles on Business and Human Rights are a sector and issue-specific due diligence framework.

The emergence of standards that explicitly recognize the corporate group and the role of a parent or controlling company are important; they underline a fundamental reality about the nature of multinational corporate operations – while each entity within the group has separate legal personality, the group as a whole is typically strategically co-ordinated, managed and controlled by the parent or controlling company. This is particularly the case with regard to human rights, social and environmental impacts, on which the parent or controlling company tends to develop a unified policy.

The UN Global Compact – a business membership based institution, which is a policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in areas of human rights, labour, environment and anti-corruption - recognizes the central role of the parent company. While subsidiaries can join, the Global Compact states that:

Companies joining the United Nations Global Compact commit to implementing the ten principles into their strategies and throughout their operations. Their efforts are expected to be continuous and comprehensive wherever they operate. Multinational business participants are expected to work toward a globally coherent approach to corporate sustainability.

A company's commitment to join the Global Compact applies not only to its headquarters, but also to all subsidiaries and local branches.⁸⁶⁹

Companies themselves also recognize the role of the parent company in relation to their global operations, particularly in relation to social, human rights and environmental impacts and standards of conduct. This is not only manifest through global policies and initiatives but in how companies participate in international multi-stakeholder initiatives; for example in the Voluntary Principles on Security and Human Rights, the participants are generally from the corporate headquarters although the specific focus of the Principles is on the impact of subsidiary operations.

International standards therefore recognize the central role of the parent company. These

standards should inform the concept of parent company responsibility for human rights abuses. In any claim concerning corporate-related human rights abuse, the criteria for making a parent company responsible under a duty of care principle would rest on an assessment of the extent to which the company took every reasonable step to “become aware” of the risks that its worldwide operations posed to human rights, and to prevent and mitigate those abuses.

In addition to the international standards discussed above, there is some evidence that courts are now looking at the issue of the duty of care through a due diligence lens. For example, see the *Chandler v. Cape* case described in 1.4.1 *Primary and secondary liability* above. In addition, in the case of *Guerrero and Others v. Monterrico Metals plc*, the English High Court ruled that, where the management of a parent mining corporation overlapped with that of the Peruvian subsidiary, and the parent’s CEO was in frequent contact with the local mine manager, “there was a good arguable case” that the parent corporation had a duty to take reasonable care to avoid foreseeable harm to the protesters.⁸⁷⁰ This case involved a June 2009 damages claim against a UK parent company (together with its Peruvian subsidiary Rio Blanco Copper SA) for failing to prevent human rights abuses to a group of Peruvian nationals who had staged a protest against a mine owned by the Peruvian subsidiary. It is important to note that the claimants relied on the Voluntary Principles on Security and Human Rights as evidence that the defendant mining companies were aware of the risk of ill-treatment and human rights abuses in the context of its security arrangements around mines. The section below on *Clarifying other modes and standards for establishing direct parent company liability* also highlights certain legislative provisions that recognise the concept of due diligence.

The scope of the duty of care

As such the basis of the scope of this express duty of care should be human rights due diligence. Where the parent company has the controlling interest it must ensure that it and each subsidiary carries out a risk assessment, and mitigation adequate to the risk. This should be reflected in the appropriate legal and contractual provisions governing the operation. Where the parent company does not have the controlling interest it should nonetheless ensure that an obligation to conduct specific risk assessments and put in place adequate measures to prevent human rights abuses is reflected in its commercial agreements with other parties.

One of the most frequent objections to this proposal is that the parent company cannot act as suggested because the laws of the home or host State prevent it doing so (for example, because interfering in the day-to-day management of a subsidiary risks the parent company losing its limited liability as a shareholder). Across Amnesty International’s research on corporate accountability, there are very few examples of where the law of a State actually requires a company to act contrary to human rights or prevents a company acting consistently with human rights. Far more often the issue is that the law does not require the company to act – but also does not prevent it, leaving the company with the choice. Furthermore, a duty of care and due diligence standard simply reflects the fundamental reality that multinational groups already have in place unified policies on human rights impacts and are strategically co-ordinated, managed and controlled by a parent company. As the cases and examples discussed in this book have shown, even where a parent company

exercises this level of management and control, it is extremely rare for a court to find that it reaches a level sufficient to justify imposing the relevant liability on the parent company.

A second common objection is that if some countries require companies to act diligently, in relation to human rights, this will affect their competitiveness. At the heart of this argument is the request to be allowed to get away with acting badly if it would cost money to act well and not everyone is made to do it. But there is also an assumption that significant financial or administrative burdens would be involved, which may not be the case. Acting with due diligence will require some time and resources, but the scope of due diligence can and should be adapted to reflect the potential risk and the scope of impact of corporate operations.

A third objection is jurisdictional – that an express duty of care on parents would constitute interference between one State and another. Such an objection has also been raised to specific statutory provisions that impose direct liability on parent companies in the context of their subsidiaries' extraterritorial operations. This is completely incorrect. The issues at stake are between private parties – a company and the individuals and communities its operations affect. Several examples of laws with extraterritorial reach exist. For example corruption and anti-bribery legislation, trafficking laws and some financial regulations (such as section 1504 of the Dodd-Frank Act).⁸⁷¹

In cases involving human rights abuses, the imposition of legal responsibility on parents with regard to human rights abuses arising in the context of their global operations would have to be reasonable. Even a robust process on the part of the parent company may not prevent abuses arising from unexpected events. Where the unforeseen occurs, the due diligence standard for assessing whether a parent has met their duty of care should look at detection measures employed by the company at the time and how the company responded once made aware of the situation. However, it is also vital that an obligation of due diligence on parent companies is not reduced to a box-ticking compliance exercise; corporate human rights due diligence must be translated into practical action that takes account of foreseeable risks in a given context.

An express duty of care in relation to human rights impacts, based on human rights due diligence, would include:

- identification of key risks, related to business and geographical area of operation
- the existence of a plan of action to prevent or mitigate risks, which was based on both technical data and consultation with potentially affected people and other relevant stakeholders
- specific actions triggered once abuses reported (a parent company that acted swiftly to end and remedy an abuse within the scope of what is legally possible)
- disclosure of specific policies and processes undertaken to identify and address key risks.

Ultimately, legal change will be required to implement this express duty of care and due diligence defence. When dealing with claims concerning corporate-related human rights abuses, courts can, and in the meantime should, draw more proactively upon international standards of business conduct in relation to human rights in determining whether a parent company owed a duty of care to individuals or communities affected by their global operations, and whether that duty of care was fulfilled in the particular circumstances.

Shifting the burden of proof in certain situations

An explicit duty of care on the parent or controlling company would significantly clarify the legal standards applicable to that company both before and for the purposes of any claim concerning corporate-related human rights abuses.

However, it would not eliminate the hurdles associated with the responsibility of plaintiffs to discharge other burdens of proof (i.e., in a negligence claim, even if the parent company were under an express legal duty of care, the plaintiffs would still need to show, at a minimum, that the parent company breached that duty of care and that this caused the damage suffered). The cases in this book have shown that even victims of large-scale human rights disasters or severe or systematic human rights abuses arising in the context of corporate activity face enormous difficulty in proving that a company was liable for the harm caused. This is a particular issue in cases involving toxic chemicals when victims lack the information required to establish the relevant chemicals involved and their impact on, for example, health and the environment. This hurdle could be addressed by shifting the burden of proof in certain civil claims.

The second element of the framework, therefore, is a rebuttable presumption that a parent company is legally responsible for certain types of human rights abuses arising in the context of its global operations such as those involving large-scale human rights disasters or severe or systematic human rights abuses. As such, if victims can prove that they suffered harm, the parent company would have the burden of proving that it was not legally responsible or should not be held legally responsible for that harm. The standard of proof needed to rebut this presumption would again be defined by reference to international due diligence standards (as described in more detail above). However, depending on the cause of action, the burden of proof would also be shifted for other elements required to prove that claim. For example, in a negligence claim, the parent company would not only need to prove that it did not breach its express duty of care towards those individuals and communities (by reference to the due diligence standard as described in more detail above) but also that any breach did not cause the harm suffered by the victims.

In contrast to the present situation, which requires the plaintiff to show the reasons why the parent/controlling company should be liable, it would be up to the company to show why it should not. Such a presumption is effectively a form of strict liability, with a due diligence defence. In cases such as those involving large-scale human rights disasters or severe or systematic human rights abuses, it is very apparent when corporate activity resulted in the harm caused (as, for example, in the cases of the gas leak in Bhopal and the toxic waste dumping in Abidjan). It is therefore entirely reasonable to expect the relevant parent company to prove that it was not legally responsible or should not be held legally responsible for that harm. There are many laws that already allow for reducing or shifting the burden of proof between the parties. For example, Article 6 of the Swiss Gender Equality Act establishes a lighter burden on plaintiffs alleging discrimination; they only have to prove that discrimination is likely to have occurred.⁸⁷² The following section also highlights certain legislative provisions that recognise the concept of strict liability and a due diligence defence.

There are also judicial precedents to draw from. A very important principle (which is also relevant to piercing the corporate veil) was set by the CJEU in the ambit of EU competition law

in *Akzo Nobel vs Commission of the European Communities* in September 2009. The CJEU stated the principle that where a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable presumption that the parent exercises decisive influence over the subsidiary, which in turn justifies attributing to the parent responsibility for the infringement by its subsidiaries. Plaintiffs do not need to prove either the direct or indirect involvement of the parent company and it is the parent company's responsibility to prove the independence of its subsidiary.⁸⁷³

The value of this approach is that it would shift the burden of proof to the party that was in the best position to obtain and present the relevant information. It also balances the interests of the different parties: companies would not be prevented from defending themselves and victims of abuse would still have to prove that they suffered harm.

The changes proposed above could be seen as striking at the heart of corporate and tort law – making a parent company legally responsible for the acts of its subsidiaries and shifting to the parent company the claimant's usual burden of proving that the parent company is responsible for the harm caused. However, in cases involving human rights there is an overriding public interest in making such changes. Moreover, as noted in 2.3 *The extraterritorial dimension of the State duty to protect* in *The international human right to remedy* section of this book, expert and authoritative interpretations of international legal treaties have made clear that home States can and must act to prevent human rights abuses where they have the legal and practical capacity to do so, without diminishing the legal obligations of the host State.⁸⁷⁴ The previous section on *The scope of the duty of care* has also dealt with common objections to such proposals.

While inequalities in the legal protections afforded to victims of human rights abuses by different States is an unfortunately reality, it is not an acceptable one. Through the legitimate forums and measures available to them States must cooperate and support one another to give full effect to the protection of human rights. In this context it is untenable that the government of a home State should acquiesce in a parent company domiciled in its territory failing to act robustly to prevent abuses throughout its global operations.

Again, a legal change is needed to implement this recommendation. However, courts can, and in the meantime should, draw more proactively upon international standards of business conduct in relation to human rights in determining whether a parent company was legally responsible or should be held legally responsible in certain situations, such as those involving large-scale human rights disasters or severe or systematic human rights abuses arising in the context of its global operations.

Clarifying other modes and standards for establishing parent company liability

There are various options for clarifying the modes and standards for establishing the liability of parent companies with respect to the activities of their subsidiaries. Many of these options involve the adoption of general legislation concerning human rights abuses. For example:

- Specific legislation could require parent companies to adopt and implement human rights due diligence throughout its operations (including those of its subsidiaries). The occurrence of a human rights abuse, coupled with the failure to implement or disclose adequate policies and practices (as discussed in more detail in *The scope of the duty of care* above), could give rise to liability.

■ Alternatively, specific legislation could allow for civil and/or criminal liability to be imposed automatically on parent companies for human rights abuses caused or contributed to by them or their subsidiaries (including those committed abroad). The parent company could invoke the adequacy of due diligence procedures as a defence (as discussed in more detail in *The scope of the duty of care* above).

Another option is for legislation to be developed using a piecemeal approach (i.e., to address those key areas in which human rights abuses typically arise). For example, as discussed in *The scope of the duty of care* above, the United States has adopted laws with extraterritorial effect in respect of trafficking.

The notion that legal responsibility for damages or injury caused by one actor can be automatically imposed on another actor, even though the latter may not have been at fault, is well-established. For example as discussed above, the doctrine of “vicarious liability” imposes liability on one entity for the failure of another because of a special legal relationship between the two entities, such as the relationship between an employer and employee. Thus, vicarious liability is a form of “strict” or “no-fault” liability.⁸⁷⁵

In the case of parent companies and their subsidiaries, there are legislative examples of liability being imposed on the parent with respect to their subsidiaries, especially in the areas of labour and environmental law, financial and securities regulation, insolvency, antitrust and product liability. For example, in Brazil, controlling shareholders may be liable for environmental damages if the subsidiary’s assets are insufficient to cover such damages, irrespective of any guilt on the part of the company or the shareholders. Some jurisdictions allow recourse against parent companies in cases of breaches related to labour obligations. Again in Brazil, controlling shareholders have been held liable for their subsidiary’s labour obligations when the company did not have sufficient assets to cover such obligations. In Colombia, founders of a limited liability company are liable for their company’s tax and labour obligations, regardless of guilt.⁸⁷⁶

The notion that parent companies can be held civilly or criminally liable for certain actions of their foreign subsidiaries is also well established.

An important legislative example is the 1990 Americans with Disabilities Act. This law is highly relevant to this discussion, not only because it applies extraterritorially to activities of foreign subsidiaries of US companies but because it deals directly with a human rights concern. The law prohibits discrimination against persons with disabilities by a number of entities in a number of circumstances, including private employers with regard to employment practices. Importantly, it determines that:

*If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.*⁸⁷⁷

The prohibition on discrimination imposes on all US companies covered by the law an obligation

to supervise the conduct of their foreign subsidiaries (or entities they “control”) to ensure they do not engage in discrimination against persons with disabilities abroad. The law specifically provides for enforcement by the courts and remedies for individuals. However it is important to highlight that the law has a serious – and somewhat ironic – limitation: it only applies to US citizens, whether employed in the US or abroad. It does not apply to non-US citizens employed by US companies operating outside the US. Despite this limitation, the Act demonstrates how parent company liability can be clarified by law.

The UK Bribery Act 2010 is a somewhat different model. Section 7 of the Act, on Failure of Commercial Organisations to Prevent Bribery, establishes that a commercial organization will be liable if it fails to prevent bribery by an “associated person” carried out on its behalf (which can include a foreign subsidiary).⁸⁷⁸ It further provides that the commercial organization can invoke as a defence that it “had in place adequate procedures designed to prevent persons associated with [the commercial organisation] from undertaking such conduct”.

The jurisdictional reach of this law is wide. It is applicable to any company that is incorporated in the UK and carries on a business in the UK or abroad, and to any other “body corporate” which carries on a business or part of a business in the UK, regardless of where it is incorporated.

States have shown that they are willing to adopt legislation with extraterritorial effect in certain key areas. As such, and given the sheer scale of the obstacles faced by victims of human rights abuses, it is entirely reasonable to push for States to adopt legislation that increases the likelihood of achieving accountability for corporate-related human rights abuses.

2.5.2 Eliminating *forum non conveniens* in human rights cases

The preceding sections of this chapter have demonstrated that *forum non conveniens* is a serious human rights concern. The basis for *forum non conveniens* is what forum is the most appropriate. However, in all of the human rights-related cases examined in this book where the forum issue was raised, the plaintiffs viewed the home State courts as the appropriate forum, while the corporate defendants argued for the host State. In each case the host State had already shown itself, or subsequently proved to be, unable to address the claims. The evidence from this research and other bodies of work on the topic are that *forum non conveniens* in corporate cases has had a damaging impact on the ability of often poor plaintiffs to access courts in human rights-related cases. Given that the elimination of *forum non conveniens* in certain jurisdictions has not led to legal difficulties, the total elimination of this rule, at least in corporate-related human rights cases, would significantly benefit the right to remedy.

Home State courts should exercise jurisdiction unconditionally in serious and legitimate claims brought before them by foreign plaintiffs against companies domiciled within their territory for their alleged involvement in human rights abuses abroad.

The significant improvement in access to justice that this could bring to foreign victims of human rights abuses is exemplified by the benefits that the *Owusu* decision, mentioned earlier in this chapter, brought for foreign plaintiffs in UK courts. Before *Owusu*, foreign plaintiffs who brought claims against UK parent companies in the UK courts had to face lengthy and expensive preliminary

forum non conveniens litigation.⁸⁷⁹ Corporate defendants would routinely raise *forum non conveniens* in order to have the case stayed in the UK courts, giving rise to many years of preliminary disputes that were unrelated to the merits of the case.⁸⁸⁰

The prospect of having to fight protracted and costly disputes about *forum non conveniens* used to act as a powerful disincentive for severely under-resourced plaintiffs and lawyers representing them on a “no-win, no-fee” basis.⁸⁸¹ Since the *Owusu* decision, it has been possible for a number of recent lawsuits against UK corporations about alleged human rights abuse abroad either to reach a settlement or significantly progress to trial within the period it would normally have taken to resolve arguments about *forum non conveniens*.⁸⁸²

The use of *forum non conveniens* in both Canada and the US today resembles the situation of the UK before *Owusu*. Corporate defendants in the US have routinely used this argument over the last two decades to block cases involving personal injury or environmental damage suffered overseas. To support its *forum non conveniens* claim in the Omai case before the Québec court, Cambior indicated that it would accept the jurisdiction of Guyana and undertook not to invoke any grounds based on *forum non conveniens* there. However, when the suit was finally launched against it in Guyana, Cambior raised other preliminary objections related to the serving of notice, eventually leading to the wholesale dismissal of the claim.

States that retain the use of *forum non conveniens* can ensure that the criteria they use include human rights considerations. Even in the absence of legislative guidance, the courts have enough discretion to bring human rights considerations within their evaluation of *forum non conveniens*. Courts, like any other State authority, are bound by international human rights law,⁸⁸³ and they play a particularly vital role in ensuring the realization of the right to remedy. Courts should consider whether internationally recognized human rights are at stake in the case – specifically, if the tort which the plaintiffs allege would also constitute a human rights abuse, there should be a presumption in favour of hearing the case.

The protection of human rights in any given case before them should be considered as an overriding factor in favour of retaining jurisdiction. Some US decisions have expressly adopted this approach. In *Presbyterian Church of Sudan v. Talisman Energy* and in *Wiwa v. Royal Dutch Petroleum Co*, the US courts found that in deciding whether to retain jurisdiction, the interests of the US in furnishing a forum to litigate claims of violations of the international standards of the law of human rights had to be weighed.⁸⁸⁴

Where the host State courts are considered as the forum to hear the claim, the full scope of potential problems that plaintiffs may face should be considered. This includes: the extent to which the alternative court is able to operate independently, free from political interference, corruption, unwarranted delays and inefficiency; the existence of a legal cause of action and suitable legal representation; the availability of class actions and legal aid; the availability of adequate remedies; the extent to which governments fully implement court decisions; and the personal circumstances of the parties. If these elements are not taken into account in the balancing exercise that a judge conducts to assess the adequacy of a forum, it is no surprise that alternative forums, found to be adequate, fail to provide victims of human rights abuses with access to justice and the reparation to which they have a right.

In the Omai case, the Québec court found that the lack of a procedure for bringing a class action in the host State was not a serious enough disadvantage to warrant retaining jurisdiction in Québec. The court went even further, saying that if the door to the representative action was closed, plaintiffs still had “the right to institute individual actions against Cambior”. This proposition completely overlooks both the personal circumstances of the plaintiffs, who were widely dispersed over a large jungle area, poor and marginalized within the larger society, and the difficulties they faced in trying to bring to account a foreign parent company in a country largely dependant on foreign investment. Had human rights considerations and the right to remedy in particular formed part of the balancing exercise conducted by the Québec court, the result may have been quite different.

In the Bhopal case, UCC supported its *forum non conveniens* arguments by insisting that the Indian courts were fit to hear the case (see the heading *UCC's forum objections* in *The Bhopal gas leak disaster in India* case study in *The cases* section of this book). However, when the US court granted UCC's request on condition that UCC submitted to the jurisdiction of the Indian courts, UCC appealed this decision arguing, in a complete about-turn, that:

*Indian courts, while providing an adequate forum, do not observe due process standards that would be required as a matter of course in this country.*⁸⁸⁵

It is evident that *forum non conveniens* is used by corporate defendants as a device to evade responsibility rather than to establish the best jurisdiction to resolve a dispute. Given the realities of how *forum non conveniens* is used in extraterritorial human rights litigation, the doctrine should be eliminated altogether in these cases.⁸⁸⁶

2.5.3 International cooperation and assistance

A number of international human rights treaties place on States an obligation to engage in cooperation and assistance to ensure the realization of human rights, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The scope of the obligation to engage in international cooperation and assistance is not yet fully settled and specificity is, to some extent, linked to the right or rights under consideration. However, it is generally accepted that States have an obligation to seek and provide assistance.

In the context of the right to effective remedy, both home and host States should seek the assistance of the other to ensure effective remedy. This is essential particularly in relation to those elements of remedy that a home State court could not guarantee, such as those that require action from the host State. These include, for example, guarantees of non-repetition through changes in law or policy, measures of restitution such as the remediation of a damaged environment, or apologies and disclosure of the truth about the circumstances of the abuse as a means of satisfaction.⁸⁸⁷

International cooperation and assistance would also address one of the objections raised in relation to *forum non conveniens*; that witnesses and evidence are located in the host State. While this is true to some extent, it is also the case that, in litigation involving multinational companies,

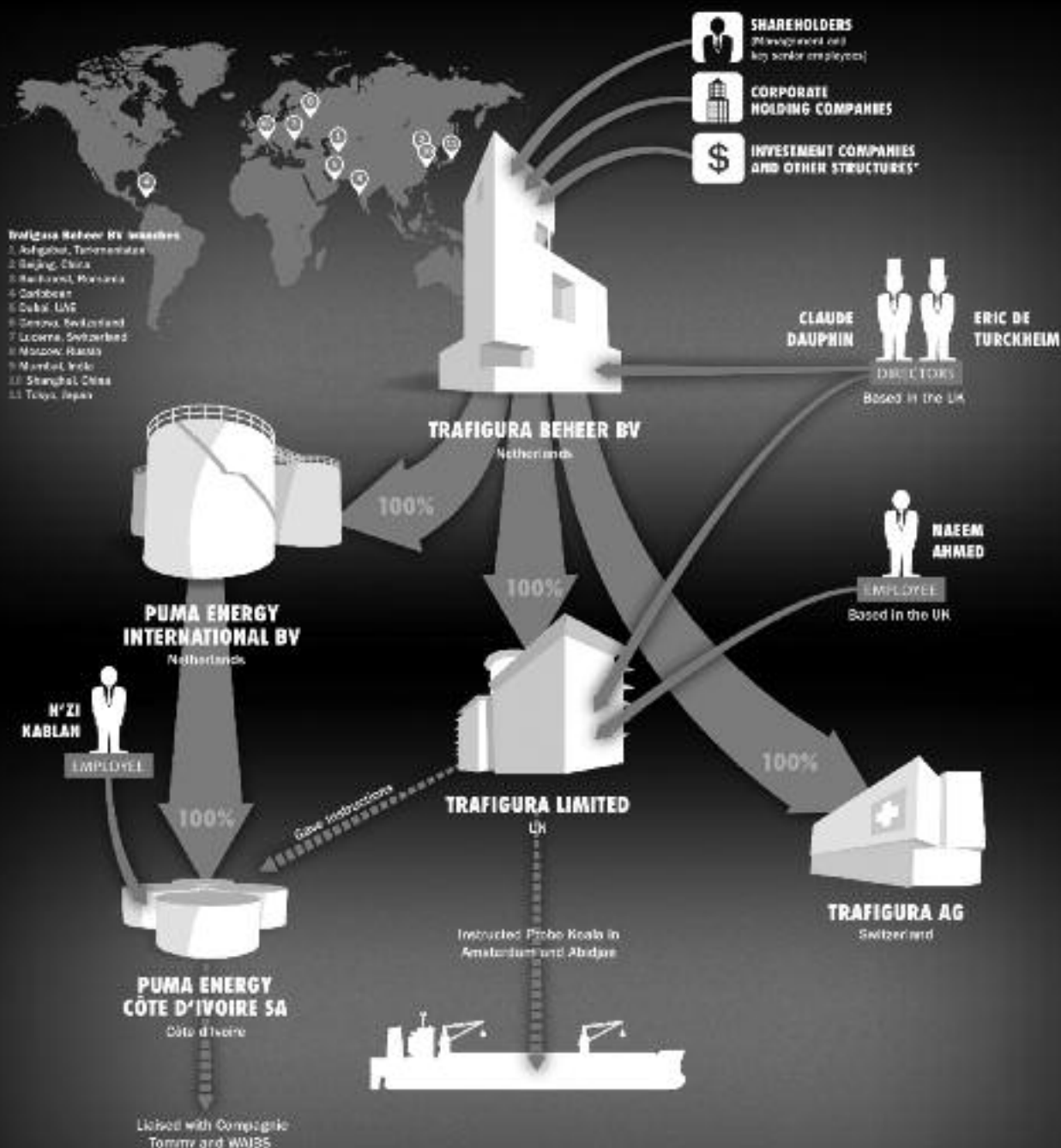
witnesses and evidence may be located in other States, particularly the home State. This was the case with the Côte d'Ivoire toxic waste dumping case (see *The toxic waste dumping in Côte d'Ivoire* case study in this book), for example, where significant information came to light as a result of a civil action in the United Kingdom. It was also a feature of the Bhopal case – UCC and its former chairman Warren Anderson have never responded to court summons (see the heading *The criminal case in India and Summons to Dow to attend criminal proceedings* in the *Bhopal gas leak disaster in India* case study in this book).

In the cases documented in this book, the application of *forum non conveniens* did not address the questions of the location of the witnesses or evidence, because in each case the use of *forum non conveniens* either ended the practical possibility of litigation or the multinational company struck a deal with the host State government. A more appropriate way to address concerns about witnesses and evidence in cases involving multinational companies is for States to cooperate to ensure that the core principles of accountability and the human right to remedy are upheld

International cooperation and assistance to ensure that victims of abuse have an effective remedy would require the development of guidance for judges and prosecutors, preferably in a multi-lateral forum. Examples of such cooperation already exist – such as the EU initiative on judicial cooperation in civil matters, which seeks to eliminate obstacles deriving from incompatibilities between the various legal and administrative systems, and thus facilitate access to justice.

TRAFIGURA'S CORPORATE STRUCTURE

Who is behind the toxic waste disaster?



* this is a simplified representation of Trafifura's complex and opaque corporate structure. As of 2006 there are a number of other entities involved which have not been added to this infographic. Trafifura Beheer BV is a subsidiary of Trafifura Holding BV, a company registered in Amsterdam, Farringford NV, a company registered in the Dutch Antilles, is the ultimate parent company of Trafifura Beheer BV.

(created in 2012)



Victims affected by toxic waste dumped around Abidjan, Cote d'Ivoire, wait to be seen by doctors, 7 September 2006. A lack of information on the nature of the waste has had severe effects on those directly affected by the dumping and the health professionals assisting them.

2/LACK OF INFORMATION

INTRODUCTION

One of the most significant barriers that individuals and communities confront when attempting to seek remedies for corporate-related human rights abuses is their lack of information - on corporate structure, activities and impacts as well as the options to seek redress. While the legal hurdles described in the previous chapter constitute serious obstacles for those seeking a remedy, they are significantly exacerbated by the lack of access to critical information. In all of the cases reviewed in this book the affected individuals and communities faced huge challenges in accessing information necessary to mount a successful legal claim – even when there was a clear abuse of human rights.

Plaintiffs generally lacked information on the social and environmental impacts of corporate activity. Frequently this information was not gathered – either by the State or the company – or it was not disclosed. The failure to gather and disclose information can affect many rights and specifically the right to effective remedy.

In all of the cases referenced in this book people were aware that they were living with contamination but they did not have basic details about specific contaminants, levels of contamination or the health risks to which they were exposed. From the gas composition at Bhopal, to the composition of the toxic waste that was dumped in Côte d'Ivoire; from the ground water contamination in the Niger Delta to the contamination of the Omai and Essequibo rivers in Guyana, companies have withheld data and States have been unable or unwilling to either compel disclosure.

The absence of information on corporate operations can make it very difficult for people to gather necessary evidence to pursue legal action. It can be difficult for people to establish the causal links between corporate operations and the negative human rights impacts they experience. While the absence of information was problematic, the cases documented in this book highlight other problems related to information on corporate operations; the outright denial, by companies, of access to non-confidential data, such as environmental impact assessments; manipulation of information to obscure issues of causation and liability; and misinformation about the cause or impact of harmful events.

Corporate control over information has been highlighted repeatedly in this the cases documented in this book. In addition to information on the harm which they have suffered, plaintiffs struggled to access information on the companies themselves – information that is vital to establishing the liability of parent companies in particular.

Access to information is not only important for people trying to bring a legal claim against a company – it may also be vital to an effective remedy in other ways. While the previous chapter of

this book focused on civil litigation, remedy involves more than compensation. As discussed in *The international human right to remedy* section of this book, a key element of remedy is reparations which can include, inter alia, such measures as verification of the facts and full and public disclosure of the truth, judicial and administrative sanctions against those responsible for the abuses and guarantees of non-repetition to prevent further abuses. None of these is possible until the abuse and responsibility for the abuse are acknowledged.

This chapter looks at how the lack of access to information undermines the right to effective remedy, particularly for poor and disadvantaged communities.

1. THE RIGHT TO INFORMATION AND INFORMATION AS A COMPONENT OF OTHER RIGHTS

Article 19 (2) of the International Covenant on Civil and Political Rights guarantees to all persons the right to freedom of expression. Article 19 (2) further provides “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”. The Human Rights Committee has noted that Article 19 (2) also “embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production”.⁸⁸⁸

To give effect to this right, the Human Rights Committee says: “States parties should proactively put in the public domain government information of public interest” and “ensure easy, prompt, effective and practical access to such information”. According to the Committee, states should also enact the necessary procedures for the public to gain access to information, such as through freedom of information legislation. The Committee has also clarified that “authorities should provide reasons for any refusal to provide access to information”, affirming the principle that there should be a presumption for disclosure, whereby non-disclosure of information should be exceptional and strictly justified.⁸⁸⁹ The right to information has also been recognized by regional human rights bodies.⁸⁹⁰

The work carried out by the UN Special Rapporteurs on Freedom of Opinion and Expression on the right of access to information sheds further light on the content and scope of this right.⁸⁹¹ Of particular interest is the work of Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain, who also addressed the right of access to information in the context of information held by private entities. In his 2000 report to the Commission on Human Rights, he suggested a broad definition of the terms “information” and “public bodies” for the purpose of delineating the scope of the right of access to information. In his opinion, information included:

all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production.

He further suggested that the understanding of “public body” for purposes of disclosure of information should focus on “the type of service provided rather than on formal designations”. It should therefore encompass “all branches and levels of government”, including nationalized industries and public corporations, private bodies that carry out public functions, and private bodies “if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health”.⁸⁹² Under this definition, private bodies, including companies, would be required to disclose information relating to aspects of their activities when a key public interest, such as health or the environment, is at stake.

Other instruments, such as the Declaration of Principles on Freedom of Expression in Africa, are much more explicit regarding access to information held by private bodies. Section IV(2) of that Declaration gives individuals a right to “access information held by private bodies which is necessary for the exercise or protection of any right”.⁸⁹³

The collection, analysis and publication of information has been recognized by human rights monitoring bodies as critical to ensuring that human rights are protected in many contexts. The Committee on Economic, Social and Cultural Rights, the expert body that monitors the International Covenant on Economic, Social and Cultural Rights, has recognized the importance of information in relation to the rights to health, water and social security, amongst others.⁸⁹⁴ The Committee has affirmed that access to health-related education and information is an important component, and an underlying determinant, of the right to health.⁸⁹⁵ It has also identified information accessibility as one of the elements of the rights to health; defined as “the right to seek, receive and impart information and ideas ... concerning health issues”.⁸⁹⁶ The Committee has highlighted that as part of the State’s obligation to protect, “states should also ensure that third parties do not limit people’s access to health-related information and services”.⁸⁹⁷

In relation to the right to water the Committee has emphasized:

*The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.*⁸⁹⁸

2. HOW LACK OF INFORMATION AFFECTS THE RIGHT TO REMEDY

Having access to certain information is vital at every stage of a remedial process. As the case studies demonstrate, individuals and communities affected by human rights abuses in which corporations are implicated often experience great difficulty in securing an effective remedy precisely because key information is unavailable or inaccessible to them. Groups that are marginalized within the wider society or living in poverty are usually further removed from the sources of information or face additional difficulties in accessing them.⁸⁹⁹

2.1 IMPORTANCE OF PRE-INVESTMENT INFORMATION

Research done by Amnesty International and other organisations has highlighted how in many situations, individuals and communities are unaware about the terms of the investment plans or project agreements between their governments and foreign investors. They often lack adequate information on the possible risks that projects may have for their human rights and whether adequate mitigation measures have been put in place.

The failure to ensure people have full information before commercial projects begin – particular where these involve an invasive or high-risk industry, such as mining or chemicals – undermines the possibility of preventing or mitigating harm; if people do not know what is planned they cannot engage in meaningful discussions on the identification and mitigation risks, even though they may be uniquely well-placed to do so.

In the absence of prior information about commercial activity and potential risks, people may not know they are being harmed at the time that harm occurs (e.g. when people are exposed to pollutants, which cause health impacts that are not immediately obvious). If the activity then results in human rights abuses, the same lack of information will likely contribute to undermining their ability to secure a remedy.

Amnesty International's research on human rights abuses linked to mining in the Indian state of Odisha found that affected villagers had received little or no information on the impact of a massive alumina refinery on their lives:

The officials did not share in the gram sabha meeting or elsewhere that there would be so much dust, chimney smoke, noise, that our river would become dirty. We had never seen a refinery so had no experience or information on what life could be like staying so close to it.

Women referring to the public meetings that were held prior to UK-based Vedanta Resources obtaining regulatory clearances for the alumina refinery in Lanjigarh, Odisha State, interview conducted in 2009

We were never told anything about an ash pond or what living next to it would be like.

BN, man from Kenduguda, Odisha State, India, whose land was acquired to support the construction of an ash pond for UK-based Vedanta Resources' alumina refinery in Lanjigarh, Odisha State), interview conducted in 2009⁹⁰⁰

In this case, as in several others investigated by Amnesty International, the initial lack of information paved the way for a range of human rights abuses. When the appalling impacts of the refinery were exposed, it was clear that people's health had been put at risk. However, the company –supported by state officials - defended its operations by pointing to the community meetings and claiming people had been given full information. A detailed investigation by Amnesty International, including testimonies of affected people and the official record of the village council meetings confirm that the villagers were not given adequate information of the nature and scale of the refinery or the possible impacts on the environment and people.⁹⁰¹

In this case, despite the negative impacts of the refinery, its operations have been allowed to continue, and an expansion has been proposed. Once companies and States have committed to and invested in commercial activities, stopping or significantly revising the plans can be difficult. Both contractual obligations and vested interests can contribute to an unwillingness to acknowledge problems with the investment.

Ensuring people have adequate information prior to the start-up of commercial activity is vital to prevent human rights abuses, including abuses of the right to remedy. The Inter-American Court of Human Rights set an important precedent in 2006, in the case of *Claude Reyes et al v. Chile*.⁹⁰² In this case, Chile had refused to provide the petitioners with information on a foreign investment contract related to a forestry exploitation project that had given rise to concerns about potential environmental impacts. The court found that the State should have provided the information requested or should have had a justification for not doing so. It found that the information the State failed to provide was of public interest, and found Chile in breach of its international obligations. Significantly, the court considered that when projects affected public interest, such as the exploitation of natural resources, the information held by the State, though related to a private company's activities, must as a rule be publicly accessible.⁹⁰³

2.1.1 Lack of baseline data

The right to remedy can be affected by a lack of relevant baseline data. It may be difficult to assess, and certainly to prove in court, the extent to which corporate operations caused specific damage if there is no baseline with which to compare. This problem was raised in the Omai case. According to some expert reports and activists involved in the Omai litigation, the lack of sufficient environmental and socio-economic baseline data complicated the assessment of the impacts of Omai Gold Mines Limited (OGML)'s operations following the 1995 spill.⁹⁰⁴

Ensuring baseline data should be seen as in the best interests of both the company and the potentially-affected communities. In the absence of any other explanation, damage caused before the start of its operations may be attributed to the company. In the case of the gold mine disaster in Guyana, during negotiations between Cambior and representatives of Essequibo communities over rehabilitation of the Essequibo River, Cambior raised the objection that heavy metal contamination could have been caused by small- and medium-scale miners operating in the region before the start of Omai's operation. The lack of comprehensive baseline data on heavy metals contamination coupled with the lack of heavy metals testing up- and downstream of Omai prior to and after the spill, complicated the assessment of what had caused the damage.⁹⁰⁵

2.2 INFORMATION ON IMPACTS

Ongoing monitoring of the impact of commercial activity is vital to protect human rights; the nature of such monitoring will depend on the nature of the business activity. As noted previously, this book focuses on business activity that poses significant risks to the environment and human rights. An important component of regulating such business in the public interest is appropriate monitoring of all relevant parameters and – critically – disclosure of the data.

Despite the importance of information on social, human rights and environmental impacts of extractive industries, in many cases investigated by Amnesty International neither the State nor the companies collected this data.⁹⁰⁶ For example, in the oil producing region of the Niger Delta in Nigeria, villagers drink water and eat food that is polluted - often having no alternatives. They fear for their health but there is little data to confirm or refute their concerns, because neither the government nor the companies monitor the human health implications of pollution, despite concerns being expressed by numerous actors, including the UN, for years.⁹⁰⁷

The failure of the government of Nigeria to monitor the impact of oil operations was noted by the African Commission on Human and Peoples' Rights in a 2002 decision in which it stated:

*government compliance with the spirit of Articles 16 [health] and 24 [healthy environment] of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.*⁹⁰⁸

One critical challenge which the authorities in some developing economies face is the lack of resources and technical capacity to gather the necessary data. The regulatory agencies officially tasked with monitoring may lack qualified personnel and basic equipment. When host States lack the resources and capacity to monitor and gather data on the impact of business activities they often leave this to the companies themselves. This issue is discussed below.

2.2.1 Corporate self-monitoring

When companies are responsible for monitoring their own impacts – particularly where there is limited or no oversight – human rights, including the right to remedy, can be significantly undermined. Individuals and communities who may be exposed to health or other risks from the corporate operations are reliant on information provided by the very entity that might be causing them harm. While some companies will behave responsibly, self-monitoring is inherently open to abuse.

The risks are exacerbated in the absence of mandatory requirements to disclose data; where companies have to publish specific information, this can then be scrutinised, and such scrutiny reduces the scope for bad practice. However, absent such a requirement companies can be reluctant to release information or, if they do, they carefully select what they will disclose. While some information may legitimately be considered confidential, companies frequently take the approach that they will not disclose data unless required to by law.⁹⁰⁹

Control over information associated with impact monitoring was a particular problem in the Ok Tedi case in PNG (see the *Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study in this book). Given the serious deficiencies in the monitoring capacity of the

PNG government, much of the environmental impact monitoring of the mine was left to the mining company, Ok Tedi Mining Limited (OTML). At the outset of the Ok Tedi project, the government had envisaged that the mining company would pay for a scientist to supervise environmental aspects of the project. The scientist would be appointed by and report to the government. However it is alleged that this recommendation was opposed by OTML, who wished to employ its own scientists. Although the data that the company scientists gathered might have been quite valuable, corporate management maintained control over the dissemination of the findings, presenting them in a manner that was intended to allay community fears about environmental changes.⁹¹⁰ Critically, the environmental study supposedly produced by OTML in 1989, on which the government appears to have based its decision not to impose any mine waste containment option on the mine, does not seem to have been released to the public.⁹¹¹

As in Ok Tedi, in the Omai gold mine disaster in Guyana (see *Cyanide spills: the Omai gold mine dam rupture in Guyana*, case study in this book), neither the Guyanese government nor the communities affected had the resources or expertise to carry out monitoring of mine impacts. Although a programme of joint testing between the government of Guyana and OGML began after the 1995 spill, many critics point to the lack of capacity of the Guyanese regulatory agencies to perform their responsibilities with independence. The agencies' lack of resources, they charge, made them dependent for data, equipment and training on the companies they were supposed to be monitoring.⁹¹²

2.2.2 Data on health impacts

Where corporate activity (or any activity) has a negative impact on human health, information is vital to limit and treat the damage. In cases where information is in the hands of corporations they may be reluctant to release it for fear of increasing their liability risks or for other commercial reasons. In both Bhopal and Côte d'Ivoire the companies at the centre of the cases refused to disclose information about hazardous material and neither was ever legally compelled to do so.

Without comprehensive and accurate information about the nature of the substances that have been released, and their toxicity and impact on human health, the authorities and other professionals struggled to administer adequate treatment.

After the gas leak in Bhopal, efforts to implement detoxification measures, to provide short- and long-term health care, and to understand the long-term health consequences of the gas leak were undermined by a lack of information about the nature and toxicity of the gases released during the leak.⁹¹³ A government report described the situation:

*Within hours all the hospitals of Bhopal were full of poison gas-stricken victims. Doctors, medical students and volunteers worked round the clock but in the absence of any open toxicological information about MIC, only symptomatic treatment could be provided ... No one knew for certain what gases had been released from the Union Carbide facility ... The Union Carbide management was completely silent on this and did not even say what toxic gases had been released from their facility or what antidotes could help.*⁹¹⁴

Not only did UCC consistently fail to release this information,⁹¹⁵ it actually denied that methyl isocyanate (MIC) was toxic, saying, for example, that the substance that had leaked was “nothing more than a potent tear gas”.⁹¹⁶ This was despite UCC’s manual stating that MIC should be treated as an extremely hazardous substance.⁹¹⁷

More than 20 years later, in 2006, the oil trading company Trafigura also failed to fully disclose information believed to be in the company’s possession on the toxic waste that was dumped in Abidjan. Although some independent analyses of the waste were carried out, these had limitations and only Trafigura knows the exact process by which the waste was created. Statements made following the out-of-court settlement in the UK in 2009 make clear that Trafigura holds expert reviews of the waste and potential medical impacts.

In the immediate aftermath of the dumping doctors were hampered by a lack of information on the composition of the waste. A doctor told Amnesty International:

*“As we are not aware of the composition of the waste – although we know it was hydrocarbon and non-radioactive waste – we had to do a symptomatic treatment for all the symptoms. As a result we mostly used generic medicine to treat symptoms related to the toxic waste.”*⁹¹⁸

The company subsequently made claims about the likely health impacts, including stating that the waste could not have caused deaths or long-term health problems. However, since the company has never disclosed key information about the waste or its own assessment of the impacts, these claims cannot be verified. On the contrary, Trafigura has made every effort to ensure that any information it has does not reach the public. The settlement agreement that ended the UK civil claim included confidentiality clauses barring both the plaintiffs and the expert witnesses from disclosing any expert reports.⁹¹⁹

In its verdict against the company in July 2010, the Dutch court specifically noted Trafigura’s lack of openness about the waste:

*It was also Trafigura that had refrained from the very start to speak openly about the nature of the slops in the media and the manner in which the slops had originated. The press releases published by Trafigura in September 2006 bear witness to this. In its annual report for 2007, it had even confined itself to describing the slops as “comprising a mixture of gasoline, water and caustic soda”. In its contact with the press in 2006 and 2007, Trafigura adopted a defensive attitude when it came to the nature of the slops, even though it was possible to provide much more clarity regarding the precise composition of the materials and the potential consequences for man and the environment.*⁹²⁰

No health monitoring or epidemiological studies have been established to assess the medium to long-term health impacts of exposure to the waste. To this day people living in the vicinity of the dump sites continue to fear the medium- to long-term effects of the waste on their health and that of their children.

A critical element of right to effective remedy in both the Bhopal and Côte d'Ivoire cases is the disclosure of information to enable the most effective medical care. The payment of compensation – problematic in both cases, as discussed earlier – is not sufficient reparation in such cases.

While the companies in both cases did not disclose full information, there are questions about why the governments of Côte d'Ivoire and India did not require the disclosure.⁹²¹

2.2.3 Manipulation of information

While withholding or failing to gather information necessary to ensure an effective remedy is a problem in many cases, the manipulation of information after harm has occurred can also undermine human rights. One of the most problematic examples documented by Amnesty International is Shell's use of discredited and misleading information to attribute the majority of oil spills from its Niger Delta operations to sabotage or oil theft.

Hundreds of oil spills occur in the Niger Delta every year. Because of serious weakness in the regulatory system the company (which is the potentially liable party) has substantial control over a process that sets many of the parameters for liability. These include the cause of the spill, the volume of oil spilled, the area affected.

Amnesty International research published in 2013 found evidence not only of serious and systemic flaws in Shell's oil spill investigation process, but also specific examples where the cause of an oil spill appears to have been wrongly attributed to sabotage. The evidence includes a secretly filmed video of an oil spill investigation. In addition, the research exposed serious problems with how the volume of oil spilled is assessed and recorded; it is likely that the volume of oil recorded as spilled in many cases is incorrect.⁹²²

The human rights impacts are serious – both the cause of a spill and the volume spilled affect the compensation a community receives. If the spill is recorded as caused by sabotage or theft, the affected community gets no compensation, regardless of the damage done to their farms and fisheries.⁹²³

The human right to effective remedy of thousands of women, men and children in the Niger Delta has been completely undermined by this process.

2.2.4 Implications for legal claims

The lack of sufficient information about the nature of the impact and its consequence on people's lives, livelihoods or health (the "injury" or "loss" in a tort claim) can undermine the robustness of a legal claim. As explained above, the onus is on the plaintiffs to prove, on a balance of probabilities, both that the defendant's action or inaction was responsible for a specific harm, and the personal injury or loss caused to themselves. The plaintiffs and their lawyers will need to gain access to the information required to prove both of these elements.

In almost all of the cases Amnesty International has investigated and referenced in this book, information needed by plaintiffs to prove that the company's operations were responsible for causing damage either did not exist or was in the hands of the corporate defendant. In many cases this was due – at least in part – to weaknesses in the regulatory system, particularly where monitoring of critical aspects of impact and risk management were left to the company itself.

In many legal systems, this information can be obtained during legal proceedings. Provided a claim is not frivolous or vexatious, a judge will allow it to proceed and order the disclosure of the documents sought by the plaintiffs to help substantiate their case at the discovery stage. However, where discovery rules are restrictive, plaintiffs have a very difficult task. The civil action taken by four Nigerian farmers against Royal Dutch Shell and its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Limited (SPDC), described in the previous chapter, provides an example of challenges.

In 2008, four Nigerian farmers and Friends of the Earth Netherlands filed a claim in The Hague, Netherlands, against oil company Shell for damages caused by contamination of land and water. Much of the evidence the plaintiffs say they needed to prove their case was in the hands of Shell. Certain internal company documents, the plaintiffs argue, would help prove their claim that Shell's parent company, RDS, maintained clear control over its subsidiary's operational management and should therefore be liable for the actions of its Nigerian subsidiary.⁹²⁴ This is a claim that RDS denied. Other documents concerned specific oil spills that could shed light on the question of whether oil spills were caused by poor maintenance, as the plaintiffs maintained, or sabotage. To obtain this information, the farmers filed a disclosure request with the court. Shell refused to release the requested documents,⁹²⁵ and in 2010 the court denied the plaintiffs' request. The judge found that the plaintiffs did not have a "legitimate interest" in the documentation, as they had not been sufficiently able to prove their claim.

According to Dutch civil procedure rules, a party to a lawsuit is, in principle, not obliged to disclose documents to the other party. If a party seeks documents from the other party it must institute a separate procedure in which he or she must explain why this information is needed (Article 843a of the Dutch Code of Civil Procedure). Dutch law, like other civil law countries, differs significantly in this respect from UK or US discovery rules in which there is an obligation to produce a list of all relevant documents that the parties possess at the start of a civil procedure.⁹²⁶ To obtain an order for disclosure from a Dutch court, a plaintiff needs to substantiate his or her claim for damages to such an extent that, in practice, it almost amounts to having to prove their claim (that is, the guilt and liability of the defendant).⁹²⁷ This places plaintiffs in the almost impossible situation of having to prove the merits of their case before they can access the very documents they need to do this.

2.2.5 Information and out-of-court settlements

The majority of the cases described in this book were settled out of court; in some cases the government acted on behalf of all of the victims; in others lawyers acted for clients, while in Omai the victims were left to negotiate by themselves. A lack of accessible information was a problem in each instance – in some cases contributing to a fresh human rights violation or abuse.

When very large numbers of people are injured by corporate activity governments may intervene to resolve the matter swiftly. Indeed, government intervention to protect human rights is required under international human rights law. However, what exactly the government does, and how it does it, are extremely important. In three of the four cases featured in this book, the host government negotiated and settled the matter directly with the company concerned, without giving those affected by the involvement of the affected population. In all three cases the governments violated the right

to effective remedy by agreeing settlement terms with the companies that were inadequate to address the harm caused and/or which gave the companies immunity from further legal action.

The settlement agreement between the government of India and UCC to resolve the Bhopal gas leak was negotiated without the participation of the victims. This was despite the victims having explicitly asked the court to involve them in any negotiations about a settlement. The exclusion of the survivors was enabled because, in March 1985, the Indian government passed the Bhopal Gas Leak Disaster (Processing of Claims) Act,⁹²⁸ which gave the government an “exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a claim arising out of the Bhopal disaster”.

The impacts of the government of India’s actions were far-reaching and devastating for survivors. The agreement capped all compensation at a fixed amount that was substantially less most estimates of the damage at the time; the inadequacy of the settlement has long been recognised and today the government of India is seeking further compensation from UCC.

Not only did the government’s agreement cap the liability, the Bhopal Gas Leak Disaster Act has prevented people from bringing civil claims on their own behalf. As noted earlier several claims made in the US courts have been dismissed on the grounds that plaintiffs did not have standing to maintain the action in light of the Bhopal Gas Leak Disaster Act 1985.⁹²⁹

The victims of the toxic waste dumping in Côte d’Ivoire were also given no information about the negotiations leading to the settlement between the government and Trafigura. As a result, the final amount of compensation agreed did not reflect the level of damage that had been caused, nor was it based on a proper assessment of the number of victims. This issue was highlighted by the UN Special Rapporteur on Toxic Waste who expressed particular concern about the fact that an agreement requiring the State “to waive all current or future action for liability and damages” was reached without consulting the victims’ associations.⁹³⁰

The negotiations over compensation payments to Ok Tedi communities were also strongly criticized. The compensation package included in the 1996 settlement that ended the legal actions was negotiated between OTML and the PNG government, with no involvement of the communities. Their only choice was to accept or refuse the final deal.⁹³¹ Likewise, there was no participation of the local communities in the negotiations that preceded the transfer of BHP Billiton’s ownership and the establishment of a trust fund, despite the intention that the trust should invest in development projects in their region. A government news release specifically acknowledges that the exit deal was reached by “government, BHP Billiton and Inmet representatives”, and that, “In addition to Cabinet endorsement, approval by the BHP Billiton and Inmet boards is necessary.”⁹³²

All three cases demonstrate how harmful compensation agreements and settlements can be in terms of limiting and denying effective remedies and reparation to victims. However, while government action in these cases was problematic, the absence of government oversight can also be an issue. In the Omai case affected individuals were left to negotiate with the company without any support. There are inherent risks in such circumstances. People are negotiating with an actor whose interests are contrary to their own and whose knowledge of the issues is – usually – far greater. It emerged that the company was offering roughly CAD\$150 per person⁹³³ (approximately

US\$110 at the time).⁹³⁴ The amounts were not only considered small, they were given as full and final settlement, and those who accepted the money were required to sign forms absolving OGML from further liability.⁹³⁵ Illiteracy in riverain communities is high, and concerns were raised that many of those who signed settlements with OGML could not read or write.⁹³⁶

In contexts where people do not have legal representatives acting for them it may be important that governments intervene; however, such intervention should not limit the rights of the affected people and should be fully transparent. A sharp contrast is provided by the actions of the US authorities following the 2010 Gulf of Mexico oil spill. In this case President Obama demanded BP set up a fund of US\$20 billion and a simplified claims process to protect the rights of people who had suffered harm following the spill. In addition BP was compelled to disclose information on how they were dealing with the leak – something they had initially been reluctant to do.⁹³⁷

3. ACCESS TO INFORMATION AS AN AVENUE TO GREATER REDRESS

Information is power and the already stark imbalances that exist between multinational corporations and poor communities are augmented and exacerbated by the control companies have over information. It is not acceptable that companies can withhold information about human rights and environmental impacts. Nor is it acceptable that companies and governments can do deals behind closed doors without public scrutiny.

Ensuring communities have access to information is key to enabling people to claim and defend their rights. Information helps level the playing field, and it must be accessible to people by right. Two reforms will aid this: one is mandatory disclosure requirements on companies – and on the parent company in respect of global operations; the second includes reforms to civil procedure laws to ensure disclosure of corporate materials relevant to matters of public concerns (such as human rights and environmental related abuses). This second reform could be achieved through provisions ensuring broad documentary discovery rules.

3.1 MANDATORY DISCLOSURE OF INFORMATION

Companies should be required by law to generate and disclose information that relates to the impact of their operations on the environment, public health or other matters of public interest, where its availability and accessibility is critical for the effective enjoyment of human rights.⁹³⁸ This should include, for example, the findings of accident investigations and other incident reports, information on waste disposal systems and pollution monitoring.⁹³⁹ It should also include – as far as possible – access to source data and not just the outcome of analysis, in order to enable independent scrutiny.

Companies that work with toxic or hazardous substances should be placed under more stringent disclosure rules. They should be compelled by law to disclose all information about the contents and toxicity of substances released into the environment that cause or have the potential to cause death or injury, and to ensure that such information is expressed in a way that is comprehensible to those affected.

Laws and mechanisms established to ensure access to this information should include robust accessibly clauses, including by providing interested parties, in particular those affected, with legal standing to request it, and refusals should be subject to review. Legitimate defences and grounds for refusal should exist to protect competing interests, but exceptions should be kept to a minimum. Decisions not to disclose information should be strictly justified on limited grounds, such as the legitimate need to protect confidential information.

There are several examples of national legislation requiring corporate disclosure of certain critical information. The US Emergency Planning and Community Right-to-Know Act is a good example⁹⁴⁰ This requires the disclosure of information to local communities about mixtures and chemicals present at a facility, and their associated hazards.

Relevant government agencies should have the resources and capacity to conduct their own independent testing so they can respond to and verify company information. However, as all of the cases in this book demonstrate, in some developing economies the financial and technical resources may not be available to do this. While action to address such deficiencies is important the capacity gaps will not be easily filled. The consequence is that, in relation to corporate activity, some communities are relatively information-rich, while others – often in poverty-stricken or conflict – affected areas- are information poor.

This can be addressed, to some extent, by a requirement on parent or controlling companies to ensure the generation and publication of certain data in relation to their subsidiaries. This is particularly important in the context of multinational industries known to carry serious human rights risks, such as extractives, chemical, medical testing, and any industry that uses large areas of land or large amounts of natural resources.

Many parent companies already publish some data on the social and environmental impacts of their global operations. However, such selective reporting is of relatively little value. Much is not included and what is disclosed, and how it is presented, is decided by the company. Social and environmental reports frequently include aggregated information which is not useful to affected individuals and information on corporate philanthropic activities, but rarely include information on harmful impacts.

The argument for a legal requirement on parent companies to ensure the generation and publication of certain data goes beyond its value in preventing double standards. It is a vital element of the State duty to protect. As noted in *The international human right to remedy* section of this book, States should act to prevent abuses by non-State actors where they have the legal and practical capacity to do so. Requiring disclosure of specific information is both legally and practically possible, and models already exist. In 2011 the UN Special Representative on business and human rights, John Ruggie, provided a number of examples of States that require mandatory disclosure of a company's social or environmental impacts, following a study of the links between corporate and securities law and human rights across a number of jurisdictions.⁹⁴¹ For example, France's Commercial Code outlines requirements for companies in specific circumstances to report information on the business' social and environmental consequences.⁹⁴²

There are other arguments in favour of mandatory disclosure of information. Perhaps the most

important is the potential to empower people to claim and protect their rights. Information allows people to act on their own behalf and to hold the powerful to account. Mandatory disclosure of information would also act as a powerful tool to prevent abuses and corruption.

Some companies argue that a mandatory requirement to disclose non-financial information would constitute an undue administrative and financial burden. However, several studies have shown that such disclosure brings benefits to a company including increased competitiveness, cost savings, easier access to capital, improved performance on the financial markets, and increased stability and better reputation.⁹⁴³ Moreover, the information required by non-financial disclosure should be exactly the information any responsible company is already gathering and assessing.

Another concern that is frequently raised is the capacity of smaller companies to engage in non-financial reporting. However, if reporting requirements are focused on risks and impacts, the nature of the reporting should be manageable for smaller enterprises.

Decisions not to disclose information should always be subjected to a “harm test”, which takes into account whether non-disclosure would undermine the human rights of the individuals or communities affected by the given activity.

3.2 REFORMS TO CIVIL PROCEDURE LAWS ON DISCLOSURE

Procedural rules that make it difficult, if not impossible for plaintiffs to access information they need to substantiate their cases should be revised. This second reform could be achieved through provisions ensuring broad documentary discovery rules and ensuring that materials referenced and/or included in court bundles are automatically deemed publicly accessible (i.e., consent to access these does not depend on the judge agreeing, or parties to the legal action consenting). Furthermore, if a case is settled, civil procedure rules should explicitly state that parties cannot agree between themselves to the non-disclosure of documents relevant to matters of public concern.



Women by a leaking oil wellhead, Nigeria, 30 January 2008. In the oil producing Niger Delta, villagers drink water and eat food that is contaminated by oil pollution – often having no alternatives. They fear for their health but there is little data to confirm or refute their concerns.



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Ukraine's Fuel Minister, Ukraine's President, the Prime Minister of the Netherlands' and [then] CEO of Royal Dutch Shell (Left-Right) strike a \$10 billion shale gas deal at the World Economic Forum, 24 January 2013. Multinational companies often have significant access to high level state officials.

3/DANGEROUS LIAISONS; CORPORATE-STATE RELATIONSHIPS

INTRODUCTION

In cases of corporate-related human rights abuses, much of the current debate on obstacles to justice focuses on challenges within legal systems in the country where the abuses occur and the difficulties victims face in accessing foreign courts. However, some of the most significant obstacles to remedy are due not to legal factors but to the actions of companies, in particular their influence over governments and regulatory systems.

As we saw in *The international human right to remedy* section of this book, States have a duty under international human rights law to ensure that companies do not have a negative impact on human rights, and to provide mechanisms of redress when rights are infringed. The autonomy and capacity of governments to discharge these legal responsibilities is therefore of paramount importance. However, many governments confront a range of direct and indirect pressures and constraints associated with the mechanics and structures of contemporary international political economy that limit their capacity to discharge these responsibilities. They also have to contend with a lack of domestic resources necessary to ensure effective regulation of companies.

Another factor is also important in this regard: corruption. From grand-scale corruption where the whole basis of a company's operation is illegitimate (such as when mining concessions are granted on the basis of bribery) to petty corruption (for example, bribing a regulator to ignore a health and safety violation), corruption undermines human rights and, often, binds State agents to corporate interests, removing the State's motive and capacity to protect human rights. As will be discussed below, these three factors – external pressures, the lack of domestic resources and capacities, and corruption – underpin corporate influence over the State. They frequently intersect and reinforce each other, and are not always easily distinguished from each other.

The problem of corporate influence on governments is pervasive but is at its most problematic where the balance of power is heavily weighted in the company's favour. A range of factors affect how much influence a company has in a particular country, but developing economies that are highly dependent on foreign investment can be particularly vulnerable when dealing with powerful multinational corporations. However, recent history - including the weaknesses of US and European financial regulators exposed since the 2008 financial crisis, and the overly close relationship between oil companies and US regulators exposed in the aftermath of the Gulf of Mexico oil spill – shows that this is not exclusively a developing country problem.⁹⁴⁴

In each of the cases referred to in this book, the consequence of corporate influence over the State was detrimental to the rights of affected communities. This was partly because – in each case – the company's interests and those of affected communities were in conflict, and partly because

the motivation and focus of governments and State agencies was skewed in favour of the companies – when confronted with conflicting interests, the State was predisposed to favour the more powerful actor. Although corporate influence is well-recognised, there has been relatively little analysis of the mechanics and impacts of this issue to date. One reason is likely to be the lack of available information, as the mechanics of influence are not transparent.

While corporate influence over the State can impact all human rights, this book focuses on the right to an effective remedy. Companies can undermine the ability of individuals to seek and obtain remedy even before a project or economic activity has begun. In several of the cases documented in this book, companies had significant input into defining the legal or regulatory framework governing their operations. For example, the Australian mining company Broken Hill Proprietary Company Limited (BHP) was involved in drafting the legal framework for the Ok Tedi mine in Papua New Guinea (PNG), while an Environmental Impact Statement prepared by a consultant for Omai Gold Mines Limited (OGML) effectively became the environmental law as far as the Omai project was concerned.

In both the Ok Tedi and Omai cases, the involvement of the companies in defining aspects of regulation was followed by agreements with the government that allowed them to dump mine waste into rivers. Where a regulatory framework allows a company to lawfully act in a manner that results in environmental damage or human rights abuses, the harmful actions are legitimized and the possibility of seeking remedy can be seriously undermined, if not entirely eliminated.

As well as shaping the regulatory framework companies can also play a significant role in the enforcement of critical regulations, despite the obvious conflict of interest. For example, in numerous cases documented by Amnesty International, companies have been largely or exclusively responsible for monitoring and reporting on key environmental parameters associated with their operations, including issues that would affect human health and local livelihoods, access to food and water. As noted in the previous chapter, this is the case in the Niger Delta where data on oil spills, including the cause of the spill, the volume spilt and the impact is largely decided by the oil companies – even though they are also the parties liable to pay compensation based on these decisions.⁹⁴⁵

The extent to which companies are involved in regulating their own activities has a range of negative effects on the right to an effective remedy. In particular, it undermines access to impartial and credible information on the impact of the industry, obscuring and making it difficult to assess critical issues such as the nature of the harm caused and who was responsible for specific actions or failures to act. As discussed in 2.2 *Information on impacts* in the *Lack of Information* chapter of this book, corporate self-regulation and victims' lack of access to information go hand-in-hand, and are significant obstacles for those seeking remedy in cases of corporate human rights abuse.

Companies not only create obstacles to remedy, they often take full advantage of and exacerbate existing obstacles. Again, the cases covered in this book demonstrate the range of ways in which companies have used existing legal and procedural obstacles to their advantage. The cases also expose how companies' greater resources have enabled them to close off avenues of redress for individuals and communities. This was particularly evidence in the use of *forum non conveniens*, which enabled companies to escape the jurisdiction – in some cases – of any court.

For all these reasons, Amnesty International believes that an analysis of barriers to justice and remedy in the context of multinational business operations cannot be limited to specific legal, jurisdictional or procedural obstacles. These issues are certainly very important, and this book has addressed some of them in the chapter *Legal Challenges*. However, a complete and meaningful analysis must also include consideration of the many ways in which companies deliberately create, exploit or exacerbate barriers to justice, and the international and domestic political and regulatory environments that both allow and empower them to do so.

This chapter examines the sources of corporate power and how the right to remedy is affected. It looks at both the influence of general corporate interests and the influence of specific companies.

1. SOURCES OF CORPORATE POWER

Companies derive power from the fact they help create wealth, jobs, goods, services and revenues. These are things most countries in the world want and need. For many businesses – particularly small and medium enterprises – their power is relatively limited. This book focuses on multinational corporations, who often have significant power and influence. This is more pronounced in certain contexts – when the company is dealing with a relatively poor State that needs foreign investment or needs the company's expertise to leverage national resource wealth, as in the case of extractive industries. It is further enhanced when a country is indebted. The majority of developing-country debt is owed in foreign currency such as US dollars. To repay this debt, developing countries need to promote growth in export sectors that generate income in hard currency.

1.1 THE NEED FOR FOREIGN INVESTMENT

The need for foreign direct investment (FDI) can leave developing countries relatively powerless in their dealings with corporate interests. However, the power imbalance is not due merely to one party's relatively greater need for the other. The structural sources of corporate power are multilayered and interconnect with the economic and political interests of both the home and host States. This can be to the detriment of the economic interest of developing countries and the human rights of communities affected by certain types of economic activity, particularly that which involves natural-resource extraction, hazardous materials or large-scale use of land.

The following sections look at the various sources of corporate power that are underpinned by the need for FDI and specifically at how the right to remedy is infringed by such action.

1.2 THE ROLE OF INTERNATIONAL FINANCIAL INSTITUTIONS

International financial institutions (IFIs) such as the International Monetary Fund (IMF) and the World Bank have played a key role in promoting investor-friendly regulatory environments in many countries, particularly developing countries. During the 1980s and 1990s, as part of structural adjustment programs, many countries were put under considerable pressure by IFIs to reform their legal frameworks to encourage foreign investment.⁹⁴⁶ This phenomenon has re-emerged in some ways as IFIs work with countries affected by the financial and economic crises that emerged in 2008.⁹⁴⁷

IFIs have promoted rules that reduce bureaucratic processes and strengthen the protection of corporate property and rights; this enabled companies to invest in developing countries with a higher level of security about their investment. IFIs have also promoted measures that go beyond guaranteeing the security of investments and actually enhance the potential for investors to secure – and export – profits.

IFIs prescriptions to attract foreign investment have also included reducing or removing regulations that protect the environment and human rights. This has been particularly notable in the context of the extractive sector where we have seen mining and forestry codes relaxed, the removal of bans on raw log exports, liberalization of land ownership rules⁹⁴⁸ and the introduction of legislation granting companies exemptions from existing laws and guaranteeing indemnity from environmental damage.⁹⁴⁹

The capacity of IFIs to press such policy frameworks on host governments has been particularly pronounced in those countries encumbered with significant foreign debt burdens. For example, the IMF has encouraged countries to prioritize export sectors because boosting exports enables countries to raise the capital needed to pay back loans from the IMF and other lenders. Such export-oriented development strategies have often been pursued with particular fervour in mining, oil, gas and logging.⁹⁵⁰ IFIs have effectively pushed many developing countries into a greater dependence on foreign companies that invest in just a few sectors and, as we saw in the cases of Ok Tedi and Omai, this very circumstance of the country's high dependence on a few major corporate investors creates a significant power imbalance that companies can exploit. In effect, IFIs – particularly in the 1980s and 90s – laid the foundations for abusive corporate practices in developing countries, and many of the policies they promoted remain in place today.

In addition to promoting investor-friendly rules and a reduction in the scope of environmental and social protections, IFIs have promoted – and at times required – cuts in public expenditure as part of structural adjustment programmes.⁹⁵¹ Therefore, at the same time that regulatory regimes were relaxed to attract foreign investment, funding was often reduced for vital government functions to monitor and control any adverse social, environmental and human rights consequences associated with corporate operations. The outcome: less regulation and then less capacity to enforce what is left.

In a study published by the World Wide Fund for Nature in 1996, seven of nine countries examined were found to have experienced a severe decline in their government's ability to manage important environmental matters as a consequence of budget cutbacks prescribed by the IMF/World Bank. These are some examples of their findings:

- In Cameroon, cuts in the forestry service budget during the mid-1990s resulted in a failure to police logging concessions.
- In Tanzania, although FDI in the extractive sector increased in the 1990s, government allocations for monitoring those activities declined.
- In Venezuela, budget cuts led to a 40 per cent reduction in funding allocations for personnel in the Ministry of the Environment and the abandonment of plans to strengthen environmental monitoring of petroleum and petrochemical companies.

■ In El Salvador, fiscal discipline eliminated the budgets of the nation's natural resource management agencies and caused the demise of national technical capacity.⁹⁵²

Similar conclusions were reached in another cross-country study that looked at the impact of IMF policies on deforestation in Brazil, Nicaragua, Guyana, Papua New Guinea (PNG), Russia, Indonesia, Tanzania and Cameroon. The study found that, in Brazil, for example, overall spending on environmental programmes was cut by approximately two-thirds in the late 1990s, preventing the implementation of 10 out of 16 of those programmes.⁹⁵³ In most of the countries considered by the study there was – and remains – a significant proportion of the population that is dependent on the natural environment and eco-services for at least some of their access to livelihoods, food and water.

A 2002 study by the International Institute for Environment and Development noted the impact of incentives for foreign investment:

*The potential contribution of minerals to national economies is mostly far from realised. In all too many instances, incentives for foreign investment reduce the wealth available to the host nation.*⁹⁵⁴

The Ok Tedi mine illustrates the support an individual project can enjoy from the investor friendly environment encouraged by IFIs. Since the early 1960s, various IFIs (in particular, the IMF, World Bank and Asian Development Bank) have encouraged a range of institutional and policy changes to attract foreign investors into the mining and petroleum sectors of PNG.⁹⁵⁵ During the 1990s, the IFIs moved forward with a structural adjustment programme for the country which included US\$10 million for an institutional strengthening project in the mining sector. This project was primarily intended to strengthen the capacity of national government agencies to attract new foreign investment.⁹⁵⁶ At the same time PNG was expected to reduce government spending and the size of the civil service. This resulted in the Department of Environment and Conservation being dismantled, which affected the government's ability to regulate mining and forestry projects.⁹⁵⁷ In 2009 Amnesty International asked PNG's [then] Health Minister, Sasa Zibe, about the adequacy of environmental and health protection in the context of mine operations in the country. The minister emphasized the serious constraints confronting the government, which he said was "facing pressing economic problems to meet debt needs."⁹⁵⁸

Guyana's willingness to shape policy frameworks in line with foreign investor interests was similarly affected by the conditions of loans from IFIs and the need for FDI. The mining, oil and logging sectors were targeted as part of the export-oriented strategy promoted to help Guyana meet its foreign debt repayments. As part of a structural adjustment programme that began in the late 1980s, the IMF sought to make these industries the country's key economic sectors.⁹⁵⁹ During the 1990s, the government opened up exploitation of the country's natural resources, especially timber and minerals, in order to generate income and satisfy the conditions of a 1991 IMF/World Bank structural adjustment programme.⁹⁶⁰

The Omai project was a direct result of the policies encouraged by the IFIs, and one of the centrepieces of the World Bank's structural adjustment programme for Guyana.⁹⁶¹ The World

Bank's Multilateral Investment Guarantee Agency (MIGA) was a key financier for the project. There are several accounts of direct political pressure exercised by MIGA to prevent tightening of environmental regulations following the waste spill, including reports that a MIGA representative told parliamentarians that any new environmental regulations placed on the Omai would be tantamount to nationalisation.⁹⁶² Years later, the victims of the Omai spill wrote a letter to MIGA stating:

*We believe that Omai's profitability has been given greater importance by national and international authorities than our health, safety, and welfare. We welcome development but it must not be at the expense of the lives of our people. We and our fish, agriculture, and environment are all suffering from Omai's pollution which continues to this very day. The Commission of Inquiry's report regarding the effect of the disaster on our health is not true. There is much more disease and suffering now than before the Omai mine began operations.*⁹⁶³

More recent IFI policy, particularly that of the World Bank, has incorporated some recognition of the need for a sustainable development approach in projects in the natural resource sectors. However, a 2004 study of mineral development in PNG found that the IFIs remained far more strongly focused on building systems and institutions to enable and facilitate FDI than on building regulatory capacity to manage the impacts of FDI projects.⁹⁶⁴

1.3 INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

The capacity of host governments to effectively regulate the activities of foreign investors may also be constrained by the terms of international economic law, such as multilateral, regional and bilateral trade and investment agreements. Trade and investment agreements are usually concluded between States, although companies and States can also enter into legally binding investment agreements. While the content of such legal agreements varies, they share a basic focus on providing foreign investors with special legal rights and remedies to protect corporate financial interests. And, unlike public international law – such as international human rights treaties – such private international law agreements are enforceable through mechanisms such as international investment arbitration. Arbitration and other similar processes are supra-national mechanisms that have powers similar to a court of law; they can make decisions that are binding on all parties to the legal agreement that underpins them. It is such mechanisms that give international economic law its teeth.

A range of protective clauses are typically built into investment agreements, such as protections against “expropriation without (adequate) compensation”,⁹⁶⁵ or “stabilization clauses”,⁹⁶⁶ which protect the value of the investor's property. A stabilization clause addresses changes in law in the host State during the life of the project which may affect the investment. They are seen as risk mitigation tools for investors and are widely used across industries and regions of the world. The implication of such clauses is that the host government cannot institute changes in law, policy or practice that would have the effect of costing the company or investor money that was not envisaged at the time the investment. If the government does this, then it can face significant penalties –

usually financial. In practical terms, this means that if a government decided to enact new laws or policies to protect the environment or human rights – which could require companies to take actions that had financial consequences – this could be seen as breaching investment agreements.⁹⁶⁷

The Mineral Agreement between the government of Guyana and OGML contained a good example of this sort of clause, stating that:

*If Guyana ... enacts or adopts any new law or policy or amends or repeals any existing law or policy ... (collectively, "Unilateral Action") [with] the effect of preventing or constraining the exercise of any right or of materially increasing the burden of performance of any obligation ... of the Private Parties ... Guyana ... agrees to take such measures as may be required to restore the Private Parties to the position they would have retained had such Unilateral Action not been taken...*⁹⁶⁸

A study of stabilization clauses conducted for the International Finance Corporation of the World Bank and the UN Special Representative of the Secretary-General on Business and Human Rights found that:

Evidence supports the hypothesis that some stabilization clauses can be used to limit a state's action to implement new social and environmental legislation to long-term investments. The data show that the text of many clauses applies to social and environmental legislation, so that investors are able to pursue exemptions or compensation informally and formally.

The same study also found a difference between the way clauses were used in developing and developed economies:

*[O]f the stabilization clauses examined, a majority of them from countries outside the Organisation for Economic Co-operation and Development (OECD) were drafted in a way that can either insulate investors from having to implement new environmental and social laws or to provide investors with an opportunity to be compensated for compliance with such laws. None of the contracts in the study from OECD countries offer exemptions from new laws, and they only rarely offer an opportunity for compensation for compliance with the same breadth of social and environmental laws as in non-OECD countries.*⁹⁶⁹

In those cases where restrictive stabilization clauses apply, the potential cost of compensation or the fear of being sued by a foreign investor may dissuade host governments from enacting legislation or taking other forms of regulatory action that may have a negative impact on the value of the investor's property.⁹⁷⁰ This is not a hypothetical concern. Foreign investors have sued sovereign States for alleged infringement of investment agreements. When Pacific Rim Mining Corp was denied permission to extract gold in El Salvador on the basis of an unsatisfactory environmental impact statement and concerns over adverse environmental and socio-economic impacts, the

company filed a claim under an “investor-state” dispute system provided for under the Central America Free Trade Agreement (CAFTA).⁹⁷¹

Under CAFTA, foreign investors can take States in which they have invested to arbitration before the World Bank’s International Centre for Settlement of Investment Disputes, and pursue compensation for damages. Indeed, the potential for such lawsuits against host governments can become an effective pressure tactic for investors when a State’s actions put their interests in jeopardy.⁹⁷² Pacific Rim’s claim is still ongoing.

Trade and investment agreements provide companies with additional protections and leverage – but how does this come about? As noted above, many such agreements are State to State. The next section explores how the home States of major multinationals shape the content of international legal agreements that benefit corporate interests – and, critically, how the companies themselves influence their home States in these negotiations.

1.4 THE HOME STATE AND CORPORATE LOBBYING

The home States of major multinationals frequently play a role in promoting the interests of ‘their’ corporations abroad. This is done through trade and investment negotiations and discussions, which may occur in formal bi-lateral or multilateral forums or informally, and through direct contact with the host States where companies invest.

The impetus for home States to support national corporate interest abroad comes in large part from the State’s economic interests. Multinational corporations provide jobs at home and their revenues from foreign investment can contribute to public wealth. Companies in the extractive sector may have additional importance in terms of access to strategic mineral or energy resources. The importance of multinational corporations to their home State economy is a complex subject which this book will not address; suffice to say there are controversies about the extent to which a company’s foreign investments benefit the public (as opposed to the private) wealth of home States.⁹⁷³

There is a range of ways in which home State governments directly engage host State governments to promote trade, investment opportunities and – implicitly or explicitly - corporate interest, including through trade missions or by assisting companies to develop contacts with key decision-makers.⁹⁷⁴ For example, in Central America the US government has played a direct role in influencing the investment regimes of governments via its policies of promoting the establishment and expansion of free trade zones throughout the region, and correspondingly promoting strong protections and incentives for US foreign investors.

Many governments of industrialized States explicitly or implicitly acknowledge that one of their key foreign relations priorities is to assist their own corporations to “win contracts in foreign markets and lobby against regulatory and political barriers”⁹⁷⁵ in other States. For example, in 2003, the UK Foreign and Commonwealth Office stated that it:

will seek to influence international economic policy, trade and investment policy, the EU agenda and the business environment in individual countries in a way which promotes UK business interests ... FCO staff in London, Geneva, Brussels and posts around the network

are working to help secure ambitious trade and investment agreements, and to promote secure, stable, competitive and sustainable operating environments for UK business. ⁹⁷⁶

A recent report for the US Congress noted that the US government offers a wide variety of services that contribute to export promotion, including “services directly [to] assist US companies to overcome information and market entry barriers related to exporting...”. The study noted that:

*The federal government also conducts business matchmaking services, including trade missions (official business development missions led by senior U.S. government leaders to foreign countries) and reverse trade missions (bringing foreign buyers to the United States to meet with U.S. firms).*⁹⁷⁷

When a State acts internationally for the benefit of specific corporate interests, they often do so based on what companies ask them to do. Multinational companies have significant influence on their home State, and actively seek home State assistance to secure beneficial regulatory and investment frameworks in other countries.

The mechanics of corporate influence over home States are diverse and not fully understood. Corporate influence on the State can be explicit – such as when senior company executives are part of government-led trade delegations or provide advice to States in multilateral trade and investment negotiations. A 1991 study on the composition of US trade advisory committees found that, of the 111 members of the three committees reviewed, 92 were from individual companies and 16 from trade associations, compared with only two from labour unions.⁹⁷⁸ In the negotiation of many international regimes, business also has a formal voice on advisory panels and in writing and reviewing influential reports.⁹⁷⁹

However, the substance or effect of corporate influence can be difficult to determine. Unlike the lobbying carried out by civil society groups, where the objectives and content are largely publicly disclosed,⁹⁸⁰ corporate lobbying frequently lacks transparency. No-one knows what issues are discussed or agreements made in closed-door meetings between senior company executives and ministers and civil servants.⁹⁸¹ News of such meetings occasional leaks out; for example, in January 2008 Shell was reported as having secured important concessions from [then] Nigerian President, Umaru Musa Yar'Adua, over key federal government policies which the company considered to be unfavourable to its operations in Nigeria. Shell received a softening of the announced deadline for the end of gas flaring activities following a high-level meeting between the Nigerian President, Shell's CEO and the Dutch Prime Minister during the World Economic Forum meeting at Davos in Switzerland.⁹⁸²

More recently, in May 2012 the New York Times exposed how Shell convinced the White House to support oil-drilling in the Arctic. According to the article Shell retained retired Senators to lobby presidential candidates for them. Following the election of President Obama in 2008, a senior Shell executive, visited the White House at least six times in the Obama administration's first two and a half years. In 2010 and 2011, a senior Shell lobbyist, was cleared into the executive complex 13 times. Throughout, Shell reportedly maintained a steady flow of visits, letters and calls to agencies

responsible for granting the permits required for Arctic drilling.⁹⁸³

The channels of corporate influence can be less direct. Phenomena such as “regulatory capture” and the “revolving door syndrome” are well-known in some sectors, including extractive industries. Essentially the relationship between the regulator and the regulated entities becomes overly close to the point where there is little meaningful oversight. This can happen when former regulatory staff join companies bringing with them their knowledge of regulatory process and influence with former colleagues. Corporate executives may serve, at certain points in their careers, in high ranking government positions or as part of trade or other State delegations.⁹⁸⁴ For example, a former vice president of US food processing company Cargill acted as the US negotiator on agriculture in the initial stages of the Uruguay Round negotiations, before returning to work in the industry.⁹⁸⁵

The phenomenon of regulatory capture was raised in the aftermath of the Gulf of Mexico oil spill case. It was observed and debated in Congress in the US. In the words of one senator:

*By all accounts, [the Minerals Management Service] operated as a rubber stamp for BP. It is a striking example of regulatory capture: agencies tasked with protecting the public interest come to identify with the regulated industry and protect its interests against that of the public. The result: government fails to protect the public ... The industry has lawyers and lobbyists working the agency. The industry threatens lawsuits if it gets regulations it does not like, and is accommodating and friendly when it gets regulations it does like.*⁹⁸⁶

Business influence may also be exercised by creating patron-client relationships with individual politicians or senior officials, or through the development of close relationships with political parties or specific regulatory agencies.⁹⁸⁷ This can allow companies to gain leverage over government policy as a result of an alignment between their interests and the interests of elite groups within the domestic political system. Although it is often difficult to prove the existence of these privileged channels of influence and relationships, they can become patently obvious in the way in which governments behave towards certain companies or to a whole industry. Such corporate influence can result in favourable conditions of operation domestically and home State support for favourable conditions in other countries when a particular company or industry wants to invest.

Home State support to corporate foreign investment goes beyond helping companies to secure favourable investment conditions at the outset. It is not uncommon for home country governments to engage in dialogue with host country governments to resolve disputes between the host State and the company. For example, during the process of approval for the proposed route of the Baku–Tbilisi–Ceyhan (BTC) oil pipeline through Georgia, local groups allege that intense pressure was placed on [then] President Shevardnadze, both by BP representatives and a special envoy sent by the US government, after the Georgian Environment Minister at the time, Nino Chkhobadze, initially refused to agree to BP’s chosen route for the pipeline. They claim that Shevardnadze eventually detained Chkhobadze in her office until she finally signed the permit at 3am on the night before BP’s deadline.⁹⁸⁸

As we saw in the Bhopal case study, the US-India CEO Forum was used as a platform for both

US and Indian industry and government representatives to express concerns over and influence government policy, including that relating to the resolution of legal matters concerning Bhopal. In a confidential note to the Indian Prime Minister, dated February 2007, the Indian Minister of Commerce and Industry explains how, during the October 2006 US-India CEO Forum in New York, The Dow Chemical Company (Dow) and senior US government officials had raised concerns over the government of India's request for an advance payment from Dow for plant site remediation.⁹⁸⁹

The cases covered in this book are not the only examples of how companies' home States intervene with host States to support corporate interests. The Nicaragua garment sector, for example, is dominated by Taiwanese investors. The Taiwanese government is able to exert substantial pressure on Nicaraguan decision-makers because of the scale of Taiwanese investment in the country's export sector. According to a representative of the Taiwanese embassy in Managua, "Right now with the trade volume produced by the free trade zone, Nicaraguan trade is dependent on the investment of more than US\$200 million of Taiwanese money invested here. Seventy-five per cent is concentrated in the textile industry". Embassy staff also stated: "Big companies help us to establish stable diplomatic relations...That's why we bring companies with big capital to invest. So the government helps investors, and the Embassy helps them when they have a problem...Whenever there is a labour problem with a Taiwanese company we report to Taipei, and they usually ask us to help solve the problem..."⁹⁹⁰

1.5 DIRECT CORPORATE INFLUENCE ON HOST STATES

Multinational companies planning to invest in a developing economy can directly influence laws and regulations applicable to their industry in general or to the specific investment project they are pursuing. Their ability to do so is affected by a number of factors. These include: the relative importance of the business sector to an economy (for example, where a country is dependent on minerals or oil); the extent of the State's dependence on foreign investment to promote economic development, generate wealth and/or unlock natural resources (discussed above); the resources and technical capacities that a company can deploy in negotiating the terms of its investment, relative to those of the government. It is not uncommon for all of these factors to weigh in an investor's favour and this, in turn, can lead to disproportionately advantageous terms of investment for the company, and corresponding disadvantage to the country and/or specific communities. Often such disadvantage may be unintended and the risks are never identified, let alone considered.

A company's direct influence on the regulatory framework can happen before the investment begins as well as throughout the period of investment, and in some cases, even beyond this point. The Ok Tedi case is perhaps the most egregious example of direct corporate interference with the State's regulatory framework contained in this book. However, it is clear that similar corporate interference occurred in the Omai and Bhopal cases.

The Ok Tedi mine was (and continues to be, although challenges are emerging) governed by a special legal regime containing certain features that help entrench the negotiating power of the mining companies. As described in the case study, the laws governing the mine excluded application of any other law in effect in the country, including environmental and public health

legislation, and contained provisions articulating the constitutional validity of any possible abrogation of rights. As a result OTML (and BHP while being its majority shareholder) was able to negotiate and renegotiate the terms of its operations. The laws governing the mine legitimised the long-term dumping of waste despite the environmental and human rights implications, and explicitly undermined the right to remedy by making it illegal to bring proceedings in a foreign court in relation to compensation claims arising from any mining and petroleum projects in PNG.⁹⁹¹ The legal regime also allowed the companies involved to defend serious human rights and environmental abuses publically because they could claim they were fully compliant with PNG law.

What is particularly striking about this case is that companies were able to go beyond securing legislation that favoured their interests and were able to get the government to pass legislation specifically directed at restricting the legal rights of the people of PNG – and more precisely of those who happened to be suing the companies in question.

At the time when the laws were drafted the mining and petroleum sectors accounted for a significant proportion of PNG's export earnings and overall GDP.⁹⁹² In 1991, export sales from the Ok Tedi mine alone accounted for 34 per cent of PNG's total export earnings for the year.⁹⁹³ Clearly, PNG's national economy depended heavily on the mining industry and the Ok Tedi mine in particular.

OTML's bargaining power grew further as a result of the loss of the Panguna copper mine, which occurred at around the same time that work on the tailings dam was destroyed.⁹⁹⁴ This placed the company in a very strong bargaining position to resist government pressure to construct a new dam.⁹⁹⁵ Analysts contend that PNG could not afford to forego earnings from Ok Tedi, and that under threat that BHP would shut down, the government dropped the requirement to build a dam to contain mine waste.⁹⁹⁶ This helps to explain both the largely advantageous legal regime within which the mine operated, and the outcome of the dispute over construction of the dam.

At the time the Omai mine was in operation, Guyana was structurally dependent for its economic growth on the mining sector in general, and the Omai mine in particular. Omai represented the largest single foreign direct investment in the Guyanese economy, and soon become one of the biggest earners of foreign exchange.⁹⁹⁷ It accounted for 25 per cent of the export earnings of the country by 1996, and 20 per cent of its GDP during the years of gold production. This context undoubtedly shaped the nature of the company-government relationship.

The Bhopal case study gives another clear example of how corporate influence works behind the scenes. The promise of significant future investment in India was used by Dow very effectively to lure high ranking government officials to support its demands for all legal action against the company in India to cease. This was demonstrated by the myriad of letters and communications between Dow and government officials, and amongst those officials, which were unearthed through Right to Information (RTI) requests. A few extracts from some of these communications serve to illustrate the point. Referring to a recent US-India CEO meeting in New York,⁹⁹⁸ Dow wrote to Indian Ambassador to the US:

In the July inaugural US-India CEO Economic Dialogue discussion, one of the top areas cited as a barrier to mutual business success was legacy legal issues within India. Several

companies face such issues, and all agree that legacy matters which are unpredictable and changeable are a barrier for any company to feel certainty in the investment climate.

Referring specifically to Bhopal, the letter goes on to say:

*Resolution of this issue will serve as a clear example of the government of India's commitment to progress in developing certainty and **support for future foreign direct investment.** (Emphasis added)*

As cited in the Bhopal case study, the note then states Dow's specific demands:

The Gol [government of India] will implement a consistent, government-wide position that does not promote continued Gol litigation efforts against non-Indian companies over the Bhopal tragedy. Identified companies, at the request and sponsorship of the Gol, will be invited to discuss their views directly with involved Ministries of the Gol.⁹⁹⁹

In another letter from Dow to Ronen Sen, the Indian Ambassador to the US, the company specifically places its demand for withdrawal of the government's request for an advance payment from Dow of Rs1 billion in the context of the company's future investment plans:

Our common goal is to support economic growth in India, including key foreign investments that will promote job creation, economic diversification and technology updates. Thank you for your efforts to ensure that we have the appropriate investment climate to facilitate forward-looking investment and business partnerships.¹⁰⁰⁰

Government officials, for their part, were also prepared to address legal matters relating to Bhopal within the larger context of Dow's future investments in India. Referring to a list of issues emerging from a US-India CEO Forum meeting in October 2006 in New York, the Deputy Chair of the Planning Commission informed the Prime Minister of Dow's concerns:

Dow Chemicals is set to make large investments in India, but have run into difficulties because of potential legal liabilities arising from the fact that it purchased Union Carbide Ltd (the parent of Union Carbide India) long after the Bhopal disaster and after all civil claims were settled as per the Supreme Court's decision."

Referring to the fact that the government of India's request that Dow make an advance payment of Rs1 billion towards clean up of the Bhopal site, the note referred to Dow's warning that:

unless this presumption is removed, their Board would regard investment in India as fraught with legal risk.

and to the company's wish for:

a statement from Gol in the Court clarifying that Gol does not regard Dow as legally responsible for liabilities of UCC.

The note closes by saying:

*The issue is obviously complex and has implications for investors generally.*¹⁰⁰¹

Referring to Dow's concerns over Bhopal, an April 2007 note from the Cabinet Secretary to the Prime Minister suggests resolving the matter:

with a view to sending an appropriate signal to Dow Chemicals, which is exploring investing substantially in India and to the American business community.

This note concludes by stating:

*given the scope for future investments in the sector, it stands to reason that instead of continuing to agitate these issues in court for a protracted period, due consideration be given to the prospect of settling these issues appropriately. An important aim is to remove uncertainties and pave the way for promoting investments in the sector.*¹⁰⁰²

The issues under consideration in these exchanges had a direct bearing on the right to remedy of the survivors of Bhopal, yet they were not only excluded but the impact of the proposals on them seems not to have even been considered.

It is highly unlikely that Dow would have been so explicit in its demands to the government of India to drop all legal action against it, had the myriad of communications unearthed through Right to Information (RTI) requests been open and public from the outset. The enticement of future large investments in India was a thread running through all of Dow's communications. As outlined above, companies can draw on government fears about regulatory competition, condition future investment in the country, or use implicit or explicit threats of exit, as a means of obtaining concessions or to avoid regulations or sanctions.

While a country's need for FDI can give a company substantial leverage so too can the company's greater legal and technical knowledge and capacities. There is often a significant mismatch between the number, and the capacities, of lawyers, negotiators and other experts representing a company compared to those representing host governments. The disproportionate access to knowledge, skills and expert advice that companies often enjoy places them at a significant advantage vis-à-vis the host government negotiators. Host governments may not only lack these resources, they may come to rely on the skills and information provided by the company itself as the basis for their own decision-making (see more on this in the *Lack of information* chapter

of this book). In these situations, companies have an immense opportunity to influence government thinking and decisions.

In the Omai case, Omai Gold Mines Limited (OGML) hired a private consultant to prepare an Environmental Impact Statement (EIS) which, under the Mineral Agreement, became the environmental law as far as the Omai project was concerned. It was agreed that compliance with the EIS would constitute compliance with all laws and administrative policies of Guyana then in effect that related to environmental matters. The government also guaranteed the company indemnity from any regulatory action that resulted in greater financial costs to the project.

There is a multiplicity of examples beyond the case studies in this book.

A 2003 study on the telecommunications industry in the Caribbean found that the US company, Cable and Wireless, had used their influence to play a dominant role in writing regulatory frameworks throughout the Caribbean region. This provided the blueprint for network development policies, including the rate of expansion into rural areas, the rates of return on investment in the sector, the type and extent of technology usage and even tariff levels.¹⁰⁰³ A 1985 study by the Commonwealth Consultative Group, drawing special attention to the potential inequality in negotiating relations between small States and large companies in fields with high financial and technological demands, observed that:

*In many cases, the agreements transnational corporations draw up may be said to resemble those unequal treaties that imperialist powers used to impose in earlier centuries upon weaker nations.*¹⁰⁰⁴

In August 2005, the National Transitional government of Liberia entered into a Mineral Development Agreement (MDA) with Mittal Steel to exploit Liberia's extensive reserves of iron ore. Global Witness, which investigated the Mittal investment, found that Liberia had ceded important sovereign powers and economic rights over a strategic non-renewable resource to a foreign multinational company. The organization found that: “

*The combination of both the “Mittal-friendly” and relaxed wording in the contract meant that in most significant areas Mittal had control over all major decisions in project development, including company and capital structure, taxation, royalties and transfer pricing, the transference of the state assets, the stabilisation clause, land rights, private security forces, rights to minerals and confidentiality.*¹⁰⁰⁵

The MDA allowed Mittal to maximize its profits at the expense of a country trying to get back on its feet after enduring 15 years of armed conflict. The agreement gave the company complete freedom to set the price of the iron ore, and therefore the basis of the royalty rate. In a mining operation of this scale, royalties payable to the government, together with tax revenues and employment, represent the greatest benefits to the economy. In this case, all the ore was to be sold to Mittal affiliates and the price was set not by the market but by Mittal. This is called a “transfer price”.¹⁰⁰⁶

The Mittal-Liberia MDA was clearly open to exploitation, and created the opportunity for Mittal to sell the iron ore to an affiliate at below market value, thus reducing the royalties paid to the government of Liberia, whilst simultaneously reducing the company's tax burden in Liberia. Mittal's actions in this case were not illegal but were clearly unethical.

Following Global Witness's exposure of the situation, Mittal was forced to renegotiate the MDA with the government of Liberia. Global Witness issued a statement in August 2007 stating that

The amended contract, which has been almost completely re-written, addresses the most onerous provisions of the original agreement and gives Liberia a real chance of extracting reasonable benefits from the concession.

The NGO also stated that, at that time, a number of issues had not been addressed which

constitute departures from best practice.

Global Witness concluded that "By renegotiating the contract Mittal Steel [now Arcelor Mittal] has shown that it is possible for a multinational to act responsibly and negotiate a deal that remains profitable and safeguards the interests of the host country and its people."

1.6 UNDUE INFLUENCE ON REGULATORS

Once a company has committed to invest and commenced operations, its ability to continue to influence how its negative impacts are addressed varies. Arguably companies can have less influence, as they are financially committed. However, Amnesty International's research has found that companies have several means of continuing to exert influence in their own favour while simultaneously avoiding responsibility for human rights harms and undermining the ability of people to seek an effective remedy. These include leveraging the ongoing dependence of the host State on their investment and technical expertise, and their undue influence on often weak regulators.

In many developing economies regulatory agencies that deal directly with social and environmental issues lack legal powers, financial resources and technical expertise. As noted earlier, in some cases the lack of resources available to the regulators is partly due to the requirements of structural adjustment programmes promoted by IFIs.

Where the regulators are weak the State may become reliant on companies to regulate themselves. The implications of this on the right to remedy are serious.

The control that oil companies have over environmental matters in the Niger Delta was referenced in the previous chapter. The majority of the people of the Niger Delta are reliant on the natural environment for their livelihood and for access to food and water.¹⁰⁰⁷ Pollution of the rivers, creeks and land due to oil spills has resulted in violations of people's economic and social rights. Despite the impact of the oil industry there is little or no meaningful regulatory oversight. In a 2011 assessment of one of the oil affected areas of the Niger Delta, the United Nations Environment Programme (UNEP) found:

Both [the Department of Petroleum Resources] and [the National Oil Spill Detection and Response Agency] suffer from a shortage of senior and experienced staff who understand the oil industry and can exercise effective technical oversight. The main reason for this is that individuals with technical knowledge in the field of petroleum engineering or science find substantially more rewarding opportunities in the oil industry.¹⁰⁰⁸

The same report went on to observe that:

government agencies are at the mercy of oil companies when it comes to conducting site inspections.¹⁰⁰⁹

When a State allows a company to monitor key environmental parameters this removes independent oversight and is open to abuse. The implications for the right to remedy are serious. People are deprived of impartial information and may be unaware of the harmful consequences of corporate operations because information is not disclosed or is manipulated – both issues are discussed in the previous chapter. In some cases people may be well aware of the harm they are suffering but there is no official data to support their efforts to seek legal remedy; or the “official” data compiled by the company undermines their claim. This is an issue in the Niger Delta.

In Nigeria, if an oil spill is designated as caused by third party interference the affected community gets no compensation – regardless of the damage done to their homes, farms and fisheries. Amnesty International has uncovered specific cases where the cause of a spill has been misstated by a company or the volume of oil spilt is under-recorded. However, because the oil companies control the only “official” information on oil spills, people cannot contest their investigations. The result is a serious abuse of the right to remedy; Amnesty International’s research suggests that tens, if not hundreds, of thousands of people have suffered abuses of their rights to food, water, livelihood and health but have been denied effective remedies, in large part because of the control oil companies have over the oil spill investigation process.¹⁰¹⁰ The impact has also extended into court actions taken by people outside the Niger Delta. In court actions in the UK and Netherlands Shell has used its own investigation reports to defend itself in court.

The lack of sufficient regulatory capacity was a persistent problem in the Ok Tedi case. As noted earlier in the section on the influence of IFIs, the Department of Environment and Conservation, as well as other environmental enforcement agencies within PNG, have been subject to severe resource constraints, so the actual monitoring function of those agencies has been left almost entirely to the mining companies.¹⁰¹¹ A frustrated senior official within the Department of Environment and Conservation put it to Amnesty International in this way: “The polluter of the environment is responsible for monitoring the environment.”¹⁰¹² Another government employee working at PNG’s Sustainable Development and Healthy Environment Unit told Amnesty International, “We can do the monitoring, but depends on funding,” and “it is only two of us.”¹⁰¹³

As in PNG, the heightened exploitation of Guyana’s mining and forestry sectors was not accompanied by support to establish the social and environmental protections that would be needed

to control the risks inherent in these industries.¹⁰¹⁴ As outlined in the Omai case study, when the Omai mine began operating, Guyana had no environmental legislation, no environmental protection agency, and no institutional capacity to monitor environmental performance. The staff charged with monitoring mining activities within the Guyana Geology and Mines Commission (GGMC) had insufficient resources to discharge their responsibilities effectively.¹⁰¹⁵ Although environmental regulation improved after the 1995 spill, the lack of resources and expertise continued to affect the ability of the new Environmental Protection Agency to regulate mining activities.

The problems associated with weak regulatory capacity described in these cases are pervasive and widely reported across low income or developing countries. A 2005 Annual Report of the Kenyan Labour Department, for example, drew attention to the severe funding shortfalls affecting the activities of the labour inspectorate, pointing at significant reductions in staffing levels and the impossibility of carrying out inspections because of a lack of funds and transport. Similarly, the Directorate of Occupational Health and Safety Services was reported as having only 52 inspectors instead of the 168 expected to cover the entire country.¹⁰¹⁶ A report submitted to the International Labour Organization (ILO) in 2006 evaluating the operation of the Bangladesh Factory Inspectorate – the key body responsible for enforcing health and safety law – revealed serious problems of understaffing. The inspectorate employed only four safety inspectors and three health inspectors, who were responsible for 11,665 premises.¹⁰¹⁷

In Nicaragua, the capacity of the Ministry of Labour to enforce the country's labour laws was reported to be undermined by both the absence of sufficient human and material resources and a weak monitoring and enforcement regime in which inspections were infrequent, ad hoc and underpinned by an inadequate system of penalties.¹⁰¹⁸

The lack of resources available to regulatory agencies can be due to an overall lack of resources available to the government, but anecdotal evidence from a number of countries also raises questions about the influence of companies on government decisions about how to regulate companies. However, it is almost impossible to secure evidence to support allegations that regulators are kept weak as a direct result of corporate pressure on governments.

Regulatory effectiveness can also be undermined by problems of institutional design. Of particular importance are conflicts of interest that arise when a public official or agency tasked with the enforcement of certain standards is unable to discharge this responsibility impartially because they face competing interests or motivations. This is often the case when a government agency or department responsible for the promotion of a given industry is also given responsibility for enforcing regulatory standards (such as environmental protection) on that industry, or when a unit responsible for environmental protection sits within, and under the direction of, that agency or department.¹⁰¹⁹

In the case of the Ok Tedi project, until 1993, responsibility for environmental regulation fell to the Department of Mines and Energy (then the Department of Mining and Petroleum) whose main concern is the promotion and development of the industry. So two potentially conflicting functions were gathered under one single entity.¹⁰²⁰ When asked why waste dumping into the Ok Tedi River had never stopped, a senior official within PNG's Department of Environment and Conservation told Amnesty International that this was "managed by the Mining Department and economic imperatives."¹⁰²¹

The dumping of waste into the Ok Tedi and Fly rivers led to abuses of people's economic and social rights; although compensation has been paid to affected communities (albeit with disputes on whether the amounts given and the process used were fair and adequate), as stressed at several points in this text, compensation is not always a sufficient remedy. When the long-term health of the environment and long-term sustainability of livelihoods are damaged by pollution, ending and remediating the pollution are core elements of an effective remedy. In addition, long-term monitoring of the impacts to enable appropriate responses over time would be an important element of remedy in the Ok Tedi case. However, compensation is the only significant remedial action that has been taken, and even this measure took considerable efforts on the part of the local communities to achieve.

There are other ways in which companies seek to influence governments and regulators. Again, the Niger Delta offers an example. Civil society organizations and communities in the Niger Delta have long been concerned about international oil companies' influence over Nigeria's government. The government's protection of oil company interests has been very visible over many years. It contrasts starkly with the general failure to protect local communities from oil pollution and other damage linked to the oil industry. A 2010 Wikileaks' disclosure of US diplomatic cables gave an insight into Shell's relationship with the government of Nigeria. A cable dated 20 October 2009 states that Shell reportedly told US diplomats that the company had "seconded people to all the relevant ministries", and that this gave them "access to everything that was being done in those ministries".¹⁰²² Another cable, dated 2 January 2009, refers to the close ties between Shell and the governments of the Netherlands and the UK. It referred to "an ongoing program in which a Dutch diplomat works at Shell's headquarters in The Hague and a UK diplomat works at shell's London offices."¹⁰²³

2. CORRUPTION

Corruption frequently results in human rights abuses and violations. For example, when politicians or public officials divert public resources away from education and health care for personal enrichment or because they have been bribed, this can lead directly to violations of the rights to health and education. Systemic corruption in a country or institution (such as the police force), undermines the rule of law, can entrench discrimination and weaken the framework for protection of human rights.

In the context of business operations – particularly in the natural resources and extractive sector – corrupt practices involving State agents and companies have been widely documented.¹⁰²⁴ Once corruption is involved in granting access to State's natural resources, the potential for abuses increases because actors involved have placed themselves outside the law. For example, when a contract or concession is obtained as a result of bribery too often it then defines other aspects of the business operations. So, for example, the company paying the bribe may also bypass laws and regulations on land use and access, indigenous peoples' rights, or environmental protection. In such cases the company will likely act with impunity as the incentives for public officials to act in the public interest have been compromised. Corruption opens the door to human rights abuse and

is a massive obstacle to remedy and justice following abuses.

Local law enforcement officials may also be bribed to act – or fail to act – in the interests of the private actor. Even if local law enforcement has not been bribed, officers may be operating under political instructions that are based on a bribe having been paid to a government official.

Corruption also undermines consultation processes with communities who will be affected by projects through such means as bribing public officials charged with overseeing the consultation process, or “buying off” individuals who claim to represent the interests of affected communities. The violation of the right of all of those affected to participate in decisions which affect their rights is often linked with other human rights abuses such as forced evictions, the denial of adequate alternative accommodation, and denial of reparations including adequate alternative lands, compensation and other measures.

Recent resource-driven conflicts in Africa provide one of the starkest examples of how corruption and conflict are linked.¹⁰²⁵ The examples of the exploitation of resources (oil, gas, minerals and metals as well as logging) linked to corruption, conflict and human rights abuses are many and well documented (DRC, Sudan, Liberia, Sierra Leone, Angola). Some of these conflicts (and the systemic and widespread rights abuses which accompanied them) could only persist because of the corrupt acts of multiple actors, including those of States not directly party to the conflict and of private companies seeking access to resources and/or providing arms. In such cases corruption, far from being a deterrent to investment, was part of the attraction from some business actors. Corruption fuels conflict and conflict fuels corruption as those involved in conflict seek to unlock natural wealth to pay for arms and other equipment.¹⁰²⁶

How business does business – especially in resource-rich but governance-weak countries – drives not only immediate corruption, but can foster a corrupt approach to resource management in general.

Efforts to tackle corruption and to expose its impacts on human rights have increased in recent years in acknowledgement of the scale and trans-national nature of the problem. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions¹⁰²⁷ is one of several instruments that acknowledges and attempts to address the role played by business in corruption. Transparency and disclosure, as well as cooperation between States to investigate and punish corruption are central to anti-corruption efforts. However, action to remedy the impact of corruption has received less attention: this is an issue that will be picked up in the conclusion of this book.

3. SPECIFIC CORPORATE ACTION TO EVADE REMEDY

When abuses occur, companies sometimes take specific action to insulate themselves from liability or restrict the ability of plaintiffs to obtain redress. We saw a striking example of this in the Ok Tedi case. BHP used its influence over the PNG government to develop the two 1995 Acts that closed legal avenues of redress against OTML and its owners, and criminalized legal actions against them in foreign courts. The company used this same strategy when, in 2000, it negotiated a new law that allowed it to depart from the mine while legal action against it was ongoing, and establish a series

of legal protections and indemnities from environmental liabilities. The Ok Tedi/Fly River communities, who had already faced significant legal obstacles to get to court, were then confronted by new legal obstacles put forward by the company. This was a particularly blatant example of corporate abuse of the right to remedy.

In the Ok Tedi, Bhopal and Toxic Waste cases, we also saw another common practice designed to shut off available channels of redress: that of agreeing (in these cases with the government and not with those directly affected) on settlement clauses that quash existing civil and/or criminal avenues to seek remedy.

Amnesty International's research has uncovered other strategies used by companies to prevent people from accessing available remedies.

During the Ok Tedi litigation, there were reports of BHP using its influence to intimidate plaintiffs.¹⁰²⁸ Soon after the Restated Eighth Supplemental Agreement Act had been passed, the lead plaintiffs in the Australian claims were reportedly taken by a BHP and OTML senior executive and another individual acting for the companies to a hotel in Port Moresby and subjected to an array of intimidating statements and threats. These events gave rise to a further contempt of court action in the Supreme Court of Victoria against BHP, OTML and individual BHP executives, for "improper threats and improper inducements" to deter landowners from proceeding with their compensation claims against BHP.¹⁰²⁹

In the course of the Omai litigation, Cambior made use of a law suit to try to stifle attempts by activists to bring the situation at the Omai site to the attention of company shareholders and financiers.¹⁰³⁰ The company sought an interlocutory injunction (gag order) in the Canadian courts to prevent Recherches Internationales Québec's spokesperson for the National Committee of Defence against Omai, Dermot Travis, or any other individual or corporation from speaking directly or indirectly with any bank, financial institution or security dealer in an attempt to persuade any or all of them not to conduct business with Cambior. The case, however, was thrown out after three days of court hearings and no gag order was put in place.¹⁰³¹

Dermot Travis, spokesperson for the National Committee of Defence against Omai, was served with notice of the gag order request by Cambior in Canada. He told Amnesty International:

During the court process, Recherches Internationales Québec regularly communicated with key shareholders of Cambior, investment houses and the mining company's banks. We did so because these were the same individuals and groups that Cambior would communicate with regularly regarding the status of our lawsuit and their opinion of it. I suspect that their original goals were both to intimidate us and to force us to use limited resources to defend ourselves in the action. Frankly, if we had been forced to pay legal fees to defend ourselves, the Application could have shut the class action down completely. I also don't believe that they ever thought we would go public after I was served with the Application and were taken aback when we did. I believe this partly accounts for why they ultimately withdrew the Application some weeks later. Public sentiment and the business press in Canada did not take their side.¹⁰³²

3.1 UNDERMINING THE EFFECTIVENESS OR INTEGRITY OF REDRESS PROCESSES

In cases where a cause of action and channel of redress has proved available, companies may use a range of strategies to seek to gain advantage during these processes. There are procedural strategies that companies are fully within their right to pursue in their own defence. In judicial processes there are many interlocutory proceedings that both parties have a right to initiate with regard to different aspects of the claim, and at different stages. However, in almost all the cases investigated by Amnesty International, companies appear to have adopted delaying tactics by raising all possible interlocutory requests. As part of research for this book Amnesty International spoke to a senior corporate lawyer who shared a list of procedural issues corporate law firms raise in lawsuits against their corporate clients as a matter of course. These range from questions about service (e.g. identification of defendant), jurisdiction, forum, witnesses (e.g. credibility), to requests to join other potentially responsible defendants, confirmation of instructions in respect of each member of a group in a group action, security for costs and all possible preliminary issues with a view to delaying consideration of facts.

When the plaintiffs are poor individuals and communities, this practice is likely to complicate and delay claims to the extent that they may have to drop their claims or end them with premature and unsatisfactory settlements. With far greater access to financial resources and legal counsel, companies, on the other hand, are able to sustain expensive litigation if that is in their interests.¹⁰³³ All the cases featured in this book illustrate the range of corporate tactics that can be used to complicate and delay remedial processes and the direct impact this has on whether plaintiffs can sustain their legal actions over time and obtain the remedy they seek.

The Omai litigation was obstructed by jurisdictional and procedural objections raised by Cambior in both Canada and Guyana, preventing the lawsuits from progressing beyond their initial stages. The *forum non conveniens* litigation in Canada drained the plaintiffs' limited resources to such an extent that, when the case was dismissed, they were dissuaded from filing an appeal. When legal action was subsequently initiated in Guyana, Cambior sought to exploit the jurisdictional difficulties in bringing a case against a foreign defendant to impede the case from proceeding further. While the company had assured the Canadian court that it would not contest jurisdiction in Guyana, it fought to have the claim against all foreign defendants dismissed. Cambior's objections complicated the case in such a way that the plaintiffs' legal team ultimately decided to drop Cambior, together with all other foreign defendants, from the claim.

In the Bhopal case, Union Carbide Corporation (UCC) systematically ignored summonses to appear before the Bhopal criminal court and attempted to remove its assets from India to frustrate an impending seizure order by the court. UCC questioned the adequacy of the Indian judiciary to hear the Bhopal claims after having adamantly defended its adequacy before the New York District Court. In India, UCC's legal team spent much of its time in court deliberately increasing the complexity of the case.¹⁰³⁴ UCC's lawyers argued before the Bhopal judge, for example, that:

*the plaintiffs are illiterate and do not understand the contents of the affidavits on which they have placed their thumbprints. Therefore ... the complainants must be thrown out.*¹⁰³⁵

While delays are common across the justice system in Nigeria, some cases involving companies have taken 20 to 30 years to reach a conclusion, often leaving plaintiffs facing economic hardships.¹⁰³⁶ The fact that cases against companies can take so long to complete leaves people in the Niger Delta with almost no options for redress, given the weaknesses of the regulators described earlier.

Many companies also step beyond the boundaries of what is permitted when they undermine the independence and integrity of proceedings. Companies may seek to use their influence with top government officials or enlist the support of their own governments to put pressure on administrative or judicial processes of redress. As described earlier in this chapter, companies often enjoy privileged access to government officials and politicians. They may draw on these links to encourage the exercise of political pressure over administrative agencies or the judiciary in individual cases.

The cases in this book provide an abundance of examples. In the Bhopal case, attempts to interfere with judicial processes became clear with the revelation of confidential exchanges between Dow, Tata and senior Indian politicians during 2006 and 2007. Dow, with the support of Tata Group's Chair, Ratan Tata, was underhandedly pushing for a political resolution of its potential liabilities connected to Bhopal which were, at the time, and continue to be today, under examination of the courts. This resolution would consist of: plant site remediation to which Dow would allegedly be willing to contribute voluntarily "but not under the cloud of legal liability";¹⁰³⁷ a cessation of all legal action against Dow; and guarantees that the government of India would not hold Dow responsible for Bhopal.¹⁰³⁸

In the February 2005 note from Dow to Ronen Sen, the Indian Ambassador to the US mentioned above, Dow lays down its proposal to help resolve the "Bhopal matter" very clearly. The first action in a sequence of proposed measures is the implementation by the government of a:

*consistent, government-wide position that does not promote continued Gol litigation efforts against non-Indian companies over the Bhopal tragedy.*¹⁰³⁹

Dow reiterates its proposal in another letter to Ronen Sen dated 8 November 2006. Again, it ties this proposal to its request that the government of India does not hold it responsible for Bhopal, indicating specifically that:

Gol leaders need to work with all Ministries of the central government to ensure that their stated position is reflected in any and all of Gol statements, legal files, and dealings with the Indian court system.

Referring specifically to the Ministry of Chemicals and Fertilizers' request for Dow to pay a sum of money for plant site remediation, the company states:

*Gol has taken positions adverse to Dow. It follows logically from the Gol's statements regarding the non-liability of Dow, that the Ministry of Chemicals and Fertilizers should now withdraw its application for a financial deposit against remediation costs.*¹⁰⁴⁰

The various ministries that favoured Dow's proposal for a "political" resolution to the matter concurred with Dow that a special group of Indian ministers and other business leaders, including Ratan Tata, should be established to oversee plant site remediation. As we saw in the case study, the initiative was expressly rejected by the Department of Chemicals and Petrochemicals on the basis that the matter was under the Madhya Pradesh High Court, which was monitoring and supervising the entire process of environmental remediation.¹⁰⁴¹

Instances of political efforts to subvert court processes are not always as clear as those revealed in Bhopal. It is often difficult to find "smoking gun" evidence that links relationships between business and government to interference with administrative or judicial processes. However, there is often widespread belief amongst the affected people that such relationships are at the bottom of often inexplicable administrative and court decisions.¹⁰⁴²

As far as the Omai case is concerned, after the cyanide spill, Cambior actively sought to shape the government's response to the crisis, seeking to limit the duration and scope of the Commission of Inquiry's work. The company also sought to involve its home country government in the dispute. According to documents obtained under a RTI request by Canada-based Probe International, when the Guyanese government suspended operations at the mine immediately following the spill, the company contacted the Canadian High Commissioner, Simon Wade, asking him to protest to the Canadian government about the suspension.¹⁰⁴³

Many more cases of corporate instigated executive interference with remedial processes have been documented by other NGOs. The case of the Candonga dam in Brazil, for example, is another illustration of governments weighing in on behalf of the company in a legal process. The Global Justice Center and the Polaris Institute describe how communities affected by the Candonga dam in Brazil faced vigorous opposition from the Candonga Consortium when they challenged the legality of the dam's operating licence. In their account of the case, they report that the communities' legal challenge failed when mayors of neighbouring communities as well as the office of the Public Prosecutor of the State of Minas Gerais intervened on behalf of the company. The President of the Superior Court of Justice of the State of Minas Gerais overturned a previously ordered injunction to stop work on the dam on the grounds that this would harm the public interest.¹⁰⁴⁴

3.2 CORPORATE EVASION OF COMPLIANCE WITH DESIGNATED REMEDIES

If, despite all the obstacles, affected individuals or communities eventually manage to secure a favourable judgment, companies may then seek to evade compliance with designated remedies. Even where States are willing to use sanctions or enforce judgments, they may be unable to implement them against powerful companies,¹⁰⁴⁵ especially if they are based outside their jurisdiction. In effect, rulings against multinational corporations or even provisional orders or injunctions, can be difficult to execute when the company they are issued against or the assets against which a decision can be executed are located in another jurisdiction and are therefore beyond the reach of the national authorities. In these cases, judicial co-operation between States is indispensable, but such inter-State co-operation is rarely forthcoming. Companies may also use asset shifting strategies to avoid enforcement of compensation awarded against them.

4. BACK TO THE WIDER PICTURE

Why do the big industrialized countries who know [that the waste is toxic] dump in a country which has no treatment structure: it's a nastiness. We are treated like we have no value, we don't know anything ... one can take advantage of us.

Geneviève Diallo, Resident of Akouédo, Abidjan, Côte d'Ivoire, February 2009 talking about the dumping of Trafigura's toxic in August 2006.

The former UN Special Rapporteur on Business and Human Rights stated:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization, between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.¹⁰⁴⁶

The cases in this book highlight how the law can be used by companies to protect their interests, and significantly disadvantage victims, particularly when multinational corporations are involved. Laws and systems that protect human rights need to evolve to deal more effectively with the realities of a globalized economy in which powerful multinational actors operate across State boundaries.

The ability of corporations to avoid accountability and impair the ability of victims to pursue and enforce remedies is a political, legal and transparency problem. A comparison of different cases, such as the one undertaken in this book, underscores the importance of looking at the wider international and national political economy and institutional infrastructure to understand some of the root causes of corporate impunity and denial of justice in any particular case.

The reforms needed go beyond addressing legal barriers. The previous chapter argued for a mandatory requirement on companies to generate and disclose specific information about the activities and impacts of their global operations. Such information would be a substantial aid to empowering affected individuals and communities to prevent abuses and to seek remedies when abuses occur.

However, as this chapter makes clear, there is also a serious lack of information as to how companies influence states. While companies are, of course, entitled to participate in policymaking processes, the means by which they exert influence, the secrecy of the positions they push forward and the lack of transparency in their engagement with governments can easily move from legitimate engagement to undue influence. This is notably the case when companies bring the full weight of their economic and political muscle to bear on decision-makers in order to secure their own economic interests.

Measures are needed to ensure that corporate involvement in policy-making is both transparent and legitimate. To change the practices described in this book also requires a fundamental change in the culture of State-business relationships. Laws to ensure that corporate lobby positions are publically disclosed will be necessary, but other measures need to be considered, in particular oversight mechanisms such as parliamentary or congressional committees tasked with reviewing these matters.



Eric Dooh displays crude oil affecting the banks of a creek in the Niger Delta region of Nigeria. His village Goi has suffered multiple leaks from a Shell pipeline. He is one of a group of Nigerian farmers who in 2008 lodged a claim against Shell in the Netherlands.

5/CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

This book has exposed and discussed three major obstacles to remedy in cases involving multinational corporations:

- **Legal hurdles to extraterritorial legal action;** in this area we focused on the issues of separate legal personality, limited liability and the approaches of different legal systems to issues of jurisdiction.
- **Victims' lack of information,** in particular due to corporate control over information.
- **Corporate-State relationships;** in this area we examined the impact of corporate-State relationships on the willingness and ability of States to uphold human rights, including the right to remedy.

This book has focused particularly on multinational companies (MNC) and the responsibility of the parent or controlling company. While it has used the terminology of “parent” and “subsidiary” as well as “home” and “host” States, it has made clear that similar issues apply to companies whose global presence involves working through supply chains, sub-contracting chains and in joint ventures or other commercial partnerships.

The focus on MNCs reflects the scope of influence of these entities, but also their legal elusiveness. The multinational group is an entity that both exists and does not exist. Legally, most MNCs exist only as a set of separate entities, and it is this aspect of their identity that has created challenges for how their impacts are managed and how they are held to account. In most cases no one State has jurisdiction over an MNC in its entirety; rather, different States have jurisdiction over its component parts. As the cases documented in this book make clear, this facilitates corporate

evasion of accountability.

But despite the separate legal personality of the individual companies within a multinational group, MNCs also exist as an interconnected system. The reality of the MNC has been recognized in international standards and indeed MNCs self-identify as such. The emergence of standards that explicitly recognize the corporate group and the central role of a parent or controlling company is an important milestone in recognizing the fundamental reality of the strategically coordinated and managed corporate group.

However, while international standards have increasingly reflected an understanding of the reality of multinational corporate groups and the parent as an actor that influences group policy and practice globally, this reality is only patchily reflected in law. Legislation has been created to override corporate law presumptions in certain areas – such as corruption – but human rights impacts are rarely considered. On the contrary, it is clear that company law has evolved to the detriment of human rights. This must change.

The world's biggest MNCs are headquartered in developed and emerging economies; their impact is global and many invest in some of the poorest countries in the world. This book has exposed the extent of MNC influence on governments and State agencies, which is particularly pronounced in developing countries where the relative power of MNCs compared to States is often substantial. This results, too frequently, in the poorest people suffering the worst impacts of corporate bad practice.

This book has also exposed the double standards in how companies use and promote international law. Over the past 15 years we have seen the expansion of law to protect global economic interests, through a wide range of international investment and trade agreements backed by enforcement mechanisms. But while economic interests have been able to make the law work for them, those most affected by their operations have often seen the law and protection of the law recede in the face of corporate power. Deregulation, the need to attract foreign investment, and provisions in trade and investment agreements have all squeezed the protection the law can provide people affected by corporate operations – particularly in developing countries.

The central theme of this book is remedy. It looks at what happens when things go wrong. It is also about the efforts of people striving, in some cases for decades and in all cases against formidable odds, to get justice. In the cases documented in this book, some of the poorest people in the world have taken on some of the most powerful. They have done this despite their health being impaired and their livelihoods being destroyed.

No one would contest that the people whose cases are documented in this book have suffered serious abuses. In none of the cases is there any suggestion that corporate operations were not involved in the harm suffered. And yet, in every case, companies have used legal fictions and political power to evade meaningful accountability and deny people remedy. The heroism of people who have struggled to achieve a remedy is – when examined – overwhelming. The failure of States is stark.

One reason why this book has focused on four cases in considerable detail is to expose how the current system leads to clear injustices and outcomes that are not in the public interest of any of the States involved. The law has repeatedly favoured the corporate defendants – not in relation

to the merits of the case, but on the preliminary procedural and jurisdictional matters. Laws intended to guard against frivolous legal actions, prevent “forum shopping” and clarify jurisdiction are being used to frustrate legitimate claims and prevent them from even being heard.

This book has underlined that remedy is about more than access to legal forums to seek compensation. The right to an effective remedy encompasses equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. The actual reparation that should be provided in each case will depend on the nature of the right violated, the harm suffered and the wishes of those affected. The touchstone of reparation, however, is that it must seek to remove the consequences of the violation and, as far as possible, restore those who have been affected to the situation they would have been in had the violation not occurred. In all of the cases documented in this book, critical aspects of reparation were ignored, such as adequate medical treatment and environmental restoration.

To address the challenges documented in this book, certain widely held legal doctrines and presumptions must be challenged. In addition, greater attention must be paid to how people are enabled and empowered to use the law to achieve justice. Protection of human rights in the context of MNCs and globalization requires much greater cooperation between States. Sharing of information and technical and financial resources are all useful actions, but States should also be encouraged to look at cooperation in terms of accountability, carrying out investigations and ensuring people's access to legal processes.

THE REFORMS

This book has set out a number of reforms; these are not the only reforms needed.

1. MAKE PARENT/CONTROLLING COMPANIES LEGALLY RESPONSIBLE FOR HUMAN RIGHTS ABUSES ARISING IN THEIR GLOBAL OPERATIONS

The doctrines of separate legal personality and limited liability originally served a purpose. The rationale was to encourage economic activity while reducing risk to those who invest in the business. However, over time it has become clear that the framework of corporate law is enabling a situation that was never intended – one where powerful MNCs can profit from human rights abuses and environmental damage related to their operations without meaningful accountability. Of course, not all MNCs do so, but the system creates a permissive environment for abuse.

While the advantages of separate legal personality are necessary, the time has come to make these legal protections subject to certain limitations in the public interest, and to protect the international human rights framework.

A number of specific proposals have been put forward in this regard. The main one is to establish clear parameters for making parent companies legally responsible for human rights abuses

arising in the context of their global operations, including when committed or contributed to by their subsidiaries. The book proposes a three part framework:

- Placing parent companies under an express legal duty of care towards individuals and communities whose human rights may be or are affected by their global operations, including by the activities of their subsidiaries (domestic or foreign). The standard of care needed to meet this requirement would be defined by reference to international human rights due diligence standards.
- In certain situations, for example instances of large-scale human rights disasters or severe or systematic human rights abuses arising in the context of their global operations, establishing a rebuttable presumption that the relevant parent company is legally responsible. As such, if victims could prove that they suffered harm, the parent company would have the burden of proving that it should not be held legally responsible or was not legally responsible for that harm. The standard of proof needed to rebut this presumption would again be defined by reference to international human rights due diligence standards. The burden of proof would also be shifted for other elements required to prove that claim (such as, in negligence cases, requiring the parent company to prove that the breach did not cause the harm suffered by the victims).

The standard of care in both cases would be defined by reference to international standards relating to human rights due diligence processes that focus on the prevention of human rights abuses.

- Clarifying other modes and standards for establishing the liability of parent companies with respect to the activities of their subsidiaries, in particular through specific legislation with extraterritorial effect (for both civil and criminal acts).

While some court decisions have recognized that a parent company can have a duty of care to individuals affected by the operations of a subsidiary, the parameters for establishing such a duty of care are under-developed. The framework described above would place a legal requirement on parent companies to implement human rights due diligence action in respect of their global operations. The human rights due diligence requirements would apply both as a stand-alone standard of conduct, regardless of whether any claim of harm was made, as well as for the purposes of establishing parent company liability in the event of a claim. In other words the requirement to demonstrate adequate due diligence would not only be triggered by a civil claim; certain failures of due diligence should be subject to penalties, given the risk that inadequate due diligence would pose to human rights.

This legal requirement would establish greater clarity as to the standard of care expected of parent companies throughout their global operations. It would also mean that individuals who suffered harm as a result of corporate activities would be able to bring forward legal actions in the home State of the parent company on the basis that the parent company owed them a duty of care and, if the due diligence standard is not met, that it breached that duty of care. In any such cases, the criteria for making a parent company responsible under a duty of care principle would rest on

an assessment of the extent to which the company took every reasonable step to “become aware” of the risks that its operations posed to human rights, and to prevent and mitigate abuses. The occurrence of a human rights abuse, coupled with the failure to implement or disclose adequate due diligence policies and practices, could give rise to legal responsibility where the other elements of any claim are proved.

These proposals do not remove the concepts of separate legal personality and limited liability, but make the concepts subject to certain limitations. In effect the proposal is that the law moves forward to recognize the operational reality of the multinational group and the central role of the parent company in those operations.

The imposition of legal responsibility on parents with regard to human rights abuses arising in the context of their global operations would have to be reasonable. Even a robust process on the part of the parent company may not prevent abuses arising from unexpected events. Where the unforeseen occurs, the due diligence standard for assessing whether the parent company has met its duty of care should look at detection measures employed by the company and how the company responded once made aware of the situation. However, it is also vital that an obligation of due diligence on parent companies is not reduced to a box-ticking compliance exercise; corporate human rights due diligence must be translated into practical action that takes account of foreseeable risks in a given context.

An explicit duty of care on the parent or controlling company would significantly clarify the legal standards applicable to that company both before and for the purposes of any claim concerning corporate-related human rights abuses. However, it would not eliminate the hurdles associated with the responsibility of plaintiffs to discharge other burdens of proof (i.e., in a negligence claim, even if the parent company was under an express legal duty of care, the plaintiffs would still need to show, at a minimum, that the parent company breached that duty of care and that this led to the damage suffered). The cases in this book have shown that even victims of large-scale human rights disasters or severe or systematic human rights abuses arising in the context of corporate activity face enormous difficulty in proving that a company was liable for the harm caused. This is a particular issue in cases involving harmful or hazardous substances when victims lack the information required to establish the relevant chemicals involved and their impact on, for example, health and the environment. This hurdle could be addressed by shifting the burden of proof in certain civil claims.

The second element of the framework, therefore, would be a rebuttable presumption that a parent company is legally responsible for certain types of human rights abuses arising in the context of its global operations such as those involving large-scale human rights disasters or severe or systematic human rights abuses. As such, if victims could prove that they suffered harm, the parent company would have the burden of proving that it was not legally responsible or should not be held legally responsible for that harm. The standard of proof needed to rebut this presumption would again be defined by reference to international human rights due diligence standards. However, depending on the cause of action, the burden of proof would also be shifted for other elements required to prove that claim. For example, in a negligence claim, the parent company would not

only need to prove that it did not breach its express duty of care towards those individuals and communities (by reference to the due diligence standard as described above) but also that any breach did not cause the harm suffered by the victims.

In contrast to the present situation, which requires the plaintiff to show the reasons why the parent/controlling company should be liable, it would be up to the company to show why it should not. There are many laws, cited in this book, that allow for reducing or shifting the burden of proof between the parties or provide for a strict liability offence with a due diligence defence. The value of this approach is that it would shift the burden of proof to the party that was in the best position to obtain and present the relevant information. It also balances the interests of the different parties: companies would not be prevented from defending themselves and victims of abuse would still have to prove that they suffered harm.

The changes proposed above could be seen as striking at the heart of corporate and tort law – making a parent company legally responsible for the acts of its subsidiaries and shifting to the parent company the plaintiff's usual burden of proving that the parent company is responsible for the harm caused. However, in cases involving human rights there is an overriding public interest in making such changes.

This book has also addressed the most common corporate objections to the above proposals. These fall into three broad categories; one hinges on the view that parent companies cannot put due diligence measures in place because the laws of the host or home State prevent it from doing so. In reality, parent companies already exercise influence over human rights issues through global policies and there are very few examples of State law requiring a company to act contrary to human rights or preventing a company acting consistently with human rights. The real issue here is that laws do not require companies to act or prevent them from doing so, leaving the company with the choice.

The second objection is financial. Companies claim that such a requirement would undermine their global competitiveness. At the heart of this argument is the request to be allowed to get away with acting badly if it would cost money to act well and not everyone is made to do it. But there is also an assumption that significant financial or administrative burdens would be involved, which may not be the case. Acting with due diligence will require some time and resources, but the scope of due diligence can and should be adapted to reflect the potential risk and the scope of impact of corporate operations. Moreover, it is what any ethical company should be doing already.

The third objection hinges on the view that a legal requirement by a home State that required a parent company to exercise human rights due diligence in relation to its global operations would constitute interference in the affairs of those host States where subsidiaries or other commercial operations are located. However, the duty of care and legal presumption of responsibility as described here would not impinge on the jurisdiction of a host State. Rather it would enable and clarify the parameters for legal actions between private parties – a company and the individuals its operations affect. Many States already allow such civil actions; the proposals here clarify and extend the bases for such actions.

As to the third element of the framework, there are various options for clarifying the modes and standards for establishing parent company liability, many of which would involve the adoption of general legislation concerning human rights abuses. This could include adopting specific legislation that requires parent companies to undertake human rights due diligence throughout their operations (including those of its subsidiaries), with the parent company incurring liability if a human rights abuse occurred and it failed to implement adequate policies and practices. Alternatively, such legislation could allow for civil and/or criminal liability to be imposed automatically on parent companies for human rights abuses caused or contributed to by their subsidiaries (including those committed abroad). Again, the parent could invoke the adequacy of its due diligence procedures as a defence. Another option would be for such legislation to be developed focusing on specific issues related to human rights (as has been done in relation to human trafficking and corruption, for example).

There are many laws, cited in this book, which provide for liability to be imposed on one actor for damages or injury caused by another and for parent companies to be held civilly or criminally liable for certain actions of, or for failing to prevent certain acts by, their foreign subsidiaries (some of which include due diligence defences). States have shown that they are willing to adopt legislation with extraterritorial effect in certain areas. Given the sheer scale of the obstacles faced by victims of human rights abuses, it is entirely reasonable to push for States to adopt legislation that increases the likelihood of achieving remedy and accountability for corporate-related human rights abuses.

2. ELIMINATE *FORUM NON CONVENIENS*

The second element of legal reform is removing *forum non conveniens*. The use of this doctrine has contributed to some of the most egregious injustices documented in this book. The legal argument for discontinuing its use hardly needs to be made since many countries – those with a civil law tradition – do not recognize, and therefore have never applied, *forum non conveniens*.

In all of the human rights-related cases examined in this book where the forum issue was raised, the plaintiffs viewed the home State courts as the appropriate forum, while the corporate defendants argued for the host State. In each case the host State had already shown itself, or subsequently proved to be, unable to address the claims. The evidence from this research and other bodies of work on the topic are that *forum non conveniens* in corporate cases has had a deeply damaging impact on the ability of often poor plaintiffs to access courts in human rights-related cases. Given that, where *forum non conveniens* has been eliminated, this has not led to legal difficulties, the total elimination of this rule, at least in corporate-related human rights cases, would significantly benefit the right to remedy.

3. ENSURE INTERNATIONAL COOPERATION AND ASSISTANCE

The third element of legal reform is international cooperation and assistance between home and host States to ensure effective remedy. It is generally recognized that States have an obligation to

seek and provide assistance under a number of international human rights treaties. The lack of international cooperation and assistance has, however, been a significant obstacle to the success of claims in home States; defendants have frequently pointed to difficulties in accessing witnesses and evidence in home States when raising issues of *forum non conveniens*. A more appropriate way to address these concerns would be for States to cooperate to ensure that the core principles of accountability and the human right to remedy are upheld.

In the context of the right to effective remedy, home and host States should seek assistance from each other, particularly in relation to those elements of remedy that a home State court could not guarantee, such as those that require action from the host State. This will require the development of guidance for judges and prosecutors, preferably in a multilateral forum.

4. INCREASE ACCESS TO RELEVANT INFORMATION

The third major area of reform proposed is to substantially increase access to information about corporate operations; this reform is linked to the due diligence reform described above.

Information is power, and the already stark imbalances that exist between multinational corporations and poor communities are augmented and exacerbated by the control companies have over information. Corporate control over information that was vital to the protection and defense of human rights has been a feature of every case referred to in this book. In all cases the affected individuals and communities faced huge challenges in accessing information necessary to protect their rights and secure an effective remedy.

Information helps level the playing field, and it must be accessible to people by right. Two reforms will aid this: one is mandatory disclosure requirements on companies – and on the parent company in respect of global operations; the second is reforms to civil procedure rules on disclosure to ensure plaintiffs can access information during legal actions.

Companies should be required by law to generate and disclose information that relates to the impact of their operations on the environment, public health or other matters of public interest, where its availability and accessibility is critical for the effective enjoyment of human rights. This requirement should also include – as far as possible – access to source data and not just the outcome of analysis, in order to enable independent scrutiny. Companies that work with toxic or hazardous substances should be placed under more stringent disclosure rules. They should be compelled by law to disclose all information about the contents and toxicity of substances released into the environment that cause or have the potential to cause death or harm human health.

Relevant government agencies should have the resources and capacity to conduct their own independent testing so they can respond to and verify company information. However, as all of the cases in this book demonstrate, in developing economies the financial and technical resources may not be available to do this. While action to address such deficiencies is important the capacity gaps will not be easily filled. This challenge can be addressed, to some extent, by a requirement on parent or controlling companies to ensure the generation and publication of certain data in relation to their subsidiaries. This is particularly important in the context of multinational industries

known to carry serious human rights risks, such as extractives, chemical, medical testing, and any industry that uses large areas of land or large amounts of natural resources.

Many parent companies already publish some data on the social and environmental impacts of their global operations. However, such selective reporting is of relatively little value. Much is not included and what is disclosed - and how it is presented - is decided by the company. Corporate social and environmental reporting frequently includes aggregated information, which is not useful to affected individuals, and information on corporate philanthropic activities. It rarely includes information on harmful impacts.

There are other arguments in favour of mandatory disclosure of information. Perhaps the most important is the potential to empower people to claim and protect their rights. Information allows people to act on their own behalf and to hold the powerful to account. Mandatory disclosure of information would also act as a powerful tool to prevent abuses and corruption.

Some companies argue that a mandatory requirement to disclose non-financial information would constitute an undue administrative and financial burden. However, several studies referenced earlier in this text have shown that such disclosure brings benefits to a company. Moreover, the information required by non-financial disclosure should be exactly that information any responsible company is already gathering and assessing.

5. REFORM CIVIL PROCEDURE LAWS ON DISCLOSURE

Reforms to civil procedure laws in some countries would support the right to remedy in corporate cases. As with several of the other recommendations, this proposal does not introduce a new concept but rather advocates for something that already exists – and has been shown to work in some jurisdictions – to be applied more broadly. Procedural rules that make it difficult, if not impossible, for plaintiffs to access information they need to substantiate their cases should be revised. This reform could be achieved through provisions ensuring broad documentary discovery rules that allow for access to information in the possession of the defendant corporation or a third party that is relevant to the subject matter of the claim. Furthermore, if a case is settled, civil procedure rules should explicitly state that parties cannot agree between themselves to the non-disclosure of documents relevant to matters of public concern.

6. REDUCE CORPORATE INFLUENCE ON THE STATE

This book has exposed a dimension of the corporate impact on human rights in general and on the right to remedy in particular that has – thus far – received relatively little attention: the political influence of MNCs. While accepting that corporate influence on the domestic and international policy process can be legitimate, this book has revealed how legitimate advocacy too often becomes undue influence on the State, resulting in human rights abuses. As US President Obama noted in his 2014 State of the Union speech: “Ordinary folks can’t write massive campaign checks or hire high-priced lobbyists and lawyers to secure policies that tilt the playing field in their favor at everyone

else's expense." MNCs can, and frequently do.

At the heart of the undue influence of some MNCs is the secrecy that surrounds State-corporate relationships. Certain actions – such as the efforts by Dow and Tata to influence the court processes in India – cannot be defended once exposed. Measures are needed to ensure that corporate involvement in policy-making is both transparent and legitimate.

This book has proposed specific reforms. One is disclosure of corporate lobbying – who lobbies, for what, and the nature of the decisions made by governments and State agencies on the basis of corporate positioning. This recommendation is distinct from the disclosure on the impact of corporate operations, described above. Registers of corporate lobbyists already exist. What is needed is transparency around how politicians and civil servants are influenced: who they meet and what actions they take on the basis of special interests. This information is rarely in the public domain. However, if politicians and civil servants were under a duty to disclose all lobby meetings, public scrutiny would act as a check on bad practice. Specific oversight bodies such as parliamentary or congressional committees should also be established with the objective of ensuring the public interest.

A second proposed reform in relation to corporate influence on the State involves requiring both home States and international financial institutions (IFIs) to subject their attempts to shape host State policy to a human rights interest test. The ministries of government that are usually involved in IFIs and trade and investment negotiations are rarely aware of, let alone acting in line with, their State's human rights obligations. These ministries should be required by law to assess all efforts to shape foreign economic and investment policies – including via IFIs – against the potential impact on human rights, including the right to effective remedy.

To change the practices described in this book also requires a fundamental change in the culture of State-business relationships. Laws to ensure that corporate lobby positions are publicly disclosed are necessary, but other measures need to be considered, in particular oversight mechanisms such as parliamentary or congressional committees tasked with reviewing these matters.

TO SUM UP

In some respects the corporate model is antithetical to the right to effective remedy; by admitting and addressing human rights abuses companies expose themselves to financial liability and reputational harm which shareholders (if not the directors and officers of the company themselves) see as entirely contrary to their interests. Consequently, the most common corporate response to allegations of abuse and demands for remedy is defensive. This response itself frequently leads to further abuse; as companies seek to manage and contain the risks to themselves they – whether intentionally or not – can block legitimate routes to remedy. Amongst the ways that companies do this are: deals with governments, denying victims access to vital information and using vastly greater financial means to delay and frustrate attempts to bring cases to court.

This basic fact needs to be confronted when considering the recommendations made in this book. Moreover, while international human rights law places an obligation on States to ensure rights, including the right to remedy, are fully realized, international law has yet to adequately address non-State actors that may be substantially more powerful than the State and who draw power from a global political economy that plays by very different legal rules.

There are arguments against developments in law that aim to address the international nature of business operations. But those that oppose the development of extraterritorial and supra-national law to deal with the negative human rights impact of business on the one hand, frequently give their full support to the development of international law and enforcement mechanisms in the areas of trade and investment on the other.

A central question posed by this book is: in cases involving MNCs and those whose lives they affect, who does the law protect? The answer, overwhelmingly, is: the powerful corporate and economic interests. This book is a manifesto for change, a call to use the law to empower the victims and survivors of corporate-related human right abuse and to redress the current dangerous imbalances that are the consequence of failures to ensure human rights protections keep pace with the risks posed by global economic interests.

RECOMMENDATIONS

HURDLES TO EXTRATERRITORIAL ACTION

1. Make parent/controlling companies legally responsible for human rights abuses arising in their global operations

- Place parent companies under an express legal duty of care towards individuals and communities whose human rights may be or are affected by their global operations, including the activities of their subsidiaries (domestic or foreign). The standard of care needed to meet this requirement would be defined by reference to international due diligence standards.
- In certain situations, for example instances of large-scale human rights disasters or of severe or systematic human rights abuses arising in the context of their global operations, establish a presumption that the relevant parent company is legally responsible for that harm and place on the parent company the burden of proving that it should not be or was not responsible. The standard of proof needed to rebut this presumption would be defined by reference to international human rights due diligence standards.

The standard of care in both cases would be defined by reference to international standards relating to human rights due diligence processes that focus on the prevention of human rights abuses.

- Take targeted and practical steps to clarify other modes and standards for establishing the liability of parent companies with respect to the activities of their subsidiaries, in particular through specific legislation with extraterritorial effect (for both civil and criminal acts).

2. Eliminate *forum non conveniens*

- Eliminate in home State courts the use of the *forum non conveniens* doctrine, at least in cases concerning extraterritorial corporate-related human rights abuses (or, until eliminated, apply it restrictively).

3. Ensure international cooperation and assistance

- Develop guidance for judges and prosecutors, preferably in a multi-lateral forum, with respect to international cooperation and assistance to ensure effective remedy in cases concerning corporate-related human rights abuses.

LACK OF INFORMATION

4. Increase access to relevant information

- Enact laws and policies, and support the development of international standards, that:
 - Require companies to implement human rights due diligence processes and to generate and disclose information that is critical for the effective enjoyment of human rights, with regard to both their domestic as well as foreign operations. This could include, for example, requiring companies to: (a) report on their human rights due diligence processes and major human rights risks and impacts; (b) report on the findings of accident investigations and other incidents; and (c) provide environmental, social and human rights impacts assessments (both at the feasibility stage of a project and periodically throughout its lifespan, if applicable). In the case of parent or controlling companies, these requirements would apply to their global operations.
 - To the extent such information is not already in the public domain, provide legal standing to interested parties, including foreign persons, to require companies to provide access to this information (subject to limited exceptions).
- Enact laws that compel companies that handle toxic or hazardous substances, either domestically or abroad, to disclose information about the contents and toxicity of these substances to those whose human rights are adversely affected by their activities and to communities within the vicinity of facilities where these substances are produced or stored.

5. Reform civil procedure laws on disclosure

- In cases of alleged corporate human rights abuses, adopt procedural rules on discovery so as to allow plaintiffs to access information in the possession of the defendant corporation or a third party that is relevant to the subject matter of the lawsuit, and sanction failures to produce the requested information. Furthermore, if a case is settled, civil procedure rules should explicitly state that parties cannot agree between themselves to the non-disclosure of documents relevant to matters of public concern.

6. Reduce corporate influence on the state

- Enact legislation that requires politicians and civil servants to disclose all meetings with corporate actors, including informal meetings, and the issues discussed. This data should be made publicly available in the same way as disclosure of financial interests.
- Require by law that all efforts to shape foreign economic and investment policies – including via IFIs – are assessed against the potential impact on human rights and that this is publicly disclosed.



TRAFIGURA BEHEER B.V., AMSTERDAM, BRANCH OFFICE GENEVA

Amnesty International
International Secretariat
Peter Benenson House,
1 Easton Street,
London,
WC1X 0DW
United Kingdom

27th August 2012

Dear Ms Gaughran

We refer to your letter received on 15th August 2012 enclosing a draft report prepared by Greenpeace and Amnesty International concerning the Probo Koala and the discharge of slops in Abidjan, Cote d'Ivoire in 2006.

Whilst we can see the intended purpose for the report, and the convenience of fitting certain facts and law to that objective, we believe the report contains significant inaccuracies and misrepresentations. The report oversimplifies difficult legal issues, analyses them based on ill-founded assumptions and draws selective conclusions which do not adequately reflect the complexity of the situation or the legal processes. Courts in five jurisdictions have reviewed different aspects of the incident, and decisions and settlements have been made. It is simply wrong to suggest that the issues have not had the right judicial scrutiny.

In our view, the report does not set out a fair or balanced account of the Probo Koala incident, but is rather a report that has been designed to support the stated position of Greenpeace.

The Probo Koala incident was a distressing and difficult event for those in Abidjan. Many different authorities and companies were involved and there is little doubt that mistakes were made and we believe that everyone involved would have wanted to see things handled differently. This incident provided additional impetus for Trafigura to review and improve the ways in which we conduct our business, and has led to the introduction of more robust processes across our operations.

Trafigura deeply regrets the impact the Probo Koala incident had - both real and perceived - and we have sought to assist the people affected through the variety of the settlements that have been made. It is regrettable - but entirely outside our

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ANNEX



TRAFIGURA BEHEER B.V., AMSTERDAM, BRANCH OFFICE GENEVA

control – that the funding made available appears not to have benefited those people, nor reached the projects intended.

At Trafigura, we have sought to learn from our experiences and have maintained our commitment to the countries in which we operate. The company has a long-established commitment to Africa and, since 2006, we have invested almost US\$2 billion in sub-Saharan Africa, creating jobs, paying taxes, building infrastructure, providing fuel and helping Africa to grow.

Yours sincerely,

Eric de Turckheim
Member of the Supervisory Board of Trafigura Beheer BV



January 21, 2014

Seema Joshi
Head of Business and Human Rights
Amnesty International
Peter Benenson House
1 Easton Street
London WC1X 0DW, United Kingdom

Dear Ms. Joshi:

The 1984 gas leak in Bhopal, India, was a terrible tragedy that understandably continues to evoke strong emotions. What is not understandable or appropriate is how many of the facts of this terrible tragedy have been distorted over its 30 year history. Amnesty International's contention that Union Carbide Corporation deprived the victims of the Bhopal gas disaster of the "right to an effective remedy" is without any factual or legal basis. All of the victims' claims against Union Carbide were resolved a quarter-century ago by a comprehensive settlement proposed by the Supreme Court of India and accepted by the parties. After hearing all objections to the settlement, including those by victim groups, the Court expressly found that the settlement provided the victims with a remedy that was "just, equitable and reasonable" and dismissed their claims against Union Carbide with prejudice. *Union Carbide Corp. v. Union of India*, (1991) 4 SCC 584 (October 3, 1991).

The settlement proved to be more than adequate to compensate all victims. In fact, as a result of the huge surplus remaining after all claims had been paid in full, each victim received twice the amount the Supreme Court deemed to be fair compensation. (2006) 13 SCC 322 (July 19, 2004). Moreover, even if the settlement had been insufficient to compensate all victims of the disaster – which it was not – the 1991 Judgment of the Supreme Court expressly required the Union of India – not Union Carbide – to make up any shortfall.

Subsequent challenges to the settlement were rejected by the Supreme Court on the grounds that its judgment affirming the settlement was final. (2007) 9 SCC 707 (May 4, 2007). The "Curative Petition" filed by the Union of India should be dismissed for the same reason. See Union Carbide's Response to the Curative Petition Filed by the Union of India and Response to Application Filed by Various Groups, both dated November 18, 2011, which summarize Union Carbide's submissions to the Supreme Court of India. See http://www.bhopal.com/~media/Files/Bhopal/UCCResponseCP111811_2.pdf and http://www.bhopal.com/~media/Files/Bhopal/UCCResponsetogroups111811_2.pdf

January 21, 2014
Page 2
Seema Joshi

The United States Court of Appeals recently rejected any claims by local residents that Union Carbide was responsible for environmental contamination at the Bhopal plant site, stating:

“Sahu and many others living near the Bhopal plant may well have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible. After nine years of contentious litigation and discovery, however, all that the evidence in this case demonstrates is that UCC is not that entity.”

Sahu v. Union Carbide Corp., 2013 WL 3214612 (2d Cir. June 27, 2013).

Finally, Union Carbide has not responded to the many misstatements in Amnesty International's 58-page report since its basic premise is simply false.

Very truly yours,

Tomm F. Sprick

Tomm F. Sprick
Union Carbide Bhopal Information Center

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Date: 17/01/2014 10:37
Subject: Re: Your letter of January 7, 2014, to Mr. Cyrus P. Mistry, Chairman of Tata Sons (Ms. Seema Joshi, Head of Business and Human Rights, Amnesty International)
January 17, 2014

Ms. Seema Joshi,
Head of Business and Human Rights,
Amnesty International.

Dear Ms. Joshi,

We refer to your letter of January 7, 2014, to Mr. Cyrus P. Mistry, Chairman of Tata Sons.

We thank you for drawing our attention to Amnesty's report and seeking to know why Mr. Ratan N. Tata, on behalf of the Tata group, had offered to spearhead and contribute to a 'Site Remediation Fund' for the remediation of the soil at the erstwhile Union Carbide site at Bhopal.

At a meeting of the Government of India's Investment Commission in July 2006, Mr. Tata, who chaired the Commission, came to learn that the soil at the site remained un-remediated, even 22 years after the tragedy of December 1984. He felt deeply concerned that the health and welfare of the people of Bhopal were being endangered by the continued leaching of toxins into the ground and ground water.

Guided by his concern, in July 2006 itself, in a letter to the then Finance Minister, Mr. Tata said "it would be in the national interest for a Site Remediation Fund or Trust to be created to clean up the site and the toxins in the soil so that the site is rendered safe above and below ground...Tatas would be willing to spearhead and contribute to such an exercise, should this be possible." Mr. Tata reiterated that "the government and the courts would need to endorse such an initiative".

In fact, in 2009, three years after the offer was made, independent tests done by an Indian NGO established leaching of toxins at the plant site.

By that time, the Tata group's initiative had been misconstrued and wrongly interpreted, as a result of uninformed allegations. Interestingly, as per our understanding, in response to a Public Interest Litigation in 2004, the Madhya Pradesh High Court had already directed the Union and State Governments to take immediate steps for remediation of the site, independent of determination on the question of liability.

Notwithstanding different perspectives that may have existed on the association of Dow with Union Carbide Corporation and Dow's investment in India, Mr. Tata publicly stated that:

- a) it was not for him to pass any judgment on the legal issue of liability;
- b) what was of urgent need was remediation at the site and the funds to do so, volunteered by the Tata group and other willing Indian corporates, so that the health and welfare of successive generations of Bhopal could be protected from the continuing leaching of toxins;
- c) remediation could only proceed if it received endorsement from the Government and the Courts;

We hope Amnesty and your proposed report will appreciate the context in which the remediation proposal was made and conclude that the Tata group's offer of *collaboration* was without any vested intentionality but for fast and comprehensive remediation of toxic soil and water at the site; incidentally, as per our understanding, this is yet to be completed three decades after the incident.

We believe that Amnesty's effort to reach out to us was to inform itself and the readers of its proposed report about the Tata group's rationale behind the proposal, and we expect that Amnesty will place this fully in the public domain.

Kind regards,

Yours sincerely,

Debasis Ray

Debasis Ray

Chief - Group Corporate Communications

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The Dow Chemical Company

January 21, 2014

Seema Joshi
Head of Business and Human Rights
Amnesty International
Peter Benenson House
1 Easton Street
London WC1X 0DW, United Kingdom

Dear Ms. Joshi:

I am writing to respond to your letter dated January 7, 2014 to Andrew Liveris. As you no doubt know, The Dow Chemical Company acquired the shares of Union Carbide Corporation ("UCC") over 16 years after the gas release in Bhopal, and more than half a dozen years after UCC sold its shares in Union Carbide India Limited, the company which owned and operated the plant and which remains a viable company today under the name Eveready Industries India Limited. To the extent that UCC has any liability for damages resulting from the gas release or the plant site – an assertion which Dow and UCC vigorously dispute – UCC's liabilities have not been assumed by The Dow Chemical Company.

I refer you to two statements which summarize The Dow Chemical Company's submissions to the Supreme Court of India in Response to the Curative Petition Filed by the Union of India and in Response to the Applications Filed by Certain Interest Groups in Support of the Union of India's Curative Petition, both dated November 18, 2011. See <http://www.dow.com/sustainability/debates/pdfs/TDCC-Response-CP-111811.pdf> and <http://www.dow.com/sustainability/debates/pdfs/TDCC-Response-to-Groups-111811.pdf>

Your letter and allegations directed towards Dow are simply wrong and misguided.

Very truly yours,

Scot

Scot Wheeler
The Dow Chemical Company



WORLDWIDE PARTNER



Seema Joshi
Head of Business and Human Rights
Amnesty International
Peter Benenson House
1 Easton Street
WC1X 0DW
London

January 17, 2014

Ref: Your letter dated January 8, 2014

Dear Ms. Joshi,

Thank you for your letter addressed to Mr. Lakshmi N. Mittal with regards to your research on the human right to an effective remedy and how this links to the ArcelorMittal Mineral Development Agreement with the Government of Liberia.

The ArcelorMittal Mineral Development Agreement was renegotiated in 2006 with the first democratically elected government of Liberia. The changes made to the agreement seemed to have been omitted from your research. Some key items for you to note are:

- When ArcelorMittal signed its initial agreement with the Transition Government of Liberia in 2005, the country was just emerging from 14 years of civil war, which had destroyed all infrastructure, decimated the economy, and almost all of its experienced and educated citizens had fled the country. The agreement signed was not dissimilar to other mineral development agreements, where a large initial investment was required and a high risk existed due to relatively low confidence for sustained peace and stability for the term of the agreement.
- The issues raised in your letter seem to reference the Global Witness report from early 2006. However the Mineral Development Agreement was renegotiated to the satisfaction of the Government of Liberia, their reputed international advisors and NGO's by the end of 2006. This document is available on the Liberia Extractive Industries Transparency Initiative website.

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- Following the renegotiation of the Mineral Development Agreement, Global Witness published a statement in this regard: "By renegotiating the contract Mittal Steel [now ArcelorMittal] has shown that it is possible for a multinational company to act responsibly and negotiate a deal that remains profitable and safeguards the interests of the host country and its people."
- The renegotiated mineral development agreement has been the single largest engine for further economic development in Liberia that has attracted various other responsible investors now present in Liberia. The ArcelorMittal Mineral Development Agreement has served as a model for several other subsequent concession agreements.
- Recently ArcelorMittal has publicly reinforced its long-term commitment to Liberia by announcing a further \$1.5 billion investment into its Phase 2 iron ore mining project, which is especially noteworthy as several other international investors have reduced their investment into the country due to falling iron ore prices.
- Over the past year ArcelorMittal has successfully worked with the Government of Liberia and its reputable advisors on a transparent royalty formula that the Government intends to utilize in the mining sector as other producers start their export operations.

ArcelorMittal is a committed partner to the development of Liberia and its people. In addition to being the first major international company to invest in the country, it continues to support development through a number of key initiatives and actions, such as:

- ArcelorMittal's group policy on Human Rights was published in 2009. The implementation of this policy commenced in 2010 in Liberia. This includes mandatory human rights training of each employee, including the establishment of a grievance mechanism. Extended 1-month long training for security personnel is run by the Liberian National police Academy and it includes a number of human rights elements. The operations are aligned to the Voluntary Principles of Security and Human Rights, and the proactive work we do in the country in collaboration with the Liberian police and the United Nations is a demonstration of this commitment.
- To ensure effective community participation in managing the impact of our operations, we devise annual stakeholder engagement plans and run a scheduled programme of events to canvas stakeholders' concerns and interests. This activity has led to a number of positive developments, including scholarship schemes for youth in affected communities, community contracts to support the biodiversity action plan and heritage programme.
- Infrastructure project investments that include roads, schools, and hospitals along the 250 km railway corridor connecting the Nimba mines and the port of Buchanan.
- Establishment of a Vocational Training Centre in Yekepa, which will provide qualified personnel not only for ArcelorMittal operations, but also for other projects that are currently getting off the ground.

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- ArcelorMittal was also instrumental in joining forces with the Government of Liberia to establish the Liberian Extractive Industries Transparency Initiative and achieve its current compliant status, and enabling Liberia to become the first African country to do so.
- In 2010 we set up the Corporate Responsibility Forum for Liberia to benefit the development of Liberian society through effective coordination of key activities between business, government, civil society and international organisations: <http://news.bbc.co.uk/1/hi/business/8512420.stm> The Corporate Responsibility Forum has carried out a number of activities to foster a better business environment in Liberia. In this context it is particularly worth noting the training programmes for local businesses on anti-corruption, human rights and occupational health and safety.
- ArcelorMittal has published a Corporate Responsibility report on its activities in Liberia since 2011. This annual report includes further details about our engagement with society, the social and environmental impact of our operations and our efforts in upholding human rights. The latest report is enclosed, and is also available through this link: <http://corporate.arcelormittal.com/corporate-responsibility/reporting-and-assurance/our-reports/2012>

If you require any further information about this topic, please contact Joseph Mathews, who leads our work with the Liberian Government [REDACTED]

Yours sincerely,

Bill Scotting
Chief Executive of Mining

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ENDNOTES

1 Committee on the Rights of the Child, General Comment 5: General measures of implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5, 27 November 2003, para 24.

2 *Chorzów Factory (Germany v. Poland)*, 1928 PCIJ (ser A) No. 17, at para 73: (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”).

3 Article 8, Universal Declaration of Human Rights; Article 2 (3), International Covenant on Civil and Political Rights; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25, American Convention on Human Rights, Article 7(1)(a), African Charter on Human and Peoples’ Rights; Article 47, Charter of Fundamental Rights of the European Union; Articles 12 and 23, Arab Charter on Human Rights, and UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006 amongst others.

4 *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision on Appropriate Remedy, para 40 (31 January 2007); *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal Against

Decision on Appropriate Remedy, paras 23-5 (13 September 2007); and *Cantoral-Benavides v. Perú*, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, at para 40.

5 Principal 11, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” UN Doc A/RES/60/147 (21 March 2006).

6 Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of all Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 3–8, International Convention for the Protection of All Persons from Enforced Disappearance; Articles 12, 19(2), 37 and 39, Convention on the Rights of the Child; Article 13, Convention on the Rights of Persons with Disabilities; Article 83, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 25, American Convention on Human Rights; Article 7(1)(a), African Charter on Human and Peoples’ Rights; Article 47, Charter of Fundamental Rights of the European Union; Articles 12 and 23, Arab Charter on Human Rights.

7 See Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN Doc E/C.12/1998/24, 3 December 1998; Committee on the Rights of the Child, General Comment 5: General measures of implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5, 27 November 2003.

8 Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN Doc E/C.12/1998/24, 3 December 1998, para 2.

9 Committee on the Rights of the Child, General Comment 5: General measures of implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5, 27 November 2003, para 24.

10 Principles 2(b), 3(c), 11(a), 12, 19, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law , UN Doc A/RES/60/147, 21 March 2006.

11 Principles 2(c), 3(d), 11(b), 15-23, 19 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

12 Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN Doc E/C.12/1998/24, 3 December 1998, para 9.

13 Human Rights Committee, General Comment 31: Nature of the general legal obligation imposed on states parties to the covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 15; Committee on the Elimination of Racial Discrimination, Opinion of the Committee on the Elimination of Racial Discrimination, *LK v. Netherlands*, UN Doc CERD/C/42/D/4/1991, para 6.9. For further details see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A practitioners guide*, ICJ, 2006, pp 49, 57–79.

14 Human Rights Committee, General Comment 31: Nature of the general legal obligation imposed on States parties to the covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 18.

15 See for instance Human Rights Committee, *F Birindwa ci Bithashwiwa and E Tshisekedi wa Mulumba v. Zaire*, Communication Nos. 241/1987 and 242/1987, Views of 29 November 1989, UN Doc CCPR/C/37/D/241/1987 (1989), para 14.

16 Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN Doc E/C.12/1998/24, 3 December 1998, para 9.

17 *Chorzow Factory (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, para 125.

18 Human Rights Committee, General Comment 31: Nature of the general legal obligation imposed on states parties to the covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 16; Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (Article 12), UN Doc E/C.12/2000/4, 11 August 2000, para 59; Principle 18, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

19 Principle 19, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

20 Principle 20, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

21 Principle 21, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

22 Principle 22, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

23 Principle 23, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

24 See Committee on Economic, Social and Cultural Rights, General Comment 12: The right to adequate food (Article 11), UN Doc E/C.12/1999/5, 12 May 1999, para 15. The Committee on Economic, Social and Cultural Rights built on the work of Asbjørn Eide, including at the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, see *The Right to Adequate Food as a Human Right*, final support submitted by Asbjørn Eide. UN Doc E/CN.4/Sub.2/1987/23, paras 67–9.

25 Committee on Economic, Social and Cultural Rights, General Comment 15: The right to water (articles 11 and 12), UN Doc E/C.12/2002/11, 20 January 2003, paras 23–24.

26 See for example, UN Human Rights Committee, General Comment 31: The nature of the general legal obligation imposed on states parties to the covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8; Committee on Economic, Social and Cultural Rights, General Comment 12: The right to adequate food, 12 May 1999, para 15: “The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.” Also see *Young and Webster v. United Kingdom*, Nos. 7601/76 and 7806/77, 13 August 1981,

ECHR (ser. A) 2006, para 49; *X and Y v. Netherlands*, No.8978/80, 26 March 1985, ECHR (ser. A) 1985, para 27; *Z and Others v. United Kingdom*, No. 29392/95, 10 May 2001, 2001-V ECHR 1, para 70; *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No.30/2005, European Committee of Social Rights, Decision on Admissibility, 10 October 2005, para 14: “[T]he state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant’s allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator.” Also see *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct HR, (Ser. C) No.4 (1988); *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Afr Comm’n on Human and Peoples’ Rights, App No.74/92, 11 October 1995, paras 18–22; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, App No.155/96, 27 October 2001, para 46.

27 *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct. H.R., (Ser C) No.4 (1988).

28 *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct. H.R., (Ser C) No.4 (1988), para 174.

29 *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct. H.R., (Ser C) No.4 (1988), para 175.

30 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, para 46.

31 *SERAP v. Federal Republic of Nigeria*, The Court of Justice of the Economic Community of West African States (ECOWAS), Judgment of 14 December 2012, N° ECW/CCJ/JUD/18/12.

32 See for example, Philip Leach, *Article 2 ECHR (the right to life) – Positive Obligations*, available at: www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Reports/Art%20%20positive%20obligations%20-%20Law%20Soc%205_11%20PL.pdf (accessed 17 October 2013)

33 *Kalender v. Turkey*, No.4314/02, 15 December 2009, ECHR 2009.

34 Human Rights Council, *Guiding Principles on*

Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011.

35 Human Rights Council, Human Rights and Transnational Corporations and other Business Enterprises, Resolution 17/4, UN Doc A/HRC/RES/17/4, 6 July 2011.

36 *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct. H.R., (Ser C) No.4 (1988), para 172.

37 For example, the UN Declaration on the Elimination of Violence against Women establishes that states must: “Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” Declaration on the Elimination of Violence against Women (Article 4(c)), UN Doc A/RES/48/104, 20 December 1993.

38 UN Human Rights Committee, General Comment 31: nature of the general legal obligation imposed on states parties to the covenant, UN Doc CCPR/C/21/Rev1/Add.13, 26 May 2004, para 8.

39 The UN Committee on the Elimination of Discrimination against Women has explicitly stated that: “Under general international law and specific human rights covenant, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against women, UN Doc A/47/38, 1992, para 9. Also see Committee on Economic, Social and Cultural Rights, General Comment 12: The right to adequate food (Article 11), UN Doc E/C.12/1999/5, 12 May 1999, para 19.

40 Human Rights Council, Human Rights and Transnational Corporations and other Business Enterprises, Resolution 17/4, UN Doc A/HRC/RES/17/4, 6 July 2011.

41 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational

corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011.

42 This comprises the 34 Organisation for Economic Cooperation and Development (OECD) countries plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. As of January 2014 Columbia, Costa Rica, Jordan and Tunisia had also adhered to the Declaration.

43 The Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*, 2011, OECD Publishing, available at: mneguidelines.oecd.org/text/ (accessed 17 October 2013)

44 Human Rights Council, *Business and Human Rights: Further steps towards the operationalization of the "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/14/27, 9 April 2010, para 103.

45 Human Rights Council, *Business and Human Rights: Further steps towards the operationalization of the "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/14/27, 9 April 2010, para 26.

46 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989.

47 Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, UN Doc E/C.12/2011/1, 20 May 2011, para 5.

48 See for example: R Steiner, *Double standard: Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill* November 2010, Friends of the Earth, November 2010; K Watkins, and P Fowler. *Rigged Rules and Double Standards: Trade, globalisation, and the fight against poverty*, 2002, Oxfam; J McCulloch, G Tweedale, "Double standards: the multinational asbestos industry and asbestos-related disease in South Africa", *International Journal of Health Services*, 2004; Vol34 No.4 p663-79; R. Macklin, "Double Standards in Medical Research in Developing Countries", 2004 Cambridge University Press.

49 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para 29.

50 International Court of Justice, *The Corfu Channel Case (UK v. Alb.)*, Merits Judgment of 9 April 1949, pp18, 22.

51 *Al-Skeini and Others v. the United Kingdom*, No.55721/07, 7 July 2011, ECHR 2011, para 133.

52 *Ilascu and Others v. Moldova and Russia*, No.48787/99, 8 July 2004, ECHR, para 317.

53 *Victor Saldano v. Argentina*, Inter-American Commission on Human Rights, 11 March 1999, Report No.38/99, para 17.

54 *Munaf v. Romania* CCPR/C/96/D/1539/2006, UN Human Rights Committee, 21 August 2009, para 14.2.

55 This has been affirmed by several commentators: "[T]he state is under a duty to control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state." Ian Brownlie, *System of the Law of Nations: state responsibility (Part 1)*, York 1983, Clarendon Press, p165; Nicola M C P Jägers, *Corporate Human Rights Obligations: in search of accountability*, Antwerp 2002, Intersentia, p172 (deriving from "the general principle formulated in the *Corfu Channel* case - that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States - that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control").

56 Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, 11 August 2000, para 39.

57 Committee on Economic, Social and Cultural Rights, General Comment 15: The right to water (Articles 11 and 12), UN Doc E/C.12/2002/11, 20 January 2003, para 33. Also see Committee on Economic, Social and Cultural Rights, General Comment 19: The right to social security (Article 9), UN Doc E/C.12/GC/19, 4 February 2008, para 54.

58 Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, UN Doc E/C.12/2011/1, 20 May 2011, para 5. Such expectations were reiterated by The Committee in their 2011 concluding observations on Germany, in which they raised concerns about the failure of the state to give due consideration to human rights in the context of the government's support of investments by German companies abroad. Committee on Economic, Social and

Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations, Germany*, UN Doc E/C.12/DEU/CO/5, 20 May 2011, paras 10-11.

59 Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, Canada*, UN Doc CERD/C/CAN/CO/18, 25 May 2007, para 17 and UN Doc CERD/C/CAN/CO/19-20, 9 March 2012, para 14; *Concluding Observations, United States of America*, UN Doc CERD/C/USA/CO/6, 8 May 2008, para 30; *Concluding Observations, Australia*, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, para 13; *Concluding Observations, Norway*, UN Doc CERD/C/NOR/CO/19-20, 8 April 2011, para 17 and *Concluding Observations, United Kingdom*, UN Doc CERD/C/GBR/CO/18-20, 14 September 2011, para 29. The extraterritorial application of the Convention was affirmed by the International Court of Justice in its Provisional Measures decision on Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order (Provisional Measures) of 15 October 2008. The Court observed that there was no restriction of a general nature in the Convention relating to its territorial application; and that neither Article 2 nor Article 5 of the Convention contained a specific territorial limitation. The Court consequently found in the case that “these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory” (para 109).

60 See Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations, New Zealand*, UN Doc CRC/C/NZL/CO/3-4, 11 April 2011, para 23; *Concluding Observations, Denmark*, UN Doc CRC/C/DNK/CO/4, 7 April 2011, para 30; *Concluding Observations, Italy*, UN Doc CRC/C/ITA/CO/3-4, 31 October 2011, para 21; *Concluding Observations, Sweden*, UN Doc CRC/C/OPSC/SWE/CO/1, 23 January 2012, para 21; *Concluding Observations, Australia*, UN Doc CRC/C/AUS/CO/4, 28 August 2012, para 28; and *Concluding Observations, Turkey*, UN Doc CRC/C/TUR/CO/2-3, 20 July 2012, para 23.

61 Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations, Canada*,

UN Doc CRC/C/CAN/CO/3-4, 6 December 2012, para 29.

62 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 13, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

63 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 25, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

64 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 25, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

65 Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub L 111-213, H.R. 4173. Available at: www.sec.gov/about/laws/wallstreetreform-cpa.pdf (accessed 10 January 2014). Under the Act, passed into law in 2010, the US Congress required certain companies that are regulated by the Securities and Exchange Commission (SEC) to disclose whether their products rely on “conflict minerals” (tin, tantalum, tungsten, and gold) from the Democratic Republic of the Congo (DRC) and bordering countries. Congress enacted the disclosure provision, contained in section 1502 of the Act, as a tool to promote peace and security in the region. Business groups in the US have challenged the regulations adopted in August 2012 by the SEC to implement section 1502. Amnesty International joined the lawsuit to support the rule. In July 2013, the federal district court upheld the rule in full against the industry groups’ challenge. That decision was appealed by the business groups and the case is currently with the US Court of Appeals for the District of Columbia Circuit.

66 UN General Assembly, Declaration on the Elimination of Violence against Women (Article 4(d)), UN Doc A/RES/48/104, 20 December 1993.

67 Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against women, UN Doc A/47/38, 1992, para 24 (r(ii)) and (t(ii)).

68 Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc E/C.12/2011/1, 20 May 2011, para 5.

69 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*,

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011, p22.

70 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principle 15), UN Doc A/RES/60/147, 21 March 2006. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that preceded the Principles and Guidelines had similarly contemplated reparation for abuses committed by private parties, and established in Principle 8: “Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitutions to victims, their families or dependants.” UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34, 29 November 1985.

71 Committee on Economic, Social and Cultural Rights, General Comment 4: The right to adequate housing (Article 11 (1)), UN Doc E/1992/23, 13 December 1991, para 17.

72 Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations, United States*, UN Doc CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para 13.

73 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 37, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

74 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 37, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

75 Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Germany, adopted by the Committee at its 106th session, 15 October to 2 November, advanced unedited version, available at: www.globalinitiative-escr.org/wp-content/uploads/2012/11/ICCPR-Con-Obs-Germany-2012.pdf (accessed 17 October 2013)

76 Universal Declaration of Human Rights (Preamble and Articles 22 and 28), 10 December 1948; International Covenant on Economic, Social and Cultural Rights (Articles 2, 11, 15 and 23), 16

December 1966; Convention on the Rights of the Child (Articles 23(4), 28(3) and 45), 20 November 1989.

Other instruments include: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 33, 64, 65 and 67), 18 December 1990, and Convention on the Rights of Persons with Disabilities (Article 32), UN Doc A/RES/61/106, 24 January 2007. The commitment to realize the human rights of all regardless of location is captured in further international treaties including: International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979; International Covenant on Civil and Political Rights, 16 December 1966, and in many regional human rights instruments.

77 See UN General Assembly, Declaration on the Right to Development, UN Doc A/Res/41/128, 4 December 1986; UN General Assembly, United Nations Millennium Declaration, UN Doc A/RES/55/2, 18 September 2000; Statement resulting from the Accra Agenda for Action, Third High Level Forum on Aid Effectiveness, 2–4 September 2008, and UN General Assembly, The Right to Food, UN Doc A/RES/59/202, 31 March 2005. The resolution on The Right to Food indicates a requirement for “the adoption of appropriate economic environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of human rights for all,” and provides that “all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries.”

78 Amnesty International interview, Abidjan, February 2009.

79 Amnesty International reviewed a large number of cases, both from its own work on corporate accountability and those of other NGOs as well as the existing literature on corporate human rights abuses, in particular documents prepared for the UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.

80 Hazra Bee, Bhopal survivor and activist, Amnesty International interview, 30 March 2012.

81 E A Munoz, “Application for License to build the Pesticide Formulation Plant in Bhopal”, Telex 031-204, 21 September 1970 (Court Doc No 10114808 of the US Southern District Court of New York) reproduced in Themistocles D'Silva, *The Black Box of Bhopal: A closer*

look at the world's deadliest industrial disaster, Victoria BC 2006, Trafford, pp181-2.

82 Surya Deva, *Regulating Corporate Human Rights Violations, Humanizing Business*, Oxon 2012, Routledge, p27.

83 "Deed of Lease between the State of Madhya Pradesh and UCIL", reproduced in Themistocles D'Silva, *The Black Box of Bhopal: A closer look at the world's deadliest industrial disaster*, Victoria BC 2006, Trafford, pp183-7.

84 1975 Madhya Pradesh Bhopal Development Plan, quoted in Larry Everest, *Behind the Poison Cloud: Union Carbide's Bhopal Massacre*, Hyderabad 1987, Sangam Books, p130. Also see Surya Deva, *Regulating Corporate Human Rights Violations, Humanizing Business*, Oxon 2012, Routledge, p29.

85 Ward Morehouse and M Arun Subramaniam, *The Bhopal Tragedy: What really happened and what it means for American workers and communities at risk* (a Report of the Citizens Commission on Bhopal), New York 1986, Council on International and Public Affairs, p24. Also see Paul Shrivastava, *Bhopal, Anatomy of a Crisis*, London 1992, Paul Chapman Publishing, p49.

86 *Bano v. Union Carbide Corporation*, 99 Civ 11329 (JFK), amended class action complaint, para 78.

87 Robert Reinhold, "Disaster in Bhopal: where does blame lie?", *New York Times*, 31 January 1985.

88 Larry Everest, *Behind the Poison Cloud: Union Carbide's Bhopal Massacre*, Hyderabad 1987, Sangam Books, p130. Also see Surya Deva, *Regulating Corporate Human Rights Violations, Humanizing Business*, Oxon 2012, Routledge, p29.

89 The government of India had given "letter of intent" approval on 13 March 1972. Ministry of Petroleum and Chemicals, "Reply from Indian government to UCIL on MIC-based Pesticides", in Themistocles D'Silva, *The Black Box of Bhopal: A closer look at the world's deadliest industrial disaster*, Victoria BC 2006, Trafford, pp197-200.

90 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p40.

91 Union Carbide Corporation directed bulk storage of methyl isocyanate despite objections from Union Carbide India Limited, who preferred to use small individual containers for economic and safety reasons. Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p41.

92 Comprised mainly of methyl isocyanate with methylamine, carbon dioxide and other reactants.

93 Bhopal Methyl Isocyanate Incident Investigation Team Report, Union Carbide Corporation, Danbury, Connecticut, March 1985, p.24

94 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p8.

95 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p9.

96 T R Chouhan, et al, *Bhopal: The Inside Story – Carbide Workers Speak Out on the World's Worst Industrial Disaster*, Other India Press, Mapusa, Goa and Apex Press, New York, 1994.

97 Rashida Bee, Amnesty International interview, 31 March 2012.

98 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, pp9-10.

99 Paul Shrivastava, *Bhopal, Anatomy of a Crisis*, London 1992, Paul Chapman Publishing, pp55-6.

100 Hazra Bee, Ramyari Bai, and Rashida Bee, Bhopal survivors and activists, Amnesty International interview, March 2012.

101 Amnesty International, *Clouds of Injustice*, 29 November 2004, AI Index: ASA 20/015/2004, 29 November 2004, p12.

102 Bhopal Gas Disaster Research Centre and Institute of Pathology, *Health Effects of the Toxic Gas Leak from Union Carbide Methyl Isocyanate Plant in Bhopal*, Technical Report on Pathology and Toxicology (1984-1992), New Delhi 2010, Indian Council of Medical Research. Chiraunji Bai, Bhopal survivor, told Amnesty International how two of her children died within the two years of the leak. Amnesty International interview, March 2012.

103 Bhopal Gas Tragedy Relief and Rehabilitation Department, *Annual Report 2003*, government of Madhya Pradesh.

104 For a brief description of gas-related health effects and their ongoing impact see Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, pp12-18.

105 Union Carbide Corporation, *Operational Safety Survey CO/MIC/SEVIN Units*, Bhopal Plant, 23 July 1982.

106 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, pp44-5.

107 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p41.

108 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p42.

109 Table based on information drawn from: a) Union

Carbide Corporation, *Operational Safety Survey CO/MIC/SEVIN Units*, Bhopal Plant, 23 July 1982; b) Union Carbide Corporation, *Operational Safety/Health Survey-MIC II Unit*, Institute Plant, 10 September 1984; c) Testimonies of Bhopal plant workers in Chouhan, T R et al, *Bhopal: The Inside Story – Carbide Workers Speak Out on the World's Worst Industrial Disaster*, Other India Press, Mapusa, Goa and Apex Press, New York, 1994; d) Inspection Report of the Union Carbide Corporation Institute West Virginia, Occupational Safety and Health Administration (OSHA), USA, February 1985; e) Testimony of Ronald Wishart in Affidavit of Edward Munoz in Re: Union Carbide Corporation Gas Plant Disaster At Bhopal, India, December 1984. MDL Docket No. 626, Misc. No. 21-38, 85 Civ. 2696 (JFK), US District Court, Southern District Court of New York and f) Union Carbide Corporation, *Bhopal Methyl Isocyanate Incident Investigation Team Report*, Danbury, Connecticut, March 1985.

110 "MIC is highly reactive with water and the mixing of the two produced a runaway heat generating chemical reaction that resulted in the leak", Union Carbide Corporation, *Bhopal Methyl Isocyanate Incident Investigation Team Report*, Danbury, Connecticut, March 1985. See also Indian Council for Scientific and Industrial Research, *Report on Scientific Studies on the Factors Related to Bhopal Toxic Gas Leakage*, December 1985.

111 Paul Shrivastava, *Bhopal, Anatomy of a Crisis*, London 1992, Paul Chapman Publishing, p39.

112 Union Carbide Corporation, *Bhopal Methyl Isocyanate Incident Investigation Team Report*, Danbury, Connecticut, March 1985.

113 For a detailed rebuttal, see: T R Chouhan, et al, *Bhopal: The Inside Story – Carbide Workers Speak Out on the World's Worst Industrial Disaster*, Other India Press, Mapusa, Goa and Apex Press, New York, 1994.

114 H L Prajapati, *Gas Tragedy: An Eye Witness*, New Delhi 2003, Mittal Publications, pp47-82.

115 The website for the Bhopal Gas Tragedy Relief and Rehabilitation Department is available at: www.bgtrrdmp.mp.gov.in/ (accessed 17 October 2013)

116 These other "break-down" products formed a substantial part of the toxic gas cocktail, "as much as one-third of the materials released may have been created by the explosion." Dr John Bucher, US National Institute of Environmental Health Sciences, quoted in *Health & Safety at Work*, August 1986, p7, as cited in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books p107

117 Russell Mokhiber, "Paying for Bhopal", *Multinational Monitor*, Vol 6, No.10, 31 July 1985.

118 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p50.

119 Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p22.

120 "Once methyl isocyanate enters the body and dissolves in bodily fluids, it will not directly cause further harm to a victim who has survived the initial exposure." More specifically, "nor does it travel to or directly affect parts of the body other than the respiratory tract." William K. Stevens, "Encouraging prognosis' is seen for gas victims", *New York Times*, 15 December 1984. Other doctors working for Union Carbide Corporation blamed emerging evidence of damage to internal organs on lack of oxygen: "One of the US doctors denied that MIC is absorbed into the bloodstream, stating that all damage to the heart, liver and central nervous system is caused by lack of oxygen...while the medical director of Union Carbide stated that the chemical cannot reach the liver or uterus." *Health & Safety at Work*, May 1985, p40, cited in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books p122

121 "We sponsored leading medical authorities here in the United States to visit Bhopal...We are pleased that their experience in Bhopal and the news reports from there corroborate the beliefs of our own medical people, that those injured by methyl isocyanate are rapidly recovering and display little lasting effects." Warren Anderson, January 1985, quoted in Anil Agarwal, "The cloud over Bhopal", *New Scientist*, 28 November 1985, p41.

122 For fuller details see: Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004 and information provided by the Bhopal Medical Appeal at: www.bhopal.org/.

123 Union Carbide Corporation, *Material Safety Data Sheet F-43458A*.

124 Union Carbide Corporation, *Methyl Isocyanate Reactive and Hazardous Chemicals Manual*, (Business Confidential), 25 March 1974.

125 "But why should the absence or presence of hydrogen cyanide among the lethal gas or gasses matter so much to Union Carbide? Anil Sadgopal, a local activist, had an explanation. 'It matters in the litigation for compensation', he says. 'Union carbide's lawyers will obviously try to reduce liability as much as possible. An important part of their strategy will be to demonstrate that the industrial slums of India are endemic with

tuberculosis and that doctors can't differentiate between TB damage and gas damage. But cyanide toxicity can't be explained away in terms of Indian epidemic. It will unambiguously establish the relationship between the gas leak and thousands who suffered'." Ian Jack, "Bhopal: Disaster seeking an antidote", *The Sunday Times*, 1 December 1985.

126 Written Statement, Counter Claim and Set-Off of Union Carbide Corporation, 10 December 1986 in Regular Civil Suit No.1113 of 86 in Court of the District Judge: Bhopal reproduced in Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal case*, Delhi 1990, Indian Law Institute, p67. 127 Statement of Jackson B Browning, Hazardous Air Pollutants, Hearing before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce House of Representatives, Ninety-Eighth Congress, Second Session, 14 December 1984, Serial No.98-192, US government Printing Office, Washington, p17.

128 Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, pp60-3. One official in charge of coordinating health and relief services across Madhya Pradesh stated, "No organ of the body has been affected except the eye and lung. There is not a single case of kidney, liver or nervous system damage." Larry Everest, *Behind the Poison Cloud: Union Carbide's Bhopal Massacre*, Hyderabad 1987, Sangam Books, p82.

129 "Why hasn't Union Carbide come forward and said 'This is the gas that leaked, this is the treatment'? Is it not a moral duty to tell us what was used, what is the treatment, what is the prevention? They have not come forward." Professor Heeresh Chandra, quoted in the Financial Times, 8 December 1984, cited in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p20.

130 Ron Dagani, "Data on MIC's toxicity are Scant, Leave Much to be Learned", *Chemical and Engineering News*, 11 February 1989, p37.

131 Union Carbide Corporation, *Bhopal Methyl Isocyanate Incident Investigation Team Report*, Danbury, Connecticut, March 1985, pp11-12.

132 In stark contrast, following an August 1985 leak at its plant in West Virginia, USA, UCC made public a detailed list of reaction products by name and quantities released. Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p50.

133 S Sriramachari has noted that "Non-availability of

any information about the toxicity of even the parent compound, MIC (methyl isocyanate), was a great impediment to institute detoxification measures and lay down guidelines for therapeutic intervention and management of the victims." S Sriramachari, "The Bhopal gas tragedy: An environmental disaster", *Current Science*, Vol 86, No.7, 10 April 2004.

134 Ivan Fera, "The Day After", *The Illustrated Weekly of India*, 30 December 1984.

135 "The State Health Director finally received solid information on the chemical (MIC) from the World Health Organization several days after the accident." International Confederation of Free Trade Unions, *The Report of the ICFTU-ICEF Mission to study the causes and Effects of the Methyl Isocyanate Gas Leak at the Union Carbide Pesticide Plant in Bhopal, India, on December 2-3-1984*, May 1985, p11.

136 Ivan Fera, "The Day After", *The Illustrated Weekly of India*, 30 December 1984.

137 Quoted in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p24.

138 This was the "enlarged cyanogen pool" theory, which believed that the effect of the released gases on the patients was to increase the cyanogenic pool inside their bodies, leading to chronic cyanide like poisoning." Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p93.

139 Anil Agarwal, "The cloud over Bhopal", *New Scientist*, 28 November 1985, p39.

140 Some doctors who performed autopsies on the dead claimed the bodies showed signs of cyanide poisoning such as a cherry-red discolouration of gas victims' blood suggesting oxygenation. See "*New Bhopal Dispute. Cyanide poisoning of victims claimed*," *Chemical and Engineering News*, 22 July 1985 p6

141 A meeting of local doctors noted that "Sodium Thiosulphate is not at all harmful and could act against many injurious products formed inside the body." Minutes of a meeting between Medical College Doctors and Dr Max Daunderer on 8 December 1984, reproduced in APPEN Report, *The Bhopal Tragedy, One Year After*, Penang 1985, Sahabat Alam Malaysia, p111.

142 The Indian Council of Medical Research (ICMR), assigned by the government of India to investigate the spectrum of health problems caused by the leaked gases, confirmed the efficacy of sodium thiosulphate and recommended a monitored programme of treatment, "The toxicological studies carried out so far... have clearly shown that, at least in the survivors, there is

evidence of chronic cyanide poisoning operating as a result of either inhalation of hydrocyanic acid or more probably subsequent generation of cyanide radical from the cyanogen pool in gas-affected victims. The changes in urinary thiocyanate and in blood gas before and after thiosulphate treatment substantiated the above findings." Observations of the ICMR, February 1985, quoted in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p114. The ICMR study is also quoted in "New Bhopal Dispute: Cyanide Poisoning of Victims Claimed", *Chemical & Engineering News*, 22 July 1985, p6.

143 Telex from Union Carbide USA, 5 December 1984, reproduced in APPEN Report, *The Bhopal Tragedy, One Year After*, Penang 1985, Sahabat Alam Malaysia, p110.

144 Dr N R Bhandari, "25 Years of Bhopal Gas Tragedy: Inside Story and Untold Truths", quoted in N D Charma, *How initial cure for Bhopal victims was scuttled*, 14 January 2011, available at: ndsharma.wordpress.com/2011/01/14/how-initial-cure-for-bhopal-victims-was-scuttled/ (accessed 28 October 2013). Also see Anil Agarwal, "The cloud over Bhopal", *New Scientist*, 28 November 1985, p41.

145 Copy of Confidential Letter by B B L Mathur, Dean of the Gandhi Medical College, Bhopal, reproduced in APPEN Report, *The Bhopal Tragedy, One Year After*, Penang 1985, Sahabat Alam Malaysia, p121.

146 A meeting of local doctors noted that "Sodium Thiosulphate is not at all harmful and could act against many injurious products formed inside the body." Minutes of a meeting between Medical College Doctors and Dr Max Dauderer on 8 December 1984, reproduced in APPEN Report, *The Bhopal Tragedy, One Year After*, Penang 1985, Sahabat Alam Malaysia, p111.

147 Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p114-17.

148 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p72,

149 Bhopal Gas Disaster Research Centre and Institute of Pathology, *Health Effects of the Toxic Gas Leak from Union Carbide Methyl Isocyanate Plant in Bhopal, Technical Report on Pathology and Toxicology (1984-1992)*, New Delhi 2010, Indian Council of Medical Research, pp141-2, available at: www.icmr.nic.in/ncrp/Bhopal%20Gas%20Report.pdf (accessed 28 October 2013). See media coverage: Aarti Dhar "MIC had delayed, recurrent cyanide toxicity, reveals ICMR report on Bhopal gas tragedy", *The Hindu*,

15 May 2011, available at: www.hindu.com/2011/05/15/stories/2011051566732200.htm (accessed 28 October 2013)

150 Correspondence with Satinath Sarangi, Managing Trustee Sambhavna Trust Clinic, which provides free medical care to survivors of the disaster and those exposed to ground water contaminated by the hazardous waste.

151 Communication with Amnesty International, 04 January 2014.

152 Surya Deva, *Regulating Corporate Human Rights Violations, Humanizing Business*, Oxon 2012, Routledge, p27.

153 Section 16 prescribes: "Where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly." Furthermore, a person will not be liable if "he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence." The Environment (Protection) Act, 1986.

154 *Indian Council for Enviro Legal Action v. Union of India* (1996) 3 SCC 212; AIR 1996 SC 1446, *Vellore Citizens Forum v. Union of India* (1996) 5 SCC 647; AIR 1996 SC 2715, *S. Jaganath v. Union of India* (1997) 2 SCC 87; AIR 1997 SC 811.

155 *Re: Bhavani River – Shakti Sugars Ltd* (1998) 6 SCC 335; AIR 1998 SC 2578.

156 On 3 December 1984, crime No.1104/84 was registered, *suo moto*, by Station House Officer at Hanumanganj Police Station. Committee on government Assurances (2003-2004), *Thirteenth Lok Sabha, Twelfth Report (Extradition of Former Chairman, Union Carbide Corporation)*, New Delhi, Loks Abha Secretariat, ch 2 para 7. Also S. Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre p31, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

157 Section 304, Chapter 16, of the Indian Penal Code (IPC) defines a crime of "Culpable homicide not amounting to murder": "Whoever commits culpable homicide not amounting to murder shall be punished

with ... [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death". Section 304A of the IPC defines "causing death by negligence" as: "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

158 Other individuals accused were Indian nationals Kishore Kamdar, Vice President and in charge of the Agricultural Products Division of Union Carbide India Limited (UCIL); Jagannath Mukund, Works Manager of the Bhopal Plant; Dr. R B Roy Choudhary, Assistant Works Manager of UCIL; S P Choudhary, Production Manager of the Bhopal Plant; Shakeel Ibrahim Qureshi, Plant Superintendent; and K V Shetty Production Assistant at the Bhopal plant. Judgment, *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129.

159 Judgment, *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129.

160 The New York Times quoted a diplomatic source concerning the intervention: "Throughout the day we were in close consultation with the Indian government at a high level...We expressed deep concern and our hope that the situation could be rectified." Robert Reinhold, "Indians arrest and then free U.S Executive", *The New York Times*, 8 December 1984. For a comprehensive account, see Dan Kurzman, *A Killing Wind: inside Union Carbide and the Bhopal catastrophe*, New York 1987, McGraw-Hill, p122.

161 The full bond reads "I, Warren M Anderson s/o John Martin Anderson am resident of 63/54 Greenidge Hills Drive, Greenidge, Connecticut, USA. I am the Chairman of Union Carbide Corporation, America. I have been arrested by Hanumanganj Police Station, District Bhopal, Madhya Pradesh, India under Criminal Sections 304A, 304, 120B, 278, 429, 426 & 92. I am signing this bond for Rs. 25,000/- and thus am undertaking to be present whenever and wherever I am directed to be present by the police or the Court. Signed: Warren M Anderson." Original Hindi Bail Bond, dated 7 December 1984.

162 *Union Carbide Corporation v. Union of India*, Supreme Court of India (1989) 1 SCC 674. In ratifying the out-of-court settlement, the Supreme Court ordered the settlement amount to be divided between UCC and UCIL (see para 1 of the Supreme Court order). To ensure that the terms of this order could be put into effect, the Supreme Court also ordered that UCIL be joined as a party to proceedings.

163 *Union Carbide Corporation v. Union of India*, Supreme Court of India (1991) 4 SCC 584; AIR 1992 SC 248.

164 Union Carbide Eastern (UCE) ceased to exist on 2 April 1991 when the corporation was dissolved. Notice dated 22 July 1991, filed with the Hong Kong Registrar of Companies on 20 August 1991. On 18 December 1990, UCE had ceased to have a place of business in Hong Kong, according to Notice of Cessation dated 8 January 1991, filed with the Hong Kong Registrar of Companies on 12 January 1991.

165 *Bano v. Union Carbide Corporation*, 99 Civ 11329 (JFK) amended class action complaint.

166 S Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre pp33, 36, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

167 The Supreme Court directed that while Rs. 60 crores from the sale proceeds would be transferred to the account of the Bhopal Hospital Trust towards construction of the hospital in Bhopal, the remaining amount of Rs.230 crores would be kept in a separate account in the name of Union Carbide Corporation and the Bhopal Hospital Trust but remain under the supervision of the Bhopal Chief Judicial Magistrate. Out of the latter amount, Rs. 187 crores was later released by order of the Supreme Court for the construction of the Bhopal hospital. S Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre pp33-4, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

168 Abhishek Manu Singhvi, Senior Advocate, Supreme Court of India, National Spokesperson, Indian National Congress, and The Dow Chemical Company legal counsel in the Public Interest Litigation before the High Court of Madhya Pradesh. Legal Opinion dated 22 June 2006 obtained through a Right to Information request.

169 Committee on government Assurances (2003-

2004), *Thirteenth Lok Sabha, Twelfth Report (Extradition of Former Chairman, Union Carbide Corporation)*, New Delhi, Loks Abha Sectariat.

170 The request was rejected by the US Department of Justice in June 2004 “as it does not meet the requirements of Articles 2(1) and 9(3) of the Extradition Treaty.” Fax from Ashley Deeks, United States Department, Office of the Legal Adviser, 25 May 2004.

171 “Opinion of the Attorney General”, *Frontline*, Vol 19, issue 1, 5-18 January 2002, available at: www.frontline.in/navigation/?type=static&page=archive (accessed 28 October 2013)

172 Associated Press, “Court issues arrest warrant for former CEO of Union Carbide in gas leak case”, *The Guardian*, 31 July 2009, available at: www.theguardian.com/world/2009/jul/31/warren-anderson-arrest-warrant (accessed 28 October 2013)

173 The Bhopal Group for Information and Action, Intervenor and Assistant to the Prosecution, personal correspondence, November 2009.

174 Agencies, “Bhopal: Delhi court allows CBI plea on extradition of Warren Anderson”, *The Indian Express*, 23 March 2011, available at: www.indianexpress.com/news/bhopal-delhi-court-allows-cbi-plea-on-extradition-of-warren-anderson/766280 (accessed 17 October 2013)

175 Lemuel Lall, “Bhopal tragedy: India yet to bring Warren Anderson, Union Carbide to book”, *India Today*, 29 November 2010, available at: indiatoday.intoday.in/story/bhopal-set-to-mourn-28-years-of-infamy-when-india-couldnt-bring-anderson-union-carbide-to-book/1/235289.html (accessed 17 October 2013)

176 Judgment, *Keshub Mahindra v. State of Madhya Pradesh* (1996) 6 SCC 129. The court found that it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the plant.

177 In the words of Dr S Muralidhar, Advocates Supreme Court of India: “The failure of the criminal justice process to deal with the problem is writ large on these proceedings.” S Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims’ Twenty Years’ of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre, p35, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

178 *State of Madhya Pradesh v. Warren Anderson (Absconder) and Others*, in the Court of Chief Judicial Magistrate Bhopal, Madhya Pradesh, Cr. Case No.8460 /

1996 - Date of Institution 1 December 1987, Judgment of 7 June 2010. One of the accused, Assistant Works Manager Roy Choudury, had died in the late 90s. See Amnesty International’s press release, India: First convictions for 1984 Union Carbide disaster too little, too late, 7 June 2010, available at: www.amnesty.org/en/for-media/press-releases/india-first-convictions-1984-union-carbide-disaster-too-little-too-late-201 (accessed 28 October 2013)

179 See for example, International Campaign for Justice in Bhopal, *Bhopal Survivors Call Verdict and Trial Utter Disappointment*, 7 June 2010, available at: www.countercurrents.org/bhopal100610.htm (accessed 28 October 2013); New Trade Union Initiative, *NTUI condemns Bhopal Gas Verdict: An Unpunished Crime by Industry*, 10 June 2010, available at: ntui.org.in/media/item/ntui-condemns-bhopal-gas-verdict-an-unpunished-crime-by-industry/ (accessed 28 October 2013) and R Shreeharan, *Bhopal Verdict Provokes Public Outrage*, 15 June 2010, available at: www.wsws.org/en/articles/2010/06/bhop-j15.html (accessed 28 October 2013). The public anger and criticism that the verdict generated led the government to pursue a “Special Leave Petition” (SLP) before the Supreme Court of India to revisit its 1996 decision to convert the criminal charges so that a higher prison sentence could be imposed. The Supreme Court rejected the SLP but allowed a “Curative Petition” to proceed with the same purpose of reviewing the 1996 decision. In the end, this too was rejected by the Court.

180 Supreme Court Of India, Criminal Appellate Jurisdiction Curative Petition (CRL.) Nos. 39-42 OF 2010 in Criminal Appeal Nos. 1672-1675 Of 1996, available at: supremecourtindia.nic.in/outtoday/q3910.pdf (accessed 22 January 2014)

181 Bhopal gas tragedy: SC dismisses CBI’s curative petition for harsher charges, *Headlines Today*, 11 May 2011, available at indiatoday.intoday.in/story/bhopal-gas-tragedy-sc-dismisses-cbis-curative-petition/1/137747.html (accessed 22 January 2014)

182 Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto 1993, University of Toronto Press, pp110-17. Also see S Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims’ Twenty Years’ of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre, p10, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

183 *The Bhopal Gas Leak Disaster (Processing of*

Claims) Act, 1985, No.21 of 1985, 29 March 1985, available at: catimesofindia.blogspot.com/2011/04/bhopal-gas-leak-disaster-processing-of.html (accessed 28 October 2013)

184 The government acted under the doctrine of *parens patriae* (parent of his country). It cited constitutional grounds for invoking *parens patriae*, describing obligations within the Indian Constitution relating to public health, welfare and equality of access to justice. Notably, India's *parens patriae* formulation asserted protection of all the disaster victims, including future generations. Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: The Bhopal case*, Delhi 1990, Indian Law Institute, ppv-vi.

185 These suits generally concerned the government's alleged joint tortfeasor liability (as minority shareholder in Union Carbide India Limited) and its failure to adequately enforce safety regulations at the Bhopal plant or maintain an effective licensing regime.

186 *Rakesh Shrouti v. Union of India and Others*, Writ Petition No.164 of 1986, and *Nasrin Bi and Others v. Union of India and Others*, Writ Petition No.1551 of 1986.

187 *Sahu v. Union of India and Others* (1990) 1 SCC 613; 22 December 1989, AIR 1990 SC 1480. The Court considered that the state had rightly taken over the exclusive right to represent and act on behalf of every person entitled to make a claim as the majority of the victims were poor and illiterate. Consequently, the exclusion of the victims from filing their own cases was held to be proper.

188 By 24 September 1985, the government of India had framed the scheme for registration and processing of claims arising out of the disaster. By the end of 1985, nearly 500,000 claims had been registered. S Muralidhar *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre, p11, available at: www.ielrc.org/content/w0405.pdf (accessed 17 October 2013)

189 Union of India's Complaint filed in US District Court, Southern District of New York, reproduced Upendra Baxi and T. Paul (eds), *Mass Disasters and Multinational Liability: The Bhopal Case*, Bombay 1986, Indian Law Institute.

190 Union of India's Complaint filed in US District Court, Southern District of New York, reproduced in Upendra Baxi and T. Paul (eds), *Mass Disasters and Multinational Liability: The Bhopal Case*, Bombay 1986, Indian Law Institute.

191 *The Union of India v. Union Carbide Corporation*, US Southern District Court of New York, 8 April 1985, reproduced in APPEN Report, *The Bhopal Tragedy, One Year After*, Penang 1985, Sahabat Alam Malaysia, pp223-8.

192 *Memorandum of law in support of Union Carbide Corporation's motion to dismiss these actions on the grounds of forum non conveniens*, 31 July 1985, In Re: *Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, 85 Civ 2696 (JFK) US Southern District Court of New York.

193 The experts were Indian Supreme Court Advocate J B Dadachanji (Affidavit of J B Dadachanji, 14 December 1985, in support of Defendant's Motion for Dismissal on *Forum Non Conveniens* Grounds) and Senior Advocate and former ambassador to the US in Washington N A Palkhivala (Affidavit of N A Palkhivala, 18 December 1985, in Support of Defendant's Motion for Dismissal on *Forum Non Conveniens* Grounds).

194 *Memorandum of law in opposition to Union Carbide Corporation's motion to dismiss these actions on the grounds of forum non conveniens*, In Re *Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, 85 Civ 2696 (JFK) US Southern District Court of New York.

195 Affidavit of Marc Selig Galanter, 5 December 1985, in support of Union of India's Claim, reproduced in Upendra Baxi and T Paul (eds), *Mass Disasters and Multinational Liability: The Bhopal Case*, Bombay 1986, Indian Law Institute, p161. In 1985 there were some 40,000 cases pending in the Supreme Court alone. Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto 1993, University of Toronto Press, p151.

196 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986).

197 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), p849. Critics argue that in underestimating delays in Indian courts Keenan failed to acknowledge pertinent case law settled in the US courts just two years previously and clearly outlined in India's *amici curiae*. The case involved the crash of an Air India plane near Bombay in 1978. Litigation brought in Washington against Boeing, the aircraft's manufacturer, was allowed to proceed in spite of *forum non conveniens* objections by the defence. The problem of endemic delays in the Indian legal system formed the basis of the forum decision. Yet Judge Keenan left the problem of delay essentially unexamined in his Bhopal ruling, and

the implications of the Air India case were entirely unaddressed. See *In re Air Crash Disaster near Bombay*, 531 F. Supp. 1075 (W.D. Wash 1982), reproduced in Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: the Bhopal case*, 2008, The University of Michigan, pp252-77.

198 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 at 256 (1981).

199 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), p846. Legal critics suggest that Keenan interpreted “less deference” to be an authoritative judicial ruling, directly applicable to India’s forum request. But as a partial opinion contained within an evenly split judicial decision, it needed to be applied with fair and balanced discretion. Critics argue that not only was “less deference” applied with full judicial authority, several sections of the ruling reveal that Keenan “construed less deference to mean little or none.” See Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: the Bhopal case*, 2008, The University of Michigan, pp1-30.

200 *Memorandum of law in support of Union Carbide Corporation’s motion to dismiss these actions on the grounds of forum non conveniens, In Re: Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, 85 Civ. 2696 (JFK) (S.D.N.Y. filed 31 July 1985)

201 *Brief of Amicus Curiae on Forum Non Conveniens*, p25, in *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986)

202 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), pp861-867.

203 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), p866.

204 *Memorandum of law in support of Union Carbide Corporation’s motion to dismiss these actions on the grounds of forum non conveniens, In Re Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, 85 Civ. 2696 (JFK) (S.D.N.Y. filed 31 July 1985).

205 *Memorandum of law in support of Union Carbide Corporation’s motion to dismiss these actions on the grounds of forum non conveniens, In Re Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, 85 Civ. 2696 (JFK) (S.D.N.Y. filed 31 July 1985) .

206 *Brief of Amicus Curiae*, Rob Hager, United States Court of Appeals for the Second Circuit, 86-7589; 86-7637, p13.

207 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), p867.

208 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986), p868.

209 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F2d 195 (2d Cir 1987), para 1.

210 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987), para 40.

211 See *Bi v. Union Carbide Chems. and Plastics Co.*, 984 F 2d 582 (2d Cir.) cert. denied 510 US 862, 114, S Ct 179, L Ed 2d 138 (1993), paras 5-6. Class representatives were Abdul Wahid and Bano Bi. The case represented by Abdul Wahid opposed Union Carbide Corporation (UCC) and Union Carbide India Limited (UCIL), whilst the case represented by Bano Bi opposed UCC, UCIL, Union Carbide Eastern, Inc, Enserch Corporation, Humphreys & Glasgow, Inc, Humphreys & Glasgow Ltd, and Ebasco Humphreys & Glasgow, Inc.

212 *In Re Union Carbide Corp. Gas Plant Disaster* 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992) (No.MDL 626).

213 See *Bi v. Union Carbide Chems. and Plastics Co.*, 984 F 2d 582 (2d Cir.) cert. denied 510 US 862, 114 S Ct 179, 126 L Ed 2d 138 (1993). Because of this decision, the Appeals Court did not have to consider the question of forum.

214 Claimants included survivor Sajida Bano, the next-of-kin of some victims and groups representing victims.

215 The plaintiffs argued that the Bhopal disaster amounted to violations of international criminal law, international environmental law and gross violations of international human rights by Union Carbide Corporation (UCC) and its CEO, and therefore fell within the scope of the US Alien Tort Claims Act. The plaintiffs also sought judgments of civil contempt and fraud in connection with UCC’s failure to meet the conditions under which the New York District Court dismissed the consolidated class actions (see the heading *UCC’s Forum objections* in *The Bhopal gas leak disaster in India* case study in this book).

216 *Bano v. Union Carbide Corporation*, 273 F 3d 120

(2d Cir. 2001).

217 *Bano v. Union Carbide Corporation*, 273 F3d 120 (2d Cir. 2001).

218 *Bano v. Union Carbide Corporation*, 2003 WL 1344884 (S.D.N.Y. Mar. 18, 2003) (No.99 CIV.11329 JFK)

219 *Bano v. Union Carbide Corporation* 361 F. 3d 696 (2d Cir. 2004).

220 *Bano v. Union Carbide Corporation*, 2005 WL 2464589 (S.D.N.Y. Oct. 5, 2005). (No.99 CIV.11329 JFK).

221 A group of property owners and people with beneficial interest in water wells and their families.

222 *Sahu v. Union Carbide Corporation* 418 F. Supp. 2d 407. (S.D.N.Y 2005).

223 One year later, in 2006, he also dismissed the “veil-piercing” claims. *Sahu v. Union Carbide Corporation* 2006 WL 3377577 (S.D.N.Y. Nov 20, 2006) No.04 Civ. 8825(JFK).

224 Summary judgment had been given to the defendants. The claim was reinstated by the Court of Appeals on the basis that the plaintiffs had not been given sufficient notice of the possibility that summary judgment might be given against them. The case went back to Judge Keenan who, on 26 June 2012, granted summary judgment to the defendants on all the plaintiffs’ claims. *Sahu v. Union Carbide Corporation*, 2012 WL 2422757 (S.D.N.Y. June 26, 2012) (No.04 Civ. 8825 (JFK)).

225 *Sahu v. Union Carbide Corporation* No.04 Civ. 8825 (JFK) (S.D.N.Y. 2012).

226 *Sahu v. Union Carbide Corporation*, No. 12-2983-cv, Summary Order of the United States Court of Appeals for the Second Circuit (27 June 2013).

227 *Sahu I v. Union Carbide Corporation*, 2012 WL 2422757 (S.D.N.Y. 26 June 2012) (No.04 Civ. 8825 (JFK)), p56.

228 Written Statement, Counter Claim and Set-off of Union Carbide Corporation, 10 December 1986 in Regular Civil Suit No.1113 of 86 in Bhopal District Court, reproduced in Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal case*, Delhi 1990, Indian Law Institute, p62.

229 In Order on Interim Relief, High Court of Madhya Pradesh, Jabalpur, Civil Revision No.26 of 88, 4 April 1988, reproduced in Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal*

case, Delhi 1990, Indian Law Institute, p380.

230 *Union Carbide Corporation v. Union of India*, Supreme Court of India (1989) SCC 540; 14 February 1989, AIR 1990 SC 273.

231 *Union Carbide Corporation v. Union of India*, Supreme Court of India (1989) 1 SCC 674 para 2c. Of the US\$470 million settlement, Union Carbide Corporation contributed US\$420 million (having already paid US\$5 million pursuant to a US court order by Judge Keenan), which was held in a US dollar account, and Union Carbide India Limited contributed the rupee equivalent of around US\$44 million, held in a rupee account.

232 Affidavit of the government of Madhya Pradesh, 12-07-1990, Review Petition No.229 of 1989, Supreme Court of India.

233 *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584; 3 October 1991, AIR 1992 SC 248.

234 Letter from Consul General of India, New York, to the US District Court dated 28 June 2004 in *Bano v. Union Carbide Corporation*, 2003 WL 1344884 (S.D.N.Y. Mar. 18, 2003) (No.99 CIV11329 JFK).

235 Written Submissions on Behalf of Interveners, Civil Appeal Nos. 3187-88 of 1988, *Union Carbide Corporation v. Union of India*, reproduced in Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal case*, Delhi 1990, Indian Law Institute.

236 His estimate was based largely on loss of earnings due to death, disablement and injury, loss of business and property, and legal costs. It excluded the cost of rehabilitation and medical treatment. Amnesty International, Clouds of Injustice, AI Index: ASA 20/015/2004, 29 November 2004, p61.

237 Ward Morehouse and M Arun Subramaniam, *The Bhopal Tragedy: What really happened and what it means for American workers and communities at risk* (a Report of the Citizen’s Commission on Bhopal), New York 1986, Council on International and Public Affairs, pp59-65.

238 *Union Carbide Corporation v. Union of India*, Supreme Court of India (1989) 2 SCC 540, AIR (1990) SC 273.

239 Order of a Constitutional Bench of the Supreme Court of India in the matter of *Bhopal Gas Peedith Mahila Udyog Sangathan and Others v. Union of India*, Writ Petition (Civil) No.843 of 1988, 3 March 1989.

240 Amnesty International, Clouds of Injustice, AI Index: ASA 20/015/2004, 29 November 2004

241 Epidemiological figures were reported by the Indian Council of Medical Research (ICMR) for the period

1985-1993. Bhopal Gas Disaster Research Centre, *Health Effects of the Toxic Gas Leak from the Union Carbide Methyl Isocyanate Plant in Bhopal. Technical Report on Population Based Long term Epidemiological Studies (1985-1994)*, Delhi, Indian Council of Medical Research, available at: www.icmr.nic.in/final/bgdrct-technical%20report.pdf (accessed 28 October 2013). The aggregate number of deaths during this period were calculated to be 9,667 by local advocate groups. Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors*, paras 75-76 (Application for Directions Curative Petition). This figure was not directly reported by the ICMR but arrived at on the basis of an analysis of ICMR's 1985-1993 epidemiological figures carried out by an expert epidemiologist hired by Bhopal advocate groups acting as Petitioners in the 2010 Curative Petition. Since this figure did not include those who died in the days immediately following the disaster (calculated by the ICMR to be about 2,500), the total death toll by 1993 was estimated at 12,167. On the basis of ICMR epidemiological figures for the period 1984-89, local advocate groups also estimated that there had been at least 3,500 cases of spontaneous abortions believed to be connected with gas exposure. Application for Directions Curative Petition, paras 75-6.

242 Bhopal Gas Tragedy Relief and Rehabilitation Department, *Annual Report*, 2003, government of Madhya Pradesh.

243 Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors*, para 117.

244 Usha Ramanathan, *A Critical Analysis of Laws Relating to Personal Injury*, PhD dissertation, September 2001, Delhi University.

245 These involved registration, identification (requiring proofs of identity, residence and medical records to prove gas-related injuries), notification of their hearing, categorization, adjudication and, for an unfortunate few, the appeals process.

246 Amnesty International interviews with survivors, 2004, 2012.

247 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p66; Rashida Bee, Bhopal survivor and activist, Amnesty International interview, March 2012.

248 This sort of complaint was replicated by many other survivors as well as organizations and activists working with survivors who talked to Amnesty International. For example, Nanni Bai, a widow, paid Rs.60,000 to a lawyer and broker to procure compensation of Rs.100,000 for her husband's death. Ahmadi Bai, 65, paid Rs.500 to a doctor so that he would testify that her illness was due to exposure. A number of survivors said that even the person who delivered the notification of the date of the claim hearing had to be bribed.

249 Dr Nishith Vohra and Dr Sathyamala "Critique of medical categorization, the process of injury assessment followed by the M.P government is faulty" in The Bhopal Group for Information and Action, *Compensation Disbursement - problems and possibilities, a report of a survey conducted In three gas affected bastis of Bhopal*, January 1992.

250 The Madhya Pradesh state government declared that "it was not practicable to subject every claimant to these time-consuming investigations in mass operations like this." Dr Nishith Vohra and Dr Sathyamala "Critique of medical categorization, the process of injury assessment followed by the M.P government is faulty" in The Bhopal Group for Information and Action, *Compensation Disbursement - problems and possibilities, a report of a survey conducted In three gas affected bastis of Bhopal*, January 1992.

251 Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors*, paras 86-92.

252 Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors*, paras 88-89 and 115. Hazra Bee and Rashida

Bee, Bhopal survivors and activists, Amnesty International interview, March 2012.

253 A study by The Bhopal Group for Information and Action on 3 gas-affected communities concluded that the claims of 42.4 per cent of the residents had not been registered. In 1 severely affected community, nearly one-sixth of the claims were not registered. The single largest omission comprised at least 15,000 gas-affected victims who were under 18 at the time of claim registration. Children born to gas-affected parents were not registered, despite the Supreme Court recognizing the entitlement of “later born children who might manifest congenital or pre-natal MIC afflictions.” The Bhopal Group for Information and Action, *Compensation Disbursement- problems and possibilities, a report of a survey conducted in three gas affected bastis of Bhopal*, January 1992.

254 Amnesty International, Clouds of Injustice, AI Index: ASA 20/015/2004, 29 November 2004

255 Amnesty International, Clouds of Injustice, AI Index: ASA 20/015/2004, 29 November 2004, pp19-20.

256 Bhopal Gas Peedith Mahila Stationery Karmachari Sangh, Bhopal Gas Peedith Mahila Purush Sangharsh Morcha and The Bhopal Group for Information and Action, *Economic Rehabilitation*, Fact Sheet 2005, available at: www.bhopal.net/delhi-marchers/factsheets/economicrehabilitation.pdf (accessed 28 October 2013)

257 Bhopal Gas Peedith Mahila Stationery Karmachari Sangh, Bhopal Gas Peedith Mahila Purush Sangharsh Morcha and The Bhopal Group for Information and Action, *Economic Rehabilitation*, Fact Sheet 2005, available at: www.bhopal.net/delhi-marchers/factsheets/economicrehabilitation.pdf (accessed 28 October 2013)

258 See the *Economic Rehabilitation* section of the website for the Department of Gas Relief and Rehabilitation, government of Madhya Pradesh, available at: www.bgtrrdmp.mp.gov.in/rehab.htm (accessed 28 October 2013)

259 See the *Economic Rehabilitation* section of the website for the Department of Gas Relief and Rehabilitation, government of Madhya Pradesh, available at: www.bgtrrdmp.mp.gov.in/rehab.htm (accessed 28 October 2013)

260 Application for Direction, State of Madhya Pradesh, 14 August 2004, in *Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India and others*, Supreme Court of India, Writ Petition (C) 50 of 1998, p10.

261 Amnesty International visit to the rehabilitation colonies, October 2013.

262 See the *Economic Rehabilitation* section of the website for the Department of Gas Relief and Rehabilitation, government of Madhya Pradesh, available at: www.bgtrrdmp.mp.gov.in/rehab.htm (accessed 28 October 2013)

263 Kiran Jain, a widow, Amnesty International interview, 2004. Another widow interviewed by Amnesty International, Nanni Bai, who was around 60 years old at the time, said that she had not received a pension. Amnesty International, Clouds of Injustice, AI Index: ASA 20/015/2004, 29 November 2004, p20.

264 Government of Madhya Pradesh, Bhopal Gas Tragedy Relief and Rehabilitation Department, *Memorandum on Plan of Actions for the Relief and Rehabilitation of Bhopal Gas Tragedy Victims*, available at: bhopal.net/wp-content/uploads/2011/11/Enclosure-3.pdf (accessed 28 October 2013)

265 R Dhara, “Health Affects of the Bhopal Gas Leak: a Review”, *New Solutions*, Spring 1994. Damage to the surface tissues of the eyes and lungs has led to a long-term prevalence of ocular and respiratory illnesses. These include early-age cataracts, diminished vision, breathlessness, persistent cough and chronic obstructive airways disease, causing weakness and fatigue.

266 S Srimarachari et al, “GC-NPD and GC-MS analysis of preserved tissue of Bhopal gas disaster: evidence of methyl carbamylation in post mortem blood”, *Medicine, Science and the Law*, Vol 31, No.4, October 1991, pp293-98.

267 R Dhara, “Health Affects of the Bhopal Gas Leak: a Review”, *New Solutions*, Spring 1994, p40.

268 Such as body aches, tingling in limbs, dizziness and loss of motor control. *International Perspectives in Public Health*, Vol 11 & 12, 1996

269 AK Saxena et al, “Effect of exposure to toxic gas on the population of Bhopal: IV- Immunological and chromosomal studies”, *Indian Journal of Experimental Biology*, Vol 26, Issue 3, March 1988, pp173-6. Immunological impacts have led to diseases such as tuberculosis manifesting at 3 times the national average. Dr C Sathyamala et al, *Against all odds: Continuing effects of the toxic gases on the health status of the surviving population in Bhopal, preliminary report of a medical study carried out five years after the disaster*, December 1989, p10.

270 *International Perspectives in Public Health*, Vol 11 &

12, 1996, pp36-40.

271 N P Shilotri et al, "Gynaecological and obstetrical survey of Bhopal women following exposure to methyl isocyanate", *Journal of Postgraduate Medicine*, Vol 32, issue 4, 1986; pp203-5; unpublished study Rani Bang, "Effect of the Bhopal Disaster on Women's Health: An Epidemic of Gynecological Diseases", 1985; Shahazadi Bee, Hazra Bee, Rampyari Bai, Bhopal survivors, Amnesty International interviews, March 2012. Rampyari Bai's daughter-in-law was seven months pregnant at the time of the gas leak and suddenly went into labour; she died that night.

272 Shahazadi Bee, Bhopal survivor and activist, Amnesty International interview, March 2012.

273 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, pp10-12.

274 Kids, youths worst sufferers of gas disaster Central Chronicle 28 November 2001. S Firani and A A Mahashur, "A survey of Bhopal children affected by methyl isocyanate gas," *Journal of Postgraduate Medicine*, Vol 32, issue 4, 1986, pp195-8.

275 A 1990 evaluation of drug use at two government hospitals by the Bhopal People's Health and Documentation Clinic revealed that 26.8 per cent of prescriptions were inappropriate, and 13.2 per cent of drugs prescribed were banned in other countries because of adverse effects. The Sambhavna Trust, *The Bhopal Gas Tragedy 1984*, 1998, p94. A report by the International Medical Commission on Bhopal in 1994 found that care was largely symptomatic, suggesting that treatment protocols for chronic patients had yet to be developed and implemented. International Medical Commission on Bhopal, *The Use of Drugs in Bhopal Gas Victims: Interim Report of the International Medical Commission on Bhopal*, December 1994, p36.

276 Shahazadi Bee, Chiraunji Bai, Bhopal survivors, Amnesty International interview, March 2012. Chiraunji Bai said that she has to spend Rs. 250 to 300 on medicines each week at a private chemist.

277 Shahazadi Bee, Bhopal survivor and activist, Amnesty International interview, March 2012.

278 Ashok Raj, "Whither Bhopal workers: a status report on their occupational dislocation caused by the gas disaster and an assessment of the efforts towards their economic rehabilitation", in *The Bhopal Gas Disaster, impacts, responses, current status and recommendations for the future*, Fact Finding Mission on Bhopal, 1994-2004. Chiraunji Bai and Kichwar Jahan, Bhopal survivors, Amnesty International

interview, March 2012.

279 International Medical Commission on Bhopal, *The Use of Drugs in Bhopal Gas Victims: Interim Report of the International Medical Commission on Bhopal*, December 1994, p36.

280 Curative Petition (C) No.345-347 of 2010 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors.*

281 This figure includes interest that would have accrued had that amount been paid in 1989 under the original settlement agreement.

282 See The Dow Chemical Company Public Statement, *Dow will object to government of India's Request to Reopen Bhopal Settlement* Midland, MI., 28 February 2011, available at: www.dow.com/sustainability/debates/pdfs/Dow_statement_Regarding_Curative_Petition1.pdf (accessed 28 October 2013) and *The Dow Chemical Company's Response to the Curative Petition Filed by the Union of India*, 18 November 2011, available at: www.dow.com/sustainability/debates/pdfs/TDCC-Response-CP-111811.pdf (accessed 28 October 2013). Also see Union Carbide Corporation's response at www.bhopal.com/union-carbide-position-statements-on-the-curative-petition-and-related-filings (accessed 28 October 2013)

283 The initial 3,000 estimated by the Supreme Court in 1989 plus a further 2,295.

284 Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors*, paras 142 and 145.

285 The 5,295 death toll suggested by the government of India is only one fourth of the 22,917 figure suggested by the Petitioners and less than half of the 12,167 calculated on the basis of Indian Council of Medical Research epidemiological figures for the period 1985-1993. Furthermore, while the government claims that there have been 4,902 cases of permanent disability and 42 cases of severe injury, the Petitioners claim that these figures should be 508,432 and 33,781 respectively. Some of the figures now suggested by the

government are much lower than even those assumed by the Supreme Court in 1989 as the basis for calculation of the settlement amount (30,000 for permanent disability and 2,000 for severe injury). See Curative Petition (C) No.345-347 of 2010 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors.*; and Application for Directions, Bhopal Gas Peedith Mahila Stationery Karamchari Sangh, applicants, in Curative Petition (C) No.345-347 of 2011 (against the impugned Judgment and Order dated 14th and 15th February 1989, 4th May 1989 and the Judgment and Order dated 3rd October 1991 passed by this Hon'ble Court), in *Union of India v. Union Carbide Corporation and Ors.*, paras 75-76, 117 and 144.

286 Bhopal activist quoted in Pervez Bari, *Bhopal Gas Survivors Demand CM, PM to Correct Facts in Curative Petition before SC*, 27 July 2011, at: twocircles.net/node/257401 (accessed 17 October 2013)

287 Transmittal Memorandum from UCC Engineering attaching Draft Criteria Report for Waste Liquid Incinerator, 27 November 1973.

288 A copy of this telex is in Amnesty International's possession.

289 A copy of this telex is in Amnesty International's possession.

290 Statement of Union Carbide Corporation Regarding the Bhopal Tragedy at: www.bhopal.com/union-carbide-statements.

291 In April 1990 the National Environmental Engineering Research Institute (NEERI), commissioned by the Madhya Pradesh government to study the extent of pollution damage from the solar evaporation ponds, concluded that there was no soil or groundwater contamination due to seepage from the ponds (Solar Evaporation Ponds, NEERI, Nagpur 1990, p.xv). However, the same month the US National Toxics Campaign (NTC) released an analysis of soil and water samples taken from in and around the factory premises. Contrary to the findings of NEERI, this revealed the presence of numerous toxins. The NTC report tested for many more chemicals than NEERI. Internally, UCC advised "caution in using the NEERI data" but UCC continues to cite the NEERI report in its defence. In November 1999 Greenpeace released a report on Bhopal which concluded that the site and immediate surroundings were contaminated with

chemicals arising from routine processes, spillages and accidents at the plant, or from dumped and stored materials on the site (Greenpeace, "The Bhopal Legacy: Toxic Contaminants at the former Union Carbide factory site, Bhopal, India", Technical Note 04/99,). Greenpeace noted that bags of Sevin were still stored on factory premises and that residue on remaining plant fixtures had not been cleaned. In May 2004, based on a report by the Waste Monitoring Committee, the Supreme Court of India observed that "due to indiscriminate dumping of hazardous waste due to non-existent or negligent practices together with lack of enforcement by the authorities, the groundwater, and, therefore, drinking water supplies" have been damaged (Order of the Supreme Court 07/05/2004 in *Research Foundation for Science v. Union of India and Anr*, Writ Petition (Civil) No. 657/1995).

292 Centre for Science and Environment, *Action Plan: Environmental Remediation in and around UCIL, Bhopal, Expert Roundtable, April 25-26 2013*, August 2013.

293 F Pearce, "5,000 days later, Bhopal damage, agony continues," *Seattle Post-Intelligencer*, September 1998.

294 In 2004, Faujia, a 15-year-old girl told Amnesty International that the "water is red here and it smells... like there is some medicine in it." Another witness, Munni Bi, said the water "is bitter... difficult to swallow". Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p26.

295 Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p26. Rashida Bee, Safreen Khan, Kichwar Jahan, and Hazra Bee, Bhopal survivors, Amnesty International interviews, March 2012.

296 This Committee was created by the Supreme Court of India in response to a writ petition: *Research Foundation for Science v. Union of India and Anr*. Writ Petition (Civil) No.657/1995.

297 Order of the Supreme Court, 7/05/2004 in *Research Foundation for Science v. Union of India and Anr*. Writ Petition (Civil) No.657/1995.

298 Special correspondent, "Bhopal gas survivors end four-month dharna" *The Hindu*, 9 August 2008, available at: www.hindu.com/2008/08/09/stories/2008080955221100.htm (accessed 16 January 2014); Press Information Bureau, Government of India, "Compensation to Bhopal Gas Victims", 12 December 2008, available at: pib.nic.in/newsite/erelease.aspx?relid=45568 (accessed 16 January 2014); HT

Correspondent, "Water around Union Carbide plant is dangerous, tests reveal", *Hindustan Times*, 26 September 2002, available at: www.hindustantimes.com/India-news/Bhopal/Water-around-Union-Carbide-plant-is-dangerous-tests-reveal/Article1-935808.aspx (accessed 16 January 2014); J van Drie-Brown, "Survivors organisations in Bhopal have charged the local government with criminal neglect in providing clean drinking water to local residents", *The Bhopal Medical Appeal*, 13 August 2013, available at: www.bhopal.org/2013/08/survivors-organisations-in-bhopal-have-charged-the-local-government-with-criminal-neglect-in-providing-clean-drinking-water-to-local-residents/ (accessed 16 January 2014); R Markward, *Adding Injustice to Injury - Health Perceptions, Plurality, and Power in the Ongoing Bhopal Disaster*, Spring 2013.

299 The Bhopal Medical Appeal, *Analysis of Chemical Contaminants in Groundwater and Assessment of the Qualitative and Quantitative Drinking Water Supply Situation in the Communities Surrounding Union Carbide India Ltd. (UCIL) Plant Site in Bhopal*, on behalf of the Sambhavna Trust Clinic, October 2009, available at: www.bhopal.org/wp-content/uploads/2010/11/2009-BMA-Sambhavna-Bhopal-Water-Report.pdf (accessed 28 October 2013)

300 In May 2012, the Supreme Court set a three-month deadline for the Madhya Pradesh government to ensure supply of clean drinking water to settlements around the Union Carbide Corporation plant "(Order of the Supreme Court, 03/05/2012 in *Research Foundation for Science v. Union of India and Anr*, Writ Petition (Civil) No.657/1995). An affidavit filed by the Madhya Pradesh government stated that it had already taken steps to supply drinking water through over-ground pipelines and provide each household with a tap connection but the process would take "some" time to complete. The court directed a newly appointed Monitoring Committee to submit a report of the work undertaken on 13 August, 2012. S N Vijetha, "Supreme Court orders end to cancer-causing water in Bhopal", *The Hindu*, 5 May 2012, available at: www.thehindu.com/news/national/supreme-court-orders-end-to-cancer-causing-water-in-bhopal/article3388215.ece (accessed 28 October 2013). In another order by the Supreme Court on 6 November 2012 (Order of the Supreme Court, 06/11/2012 in *Research Foundation for Science v. Union of India and Anr*, Writ Petition (Civil) No.657/1995), the state government was required to include four additional communities which had originally been left out of the scheme to supply piped drinking

water. UCA News *Bhopal Survivors Win Fight for Clean Water*, 9 November 2012, available at: philippines.ucanews.com/2012/11/09/india-bhopal-survivors-win-fight-for-clean-water/ (accessed 28 October 2013)

301 Bhopal Medical Appeal, *Survivors Organisations in Bhopal have Charged the Local government with Criminal Neglect in Providing Clean Drinking Water to Local Residents*, 13 August 2013, available at: www.bhopal.org/2013/08/survivors-organisations-in-bhopal-have-charged-the-local-government-with-criminal-neglect-in-providing-clean-drinking-water-to-local-residents/ (accessed 28 October 2013)

302 See for example, *Q and A with respect to the government of India's request for a Curative Petition related to the 1989 Bhopal Settlement*, 28 February 2011, p2. "While UCC's stock is owned by Dow, UCC remains a separate company as a Dow subsidiary. Under well-established principles of corporate law, both in India and the United States, Dow did not assume UCC's liabilities as part of the 2001 acquisition transaction."

303 See discussion under the headings *Ongoing environmental pollution at Bhopal*, *The criminal case in India*, and *inadequate compensation and economic rehabilitation* in this case study.

304 Strictly speaking, Union Carbide Corporation (UCC) merged with another wholly owned subsidiary of The Dow Chemical Company (Dow), a Delaware company called Transition Sub Inc. "On February 6, 2001, the corporation merged with a wholly owned subsidiary of Dow. As a result of the merger, each share of Union Carbide common stock outstanding immediately prior to the merger was exchanged for 1.611 shares of Dow common stock and Union Carbide became a wholly owned subsidiary of Dow." UCC, US Securities and Exchange Commission (SEC) form 10-Q, 15 May 2001, p13, available at: www.sec.gov/Archives/edgar/data/100790/000002991501500029/firstquarterreport.txt (accessed 28 October 2013). It has been argued that Dow created this subsidiary company for the sole purpose of merging with UCC, "a type of company it is appropriate to describe in this context as a corporate 'shell' and that the reason for doing so was "to create an additional corporate veil for the purpose of avoiding liabilities inherited from Union Carbide." See for example, Letter to India Prime Minister Mr. Manmohan Singh, Minister of Law and Justice Mr. H. Bharadwaj, Minister of Commerce & Industry, Mr. Kamalnath and other government officials by a group of Indian legal practitioners, professionals, academics and former

judges dated 21 April 2008. Arguing that the deal should be seen as a merger and that “successor liability” should apply, the letter explains that under US State and Federal law, “a company may not escape successor liability if it is deemed to have become derivatively liable as a consequence of “eccentric” management practice, that is, managerial undertakings that transparently attempt to denude a company of successor liability.”

305 “Effective with the Dow Merger, the corporation’s business activities were fully integrated with those of Dow and are no longer operated as separate business units.” Union Carbide Corporation, US Securities and Exchange Commission (SEC) form 10-Q, 15 May 2001, p8, available at: www.sec.gov/Archives/edgar/data/100790/000002991501500029/firstquarterreport.txt (accessed 28 October 2013). Also see the *About Us* section of the Union Carbide Corporation website available at: www.unioncarbide.com/about-us (accessed 28 October 2013)

306 H Rajan Sharma, argues that US law is relevant since both Union Carbide Corporation (UCC) and the Dow Chemical Company (Dow) are companies organized under the laws of the USA with their merger governed by US law and subject to approval by regulatory authorities such as the US Securities & Exchange Commission. Further, because Dow is a Delaware corporation, and the “corporate veil” that is sought to be pierced is that of Dow (not that of UCC), it is Delaware law that should apply. H Rajan Sharma, “Veil of deception”, *Frontline*, Vol 25, Issue 7, 29 March - 11 April 2008.

307 Successor liability is premised on the assumption that if a corporation acquires or merges with another, it assumes the civil and criminal liabilities of its acquisition target as a “successor-in-interest” standing in the shoes, so to speak, of the company it purchased. H Rajan Sharma, “Veil of deception”, *Frontline*, Vol 25, Issue 7, 29 March - 11 April 2008.

308 See UCC’s US Securities and Exchange Commission Form 10-Q, 15 May 2001, p13, available at: www.sec.gov/Archives/edgar/data/100790/000002991501500029/firstquarterreport.txt (accessed 28 October 2013). In their letter to Indian Prime Minister Mr Manmohan Singh and others, a group of concerned legal practitioners argued: “...the hallmark of a de facto merger is that the shareholders of the seller receive all or a portion of the purchase price in stock, thereby retaining ownership while also attempting to cleanse their assets of liability. Under the terms of the Dow-Union Carbide merger, Union Carbide shareholders

gained 25 per cent of Dow Chemical’s overall stock as the purchase price: the deal is thus properly described as a de facto merger, regardless of the utilization of a shell company during the takeover.” Letter to Indian Prime Minister Mr Manmohan Singh, Minister of Law and Justice Mr H Bharadwaj, Minister of Commerce & Industry, Mr Kamal Nath and other government officials by a group of Indian legal practitioners, professionals, academics and former judges, 21 April 2008.

309 The purchase agreement recognized a transfer of liability as The Dow Chemical Company (Dow) accepted approximately US\$2 billion of outstanding Union Carbide Corporation debt. Dow Chemical Company, US Securities and Exchange Commission (SEC) Form 10K, 20 March 2002, available at: www.sec.gov/Archives/edgar/data/100790/000091205702010680/0000912057-02-010680-index.htm (accessed 28 October 2013)

310 This fact came to light through a lawsuit in the District of Connecticut, USA. Before Dow Chemical Company’s (Dow) acquisition of the Union Carbide Corporation (UCC), the latter had been selling products in India through third-party agents in order to avoid subjecting itself to the jurisdiction of Indian courts. In case “*MM Global Services, Inc. v. Dow Chemical Co.*”, 404 F. Supp. 2d 425, 428-9 (D.Conn. 2005), those third-party agents, which included MM Global Services Inc., MM Global Services Pte. Ltd. and Megavisa Solutions, sued Dow as UCC’s parent alleging that “Union Carbide and its affiliates ceased acting consistently with their alleged contractual and legal obligations and, in particular, undertook efforts to establish Dow, untainted by the Bhopal tragedy, in place of the plaintiffs as a direct seller of products to end-users in India.” Memorandum of decision re the Plaintiffs’ motion to vacate the order granting rule 12(b)(2) motions to dismiss for lack of personal jurisdiction, p3, in *MM Global Services, Inc. v. Dow Chemical Co.*, 404 F. Supp. 2d 425, 428-9 (D.Conn. 2005). Documents obtained through this lawsuit include a series of emails between Dow Chemical officials and Megavisa revealing the system set up by Dow officials to sell UCC products in India through third companies. For example, email of January 2001: Graham Fox, Dow Chemical regional general manager for the Middle East and India to Ravi Muthukrishnan, country manager, Dow Chemical International Pvt. Ltd. (Mumbai): “As you will be aware, UCC have not sold directly to India since Bhopal and have used Mega Visa to handle many of their sales of speciality chemicals, some bulk chemicals

and wire and cable products. They work across our Dow businesses and have some several million \$ sales revenue as I understand it.” Email of April 2001: Albert Poh, Dow Chemical Pacific manager to other managers in the company: “There was a big lawsuit with UCC in India in the past. UCC considered the case is closed but India’s official and companies didn’t think so. Presuming the product ships directly from USA to India, my suggestion is to selling the product under Dow legal entity with Dow label and document will be a good way to proceed.” Email of July 2001: Mail from Dow Pacific manager Atsuko Serizawa to Edward Neunueble of Dow’s legal department: “Since Megavisa Singapore is a dummy company who negotiates nothing and owns nothing, Dow India now would like to do the business with MegaVisa India direct.” The email further said: “Country management and I are against this idea at the present time due to the threat of litigation and the protest incident of a couple of months ago.” The District Court observed certain undisputed facts: “In February 1989, Union Carbide and its Indian affiliate were ordered to pay a total of \$470 million for all civil claims arising from the tragedy. Union Carbide thereafter ceased selling products directly to customers in India. In 1987, Union Carbide appointed the plaintiff, Mega Vista Marketing Solutions Ltd. (“MVMS”) as a nonexclusive distributor to maintain Union Carbide’s access to the Indian marketplace. In 1993, Union Carbide requested that MVMS form separate corporate affiliates and open offices outside of India that would buy Union Carbide products in the United States and resell them to end-users in India.” Memorandum of decision re the Plaintiffs’ motion to vacate the order granting rule 12(b)(2) motions to dismiss for lack of personal jurisdiction, (p3), in *MM Global Services, Inc. v. Dow Chemical Co.*, 404 F. Supp. 2d 425, 428-9 (D.Conn. 2005). The lawsuit was eventually settled out of court.

311 In a letter to the Indian Prime Minister Mr Manmohan Singh and others, a group of Indian legal practitioners, academics and former judges argue: “[Dow] operating through its Indian subsidiary Dow Chemical India Private Ltd, has continued to profit from marketing Union Carbide owned products in India.” It is argued that, as a result, “Dow Chemical has continued to profit from the sales of its subsidiary’s products in India, effectively continuing the business of the selling entity, despite the latter’s status as an absconder. Indeed it is arguable that this, and numerous other identifiable aspects of Dow’s business in the aftermath of the merger with Union Carbide, such as continuity of name,

products, facilities, personnel, business operations and Union Carbide’s general enterprise, could be said to be effecting a fifth exception to absence of successor liability: the “substantial continuity test”, which originated in a series of U.S. Supreme Court labour relations and product liability cases.” Letter to India Prime Minister Mr Manmohan Singh, Minister of Law and Justice Mr H Bharadwaj, Minister of Commerce & Industry, Mr Kamal Nath and other government officials by a group of Indian legal practitioners, professionals, academics and former judges, 21 April 2008.

312 Article V of the purchase agreement states, “there are no (i) civil, criminal or administrative actions, suits, claims, hearings, investigations or proceedings pending or, to the actual knowledge of its executive officers, threatened against it or any of its Subsidiaries... except for those that are not, individually or in the aggregate, reasonably likely to have a Material Adverse Effect on it.”

313 Department of Chemicals & Petrochemicals, draft Cabinet Note regarding the Dow Chemical Company’s legal liability for environmental remediation (containing advice received from the Ministry of Law and Justice), 7 February 2008.

314 The issue of the Dow Chemical Company’s (Dow) liability is being examined in the context of the 2004 Public Interest proceedings in the Madhya Pradesh High Court and the 2010 Curative Petition in the Supreme Court of India in which Dow is a named defendant. It has also been raised in the context of the criminal proceedings before the Bhopal Chief Judicial Magistrate in which Dow was issued with court summons.

315 One of the victim and survivors’ local support groups in Bhopal, acting in their capacity as “Intervenor and Assistant” to the Prosecution.

316 Chief Judicial Magistrate, Bhopal, Order of January 6, 2005, requiring Dow Chemical Company, USA to state why it should not be asked to present absconding accused Union Carbide Corporation in the ongoing criminal case on the December ‘84 disaster in Bhopal. Criminal Case No.91 of 1992, *State v. Warren Anderson & others*. In requesting the stay, Dow Chemical International Private Ltd also argued that liability in criminal cases could not be transferred from the accused to other persons. *Dow Chemical International Pvt. Ltd v. Bhopal Gas Peedith Sangharsh Sahayog Samiti & Ors*. Misc Criminal Case No.1377 of 2005 (re Criminal Case No.91 of 1992, *State v. Warren Anderson & others*), February 2005.

317 Dow Chemical International Private Ltd (DCIPL) has

brought these actions before the Mumbai and Madras High Courts. The defendants to these actions include civil society groups such as Children Against Dow Carbide, survivors such as Rashida Bee and any person or organization connected directly or indirectly with "the cause of the victims of the Bhopal gas leak tragedy and/or protecting and/or fighting for their rights". The High Courts have granted the orders by way of interim relief (although, in July 2009, the Madras High Court dismissed applications by DCIPL to extend the interim orders with respect to their premises in Chennai). Claims made by DCIPL to permanently prohibit the defendants from protesting outside their offices remain outstanding before both High Courts. The interim orders still in place prevent the defendants from "mobbing/picketing and/or attacking and/or damaging and/or holding demonstration etc" outside DCIPL's premises in Mumbai or in any way disrupting or interfering with the operation of its business activities at those premises. The damages claimed by DCIPL in its latest action before the Mumbai High Court are for loss of business on the day of the April 2013 protest outside its Mumbai offices and compensation for harassment and intimidation of employees as a result of that protest. These allegations have not been proven. Amnesty International has been advised by one of the defendants to this claim that the protest was peaceful. See: *Dow Chemical International Pvt Ltd v The National Campaign for the Justice in Bhopal & Ors*, Suit No. 793 of 2001 in the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction; *Dow Chemical International Pvt Ltd v Greenpeace International & Ors*, Suit No. 3955 of 2002 in the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction; *Dow Chemical International Pvt Ltd v Nithyanandam & Ors*, Suit No 356 of 2009 in the High Court of Judicature at Madras; and *Dow Chemical International Pvt Ltd v Satinath Sarangi & Ors*, Suit Nos. 369 of 2013 and 386 of 2013 in the High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction. Of particular interest, in these claims DCIPL has stated that it has no connection to the Bhopal gas leak in 1984 and, as such, the actions being conducted at its premises by survivors and activists are unwarranted (see, for example, the Affidavit of Ms Ramolla Karnani in support of the Notice of Motion No. 252 of 2013 of 26 April 2013 in Suit No. 369 of 2013, para 3). Amnesty International questions this assertion, particularly since DCIPL appeared before the Chief Judicial Magistrate's Court in Bhopal (CJM) in February 2005 and successfully sought a stay in relation to the summons for Dow to appear before it

which continued for eight years (see main paragraph).

318 Amnesty International, *India: Court decision requires Dow Chemical to respond to Bhopal gas tragedy*, 23 July 2013, available at: www.amnesty.org/en/news/india-court-decision-requires-dowchemical-respond-bhopal-gas-tragedy-2013-07-23 (accessed 28 October 2013)

319 The claim originally only named The Dow Chemical Company (Dow) as corporate respondent. On 14 September 2004 Dow requested the Court also implead Union Carbide Corporation and Eveready Industries India Limited, a request that the Court accepted. Since then proceedings have continued against all three corporate defendants.

320 Madhya Pradesh High Court Order dated 30/03/05 in the case of *Alok Pratap Singh v. Union of India & Ors*, W.P. No.2802 of 2004 (on file with the authors).

321 Ministry of Corporate Affairs, Government of India, *Registry of Company or LLP Names*, available at: www.mca.gov.in/DCAPortalWeb/dca/QueryNameAction.do (accessed 16 January 2014).

322 'Information on Bhopal', available at www.evereadyindustries.com/pressroom/information-bhopal.asp (last accessed 17 December 2013). On the website, the Williamson Magor Group has stated that the present business of Eveready is manufacture and marketing of Fast Moving Consumer Goods and has no connection with the pesticides business of Union Carbide. "Needless to say, the Williamson Magor Group had no connections or involvement with the operations of the said pesticide plant at Bhopal. In fact, immediately following the accident, the plant at Bhopal was closed down permanently and all licenses were cancelled by the government. The Bhopal plant had ceased to be an asset in the books at the time of the acquisition of the shares by the Williamson Magor Group. Subsequently, the possession of the site of the plant was also taken over, unconditionally, by the State government in July 1998."

323 Madhya Pradesh High Court Order dated 30/03/05 in the case of *Alok Pratap Singh v. Union of India & Ors*, W.P. No.2802 of 2004 (on file with the authors). It had been attempted to serve notice on Dow through Dow Chemical International Private Limited

324 Press Information Bureau, government of India. Ministry of Chemicals and Fertilisers: Disposal of Toxic Waste at Bhopal, 5 August 2010, available at: pib.nic.in/newsite/erelease.aspx?relid=64168 (accessed 28 October 2013)

325 Aparna Pallavi, *Nagpur Bench Stays Transfer Of*

Bhopal's Toxic Waste, 17 December 2011 available at: www.downtoearth.org.in/content/nagpur-bench-stays-transfer-bhopals-toxic-waste (accessed 28 October 2013)

326 The legal basis for this was Rule 16 of the Hazardous Wastes (Management and Handling) Rules 1989, enacted under the Environment Protection Act 1986, which provides that the occupier and operator of a facility is liable to restore any damage to the environment at their cost or alternatively, pay the entire cost of remediation and pay in advance an amount equal to the cost estimated by the State Pollution Control Board.

327 Department of Chemicals & Petrochemicals, *Annual Report 2011-2012*, available at: chemicals.nic.in/Annual%20Report%202011-2012.pdf (accessed 28 October 2013), p35 para 3.14.

328 Ministry of Environment and Forests, Bhopal environmental remediation oversight committee constituted, 7 July 2010, available at: www.indiaenvironmentportal.org.in/reports-documents/bhopal-environmental-remediation-oversight-committee-constituted (accessed 28 October 2013)

329 The decision provided that the waste would be removed within a year with the cost of airlifting the waste met by the Central government. Activists had expressed concerns that this plan did not address the accumulated soil and water contamination as toxic gases and chemicals had seeped into the surrounding soil and water supply for decades.

330 GIZ, *Contaminated sites in India: Contract with GIZ did not materialise*, 2012, available at: www.giz.de/en/mediacenter/8869.html (accessed 28 October 2013)

331 Writ Petition (Civil) No.50 of 1998 *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors v. Union of India & Ors* with IA Nos 62-63 of 2011 In Civil Appeal Nos 3187 and 3188 of 1988, Order of the Supreme Court of 9 August 2012, at para 35 sub para. 12.

332 The Times of India, "Pithampur villagers oppose trial run for incineration of toxic waste", The Times of India, 18 June 2013 available at: articles.timesofindia.indiatimes.com/2013-06-18/indore/40048392_1_toxic-waste-pithampur-tarpura (accessed 22 January 2014)

333 "That year [1998] the Madhya Pradesh state government, which owns and had been leasing the property to Eveready, took over the facility and assumed all accountability for the site, including the completion of any additional remediation." *Statement of Union Carbide Corporation Regarding the Bhopal Tragedy*,

available at: www.bhopal.com/union-carbide-statements (accessed 28 October 2013). Similarly, The Dow Chemical Company states: "But responsibility for the clean-up of the Bhopal site lies with the Madhya Pradesh state government, not with Dow or UCC." *Q and A with respect to the government of India's request for a Curative Petition related to the 1989 Bhopal Settlement*, 28 February 2011.

334 "The Williamson Magor Group says that Eveready is neither responsible for the pollution as reported, nor is it liable for the cleanup of the hazardous material and that the obligation and liability of the clean-up, if any, should be that of the erstwhile owners of UCIL viz, UCC USA." Eveready Industries India Ltd. *Information on Bhopal*, June 16 2010 available at: www.evereadyindustries.com/pressroom/information-bhopal.asp (accessed 28 October 2013)

335 Centre for Science and Environment, *Action Plan: Environmental Remediation in and around UCIL, Bhopal, Expert Roundtable, April 25-26 2013*, August 2013.

336 The US-India CEO Forum was constituted by President George W Bush and Prime Minister Manmohan Singh in July 2005 as a platform to enhance bilateral trade and investment between India and the US. It comprises 10 CEOs from India, including Tata Sons Limited, and 10 CEOs from the US, including The Dow Chemical Company. According to the Forum's website, its role comprises providing recommendations for increased partnership and cooperation between the two countries at a business level, offering input on impediments, issues and opportunities towards enhanced trade and investment flows, and facilitating the implementation of select recommendations. See www.usindiaforum.com/index.html (last accessed March 2013)

337 Shishir Gupta, "To get Dow to invest, Tata offers to lead initiative on Bhopal", *The Indian Express*, 31 December - 2 January 2007, available at: www.indianexpress.com/news/to-get-dow-to-invest-tata-offers-to-lead-initiative-on-bhopal/19844/ (accessed 28 October 2013)

338 *Bhopal Survivors Call for Action Against Tata Group*, Press statement 9 February 2007. See further V Venkatesan, "Ratan Tata's offer to help find funds to remove the toxic waste in Union Carbide Corporation 's Bhopal plant is inconsistent with the 'polluter pays' principle", *Frontline*, Vol 24, Issue 02, 27 January - 9 February 2007, available at: www.frontline.in/navigation/?type=static&page=archive (accessed 28 October 2013)

339 “More than 200 survivors of the December 1984 Union Carbide disaster in Bhopal today demonstrated before the local corporate office of Tata Indicom against Chairman Tata Group, Ratan Tata’s offer to clear the path for Dow-Union Carbide’s investments in India.” Bhopal Gas Peedith Mahila Stationery Karmachari Sangh, Bhopal Gas Peedith Mahila Purush Sangharsh Morcha, Bhopal Group for Information and Action, Bhopal Ki Aawaaz, *Bhopal survivors demonstrate against Tata’s attempt to help Dow evade its liabilities: renew call for boycott of Tata salt and tea*, press statement, 10 January 2007,

340 These were obtained by members of the International Campaign for Justice in Bhopal through requests under the Indian Right to Information Act.

341 Letter from Mr. Andrew Liveris, CEO, The Dow Chemical Company, to the Indian Ambassador His Excellency Ronen Sen, 8 November 2006.

342 This letter was one in a series of communications with and between government officials pushing for the initiative as revealed through Right to Information requests in India. It followed a letter from Ratan Tata to Mr P Chidambaram, Finance Minister, on 10 July 2006, proposing the creation of a Remediation Fund, and was followed by various communications with the Indian Prime Minister regarding the subject. Note from Finance Minister P Chidambaram to the Indian Prime Minister recommending acceptance of the offer, 5 December 2006; Letter from Ratan Tata to the Indian Prime Minister, 5 January 2007, and Letter from Indian Prime Minister’s Office to Ratan Tata, 12 January 2007.

343 See, for example, “Dow wants to pass Bhopal buck to India, letters show”, *Indo-Asian News Service*, 9 April 2007; Staff Reporter, “Alleged conspiracy to rid Dow Chemical of liabilities”, *The Hindu*, 10 April 2007, Asian News International “Bhopal gas victims accuse Tata of being hand-in-glove with US’ Dow Chemicals”, *Hindustan Times*, 9 April 2007, “Bhopal gas site, Dow wants government to withdraw claim for clean-up”, *Business Line*, 11 April 2007 and Randeep Ramesh “Billionaire offer to clean Bhopal derided as front for chemical firm”, *The Guardian*, 10 April 2007.

344 The Association for India’s Development and the International Campaign for Justice in Bhopal filed a Right to Information application with the Indian Embassy in Washington DC on 23 May 2007 to obtain details of all communications between Dow Chemicals and the Indian government. The Embassy responded to the request on 13 November 2007.

345 These include a note from The Dow Chemical Company’s (Dow) CEO advancing a proposal to help resolve the Bhopal matter to the Indian Ambassador, 21 September 2005; a thank you note from Dow’s CEO to the Indian Ambassador for assisting in this regard, 21 February 2006; information on a meeting between Dow’s CEO and the Indian Finance Minister during the latter’s visit to New York to attend the US-India CEO Forum on 25 October 2006, information on a letter (though the letter was not provided) from Dow’s CEO to Indian Finance Minister, 26 February 2007, and information on a meeting between Dow’s CEO and the Indian Prime Minister on 14 September 2005 in New York during a CEO’s lunch co-hosted by the Indian Ambassador and Mr Bill Harrison, Chairman and CEO of JP Morgan Chase and Co-Chairman of US-India CEO Forum.

346 Non-paper from The Dow Chemical Company’s CEO, Andrew Liveris, to the Indian Ambassador to the US, Ronen Sen, entitled *Legacy Issue Resolution Proposal – India-USA CEO Dialogue Group*, 21 September 2005.

347 As revealed by a letter from Dow India’s Director of Public Affairs, Mr Rukesh Chitkara, to Principal Secretary to the Prime Minister Mr Nair, 6 June 2006.

348 Letter from The Dow Chemical Company India’s Director of Public Affairs, Mr Rukesh Chitkara, to the Principal Secretary to the Prime Minister, Mr Nair, 6 June 2006.

349 Note from Montek Singh Ahluwalia, Deputy Chairman of the Planning Commission, to the Indian Prime Minister on 2 December 2006, referring to The Dow Chemical Company’s (Dow) reluctance to invest in India in view of the legal risks and the need to resolve the issue through an inter-Ministerial meeting; Note from the Ministry of Finance to the Indian Prime Minister recommending the acceptance of Ratan Tata’s offer to set up a Remediation Fund, 5 December 2006; Note from the Cabinet Secretariat to the Indian Prime Minister entitled *Issues concerning investments in the chemical and petrochemical sectors*, referring to Dow’s future investment in the country and the need to cease “agitation” of legal issues in the courts, 6 April 2007; Note from Kamal Nath, Minister of Commerce and Industry, to the Indian Prime Minister referring to concerns expressed by Dow and US government officials during the US-India CEO Forum of 25 October 2006 in New York and suggesting the issues should be looked at in a “holistic manner”, 7 February 2007.

350 Note from Kamal Nath, Minister of Commerce and Industry, to the Indian Prime Minister, 7 February 2007.

351 Cable sent by the US Embassy, New Delhi, *New Delhi Weekly ECON Office Highlights*, 27 July 2007, available at: www.wikileaks.org/plusd/cables/07NEWDELHI3429_a.html (accessed 28 October 2013); Cable sent by the US Embassy, New Delhi, *Ambassador Discusses CEO Forum Issues with Planning Commission Deputy Chairman Ahluwalia*, 18 September 2007, available at: www.wikileaks.org/plusd/cables/07NEWDELHI4272_a.html (accessed 28 October 2013)

352 Note on the issue of application of the Department of Chemicals & Petrochemicals filed in the High Court of M.P. in W.P. No.2802/2004 requesting to direct Respondent No.4 to deposit Rs. 100 crore as advance, for environmental remediation of former UCIL Plant Site at Bhopal.

353 Note on the issue of application of the Department of Chemicals & Petrochemicals filed in the High Court of M.P. in W.P. No.2802/2004 requesting to direct Respondent No.4 [Dow] to deposit Rs. 100 crore as advance, for environmental remediation of former UCIL Plant Site at Bhopal.

354 Letter to India Prime Minister Mr. Manmohan Singh, Minister of Law and Justice Mr H Bharadwaj, Minister of Commerce and Industry, Mr Kamal Nath and other government officials by a group of Indian legal practitioners, professionals, academics and former judges, 21 April 2008.

355 There were at least 12 Amerindian villages downstream of Omai operations: Fort Island, Saxacalli, Agatash, St Maryn, Winiperu, Monkey Jump, Sherima, Anerika, Rockstone, Butakari, Riversview and Fort Island.

356 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia May 2003, thesis submitted to Virginia Polytechnic Institute and State University.

357 Signed by the government of Guyana, Omai Gold Mines Limited, Cambior Inc. and Golden Star Resources.

358 According to Guyana's National Development Strategy, adopted by parliament in 2000, "There is currently no dedicated Minister of Mines. Although the Prime Minister holds the portfolio, he is not in possession of any ministerial staff in support of the concept-utilisation formulation and implementation of policy. This is an almost untenable situation, which often appears to lead to the neglect of the sector at every level." *Guyana National Development Strategy, 2001-2010*, Chapter 16 "Mining": section 16.II Issues and Constraints, and 16.II.1 Regulatory Regime, available at:

www.sdn.org.gy/nds/chapter16.html (accessed 28 October 2013)

359 The national parliament passed Guyana's Environmental Protection Act and created the country's Environmental Protection Agency in 1996. Kwesi Nkofi (Special Projects Officer, Guyana Environmental Protection Agency), *Enforcement of Compliance Requirements at Omai Gold Mines Limited – Guyana*, Third International Conference on Environmental Enforcement, 1994, pp197-204.

360 This meant that over the 20-year duration of the mineral licence, Omai Gold Mines Limited's environmental regime could not be amended in any way that would cause it to supersede Québec's own environmental regulations. The applicable standards would later become a highly contested issue, with many arguing that the Environment Impact Statement and Mineral Agreement did not take into account the vast differences between Guyana (a tropical region) and Canada. Canadian and US water regulations point out that water standards need to be site-specific to take into account differences in baseline drinking water quality.

361 *Omai Gold Mining Project, Mineral Agreement*, 16 August 1991, Clause 15.5. This is a form of "stabilization clause" typical of host government agreements which often have the effect of constraining the capacity of host states to exercise regulatory authority over the foreign investor. See more on this in section 1. *Sources of corporate power* in the *Dangerous Liaisons* chapter of this book.

362 Including JP Morgan Canada, the Royal Bank of Canada, Societe Generale Canada, Credit Lyonnais, Banque ABN AMRO NV SUCC Du Canada, National Bank of Canada and Citibank of Canada, who together financed US\$145 million.

363 Export Development Corporation (EDC) is Canada's export credit agency. It is a Crown Corporation, accountable to the Canadian Parliament. Its role is to provide Canadian companies with financing, insurance and other services to support their export-related activities or foreign investments. EDC provided Cambior with US\$163 million in political risk insurance for the Omai Gold Mine. See www.halifaxinitiative.org/content/omai-gold-mine (accessed 28 October 2013). See more on Export Credit Agencies and their role in securing greater protection of human rights in section 2 *How lack of information affects the right to remedy* in the *Lack of information* chapter of this book.

364 The Multilateral Investment Guarantee Agency

(MIGA) is a member of the World Bank Group. Its role is to provide political risk insurance (guarantees) to the private sector to promote foreign direct investment toward developing countries. See www.miga.org/index_sv.cfm (accessed 28 October 2013). MIGA provided Omai Gold Mines Limited with US\$55 million in reinsurance. See www.halifaxinitiative.org/content/omai-gold-mine (accessed 28 October 2013). See more on International Financial Institutions and their role in securing greater protection of human rights in section 2 *How lack of information affects the right to remedy* in the *Lack of information* chapter of this book.

365 The investment was valued at US\$343 million, the single largest foreign investment in the Guyanese mining industry to date.

366 In 1985 the country began a process of economic liberalization, which included the privatization of state institutions and companies, and the adoption of International Monetary Fund structural adjustment policies and a World Bank Economic Recovery Programme. The World Bank advised Guyana's government to look to non-traditional exports, such as gold and timber, and to develop its mineral export sector. In 1986, the Guyana Natural Resource Agency was established with assistance from the World Bank to facilitate private sector investment in Guyana's natural resources. Marcus Colchester, *Guyana - Fragile Frontier: loggers, miners and forest people*, 1997, London, Latin American Bureau; Moreton-in-Marsh, World Rainforest Movement.

367 During the 1980s Guyana was deeply in debt to international lenders. External debt by 1988 stood at approximately US\$1.7 billion or almost six times as large as Guyana's official GDP. The International Monetary Fund (IMF) curtailed further lending to Guyana in 1983 due to debt arrears; however in 1988 the IMF and the Government put together a plan for reform which resulted in renewed financial support. "A country study: Guyana" in Tim Merrill (ed), *Guyana and Belize: country studies*, 1993, Federal Research Division, Library of Congress, available at: lcweb2.loc.gov/frd/cs/gytoc.html (accessed 28 October 2013). Income generated by large-scale foreign investment in the mining sector would help Guyana meet its external debt payments.

368 In 1990, Guyana paid more in foreign debt service than it received in government revenues. According to the World Bank's World Debt Tables, and the International Monetary Fund's International Financial Statistics Yearbook 1998, Guyana paid out US\$295 million in debt service while in that same year its annual

revenue was US\$140 million. Marcus Colchester, *Guyana - Fragile Frontier: loggers, miners and forest people*, 1997, London, Latin American Bureau; Moreton-in-Marsh, World Rainforest Movement. See more on World Bank and other International Financial Institutions' programmes and policies and their impact on the state's capacity to regulate foreign investment projects in 1.2 *The role of international financial institutions* in the *Dangerous Liaisons* chapter of this book.

369 Alfredo C Gurmendi, *The Mineral Industry of Guyana*, 1996, U.S. Geological Survey - Minerals Information, available at: minerals.usgs.gov/minerals/pubs/country/1996/9513096.pdf (accessed 28 October 2013). Export earnings from Omai remained high in the years that followed, fluctuating from 25 to 18 percent. For annual reviews dating from 1996 to 2001 see the US Geological Survey website available at: minerals.usgs.gov/minerals/pubs/country/sa.html#gy (accessed 28 October 2013)

370 See IAMGOLD *Annual Report 2006*: www.iamgold.com/files/docs_financial/IAMGOLD%202006%20Annual%20Report%20-%20FINAL.pdf (accessed 14 January 2014)

371 As early as the 1880s small-scale miners accessed the site to mine for gold. Several companies explored the site and conducted studies. From 1896 to 1907, a German company mined for gold and explored for diamonds. However, it was not until 1985 when Golden Star Resources acquired rights to the site that a serious feasibility study was conducted.

372 Although the project's Environmental Impact Statement (EIS) gathered some baseline information, this was criticized as incomplete and insufficient. A UN report of September 1995 criticized the mine for its poor and limited baseline data and continuous monitoring on surface and groundwater flow patterns; and groundwater levels. UN Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995, pp9-11. Upon examining the company's EIS and Mineral Agreement, in its 1995 spill report the US Environmental Protection Agency (EPA) noted the lack of a "baseline environmental assessment", a "national environmental inventory" and "environmental information on the biological situation". The report also noted the lack of attention to environmental concerns as demonstrated by the absence of an effective water monitoring system upstream of the Omai or Essequibo rivers. Harry L Allen and David W Charters, *Detailed Itinerary and Trip Report, Omai Mine Spill*, Guyana, 13-24 September 1995, pp3,

7, 9. US toxicologist Ken Silver refers to the lack of baseline health studies: Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001. Candice Ramessar alludes to the absence of a complete biological inventory of the Essequibo River and surrounding areas: Candice Ramessar, *Water is More Important than Gold: Local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University pp4,106.

373 Tailings are the materials left over after the process of separating the valuable fraction from the uneconomic fraction of an ore. Mine tailings are usually produced from the mill in slurry form (a mixture of fine mineral particles and water). A tailings pond is an area dedicated to receiving the refused mining tailings. The pond is generally impounded with a dam known as tailings impoundments or tailings dams. For more on tailing containment see www.tailings.info/basics/tailings.htm (accessed 28 October 2013)

374 Cambior-Golden Star Joint Venture, *Omai Gold Project: Environmental Impact Statement*, January 1991, Section 5.5.6.

375 "Omai shut down: after breach dumps cyanide into the Essequibo River", *Stabroek News*, 21 August 1995.

376 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p9. The Commission found that the company focused its efforts on implementing emergency response procedures, which included sending a "security detail" into riverian areas to warn small-scale miners and residents about the spillage and the use of water (pp9-10).

377 United Nations Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995, p4. The UN reported that the tailings effluent was laden with cyanide and copper. According to the report, in the first few hours of the breach 90,000 m³/hour of waste water flowed into the Omai tributary, "affecting aquatic life in the downstream stretch of the Omai river and at the confluence with the Essequibo River" (p4).

378 Company and government officials attributed the red colour to the loss of the tailings dam's saprolite core, which crumbled into the river when the breach occurred.

379 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, pp75-6.

380 However, following their investigation into the spill, as of 17 September 1995 the team of experts sent by the US Environmental Protection Agency remained unconvinced that the spill had been effectively contained by Omai Gold Mines Limited. On 22 September, the team determined that, "there were still metals leaking into the Omai River. It is not apparent that the metals are from the mine and the increased levels upstream from the mine could be from historic mining activities, however the leak could be originating from the mine and moving through fractures in the rock." Harry L Allen and David W Charters, *Detailed Itinerary and Trip Report, Omai Mine Spill, Guyana*, 13-24 September 1995, p7.

381 Text of a national address by His Excellency President Cheddi Jagan on the Spillage at Omai Gold Mines, 22 August 1995. The government designated disaster zone included an estimated 23,000 residents. Subsequently, this figure was used in the class action suit attempted in Canada and the two subsequent legal actions in Guyana.

382 Text of a national address by His Excellency President Cheddi Jagan on the Spillage at Omai Gold Mines, 22 August 1995.

383 Some residents complained that water distribution as well as other assistance did not reach all, or did not reach all equally. Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p84.

384 Text of a national address by His Excellency President Cheddi Jagan on the Spillage at Omai Gold Mines, 22 August 1995.

385 Text of a national address by His Excellency President Cheddi Jagan on the Spillage at Omai Gold Mines, 22 August 1995.

386 The call was answered by several nations and international entities such as the Pan-American Health Organization, the Canadian International Development Agency, Health Canada, Natural Resources Canada, the US Environmental Protection Agency, and the United Nations Development Program.

387 The government relied on test results compiled by Omai Gold Mines Limited, the Guyana Agency for Health Sciences, Education, Environment and Food Policy, the University of Guyana, and the Guyanese Institute for Applied Science and Technology which showed that cyanide levels had dropped to levels below Canadian

drinking water standards of 0.2 parts per million. *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, pp8-14.

388 A newspaper had reported at the time that security guards at Omai Gold Mines Limited had been seen burying scores of dead fish on the mine site in the middle of the night. "Fishy tale at Omai", *Guyana Chronicle*, 29 May 1995.

389 In 1994, Omai Gold Mines Limited's chief metallurgist, Alexandra Kozak, told a group of mining experts at a gold mining conference in Caracas, Venezuela, that the existing tailings pond had filled to capacity faster than anticipated, necessitating a discharge of tailings slurry into the river. Alexandra Kozak, *Environmental Management Perspectives at Omai Gold Mine Limited*, October 1994, Omai Gold Mines Limited. In February 1995, Omai Gold Mines Limited amended its 1991 Environmental Impact Statement and in March 1995 it requested the government to grant permission to discharge tailings pond waste into the Essequibo river.

390 Robert Bazil, "Omai welcomes probe team move", *Guyana Chronicle*, 30 March 1995. Also see "Mining company's plan to dump cyanide studied", *The Edmonton Journal*, 2 April 1995, p15.

391 Prior to the 1995 spill, effluent in the tailings pond was not subject to special treatment. It was assumed that natural degradation of cyanide would allow for discharges into the Omai river within Canadian drinking water guidelines for cyanide concentration. As of 1996, the waste allowed to be released into the Omai river was pre-treated at the treatment facility plant built as a condition for reopening the mine after the 1995 spill.

392 Mohammed Khan, "Picketers call on Omai to cease use of cyanide", *Stabroek News*, 18 March 1995.

393 The decision was based on recommendations by the Walcott Commission, a team of experts formed by the government for the purpose of examining and advising on Omai Gold Mines Limited's request to discharge into the river. The Commission concluded that the amount of cyanide intended to be released under the proposal, at 8ppm, was significantly higher than an agreed upon 2ppm and advised against allowing the discharges over concerns for the environmental implications. *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p32.

394 The 1996 Commission of Inquiry report into the

August 1995 spill noted that a spill had occurred in May 1995 but refused to assign blame to the company, calling it an accident. *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, pp7, 56 (finding 13).

395 Robert Repetto, *Silence is Golden, Leaden and Copper: disclosure of material environmental information in the hard rock mining industry*, July 2004, Yale School of Forestry and Environment Studies, p8.

396 According to a survey completed by the Guyana Geology and Mines Commission, approximately 9,144 people resided in communities situated closest to the site of the Omai Gold Mines Limited spill. The 1996 Commission of Inquiry report suggested the population of the river was an estimated 10,000. *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p18. The number of residents allegedly affected by the Omai spill and on whose behalf legal actions were launched in Canada and Guyana reached 23,000, which included all riverian villagers from the Omai site to the mouth of the Essequibo river where it met the Atlantic Ocean.

397 United Nations Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995. Ton Vlugman (Pan American Health Organization (PAHO) and World Health Organization (WHO) Health and Environment Advisor), *Omai Gold Mine Ltd Cyanide Spill; Disaster Assessment Report*, 25 August 1995, PAHO/WHO, p1.

398 Omai Gold Mine Limited disputes the fact that any fish or other aquatic life died in the Essequibo River. Roy S Carson, "Cyanide River Disaster in Guyana", *Albion Monitor*, 2 September 1995.

399 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, Chapter 5. To document the particular impact of the spill on women, Ramessar carried out interviews with a large number of women in the two communities selected for her assessment, Riversview and Rockstone. All women interviewed said that the Essequibo river was their primary source of water for domestic use. Of the women surveyed in Riversview 80 per cent claimed to have used the river for domestic purposes at least 12 times per day prior to 1995 (p63).

400 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State.

401 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p75.

402 On 30 August 1995, Ambassador Odeen Ishmael, Guyana's representative to the Permanent Council of the Organization of American States in Washington DC, stated that the ban by Guyana's Caribbean Community and Common Market trading partners was "totally unwarranted and unfounded". He stated that fish were caught at a sufficient distance of 200-300 miles from the Omai gold mine and that any fish exports were tested for contamination by the Guyanese state. "It is clear", he concluded, "that there is no threat to health from fish exports originating from Guyana". The full statement is available at: www.guyana.org/Speeches/cyanide_oi.htm (accessed 28 October 2013). By October 1995, Jamaica and St Lucia had lifted the ban, whilst in October 1995 Barbados lifted the ban on seafood imports from Guyana. *Guyana Update*, A publication of the Embassy of Guyana, Washington DC, October 1995, available at: www.guyana.org/GuyNews/octnews1.htm (accessed 28 October 2013)

403 *Judith David and Elizabeth David v. Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*; the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No.867-W, Statement of Claim, 16 August 1999, para 50.

404 A small number of poor, female headed families interviewed (four families in Riversview and three families in Rockstone) claimed to have reduced their number of meals as a way of conserving resources. Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, pp92-3.

405 Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001, p4. At the encouragement of the Guyana Research Education and Environment Network (GREEN), an environmental organization formed to support the efforts of local villagers affected by the Omai spill, residents began

documenting these changes. Villagers believe that in 2000 a major discharge took place and held a press conference in Georgetown. Personal communication with US-based legal advisor Steven D Smith who provided legal support and advice to the Guyana Research Education and Environment Network (GREEN), 31 May 2010.

406 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p3.

407 Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia May 2003, thesis submitted to Virginia Polytechnic Institute and State University, pp91-92; Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001, p4.

408 Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001, p3, 5. United Nations Environment Programme, *Incidents- Omai Mine, Tailings Dam Failure, Guyana, August 1995*, Mineral Resources Forum report. Also see Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p4.

409 Although some local activists assert that some people died as a result of the spill, no official investigations into these allegations were conducted and there is no evidence that would corroborate the alleged deaths. A legal claim lodged in 2003 in Guyana against Omai Gold Mines Limited, Cambior and others claims that people died as a consequence of the spill, but it provides no further detail.

410 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p17.

411 Many riverian villagers showed their skin lesions to specialists and the media, but the lack of medical records on these lesions or assessments as to their cause makes it difficult to prove they are connected to water pollution. See for example, George Barclay, "Residents claim US\$100 million from Omai" and Sharon Lall, "Skin infections blamed on Omai spill", *The Guyana Chronicle*, 18 August 1999.

412 Ken Silver, *Toxicological report for Residents of Essequibo Riverian Communities*, 2001. Ken Silver is a

US toxicologist who was hired by the Guyana Research Education and Environment Network (GREEN) to assess the impact on the local communities of the 1995 spill and further discharges into the Essequibo river. Silver met with 200 residents in 10 communities within the disaster zone to discuss the Omai spill and its impact on their health. Residents reported skin and gastrointestinal problems after the August 1995 spill and Silver felt it plausible that the occasional reddishness of the Essequibo river reported by residents could coincide with a spike in symptoms and poor catches of fish being reported by the fishermen's co-op. Silver concluded that the health impacts he documented were consistent with mine pollution, although he did not assign blame specifically to the Omai disaster.

413 Letter from Riverian Residents of the Essequibo, Guyana, entitled *Declaration of Lawsuit against Omai, Cambior and Associated Parties*, 5 May 2003.

414 By 2000, five years after the disaster, no testing for the presence of heavy metals or for concentrated pockets of cyanide in the sediment of the Essequibo river had been conducted. Two scientists interviewed by *Stabroek News* on the fifth anniversary of the Omai spill, Dr David Singh, Director of the Guyana Institute of Applied Sciences and Technology, and Dr Joshua Ramasamy, Pro-Chancellor of the University of Guyana and former secretary of the Guyana Environmental Monitoring and Conservation Organisation, expressed their concerns in this regard. Andrew Richards, "A look at the massive cyanide waste spill at OGML five years later", *Stabroek News*, 9 September 2000. In his 2001 toxicological report, Ken Silver noted with concern that the red plumes often observed in the river had not been adequately studied. He was particularly concerned about possible arsenic poisoning, noting that many of the conditions reported by residents correlated with symptoms of arsenic poisoning rather than cyanide poisoning. In his view, the health impacts he documented were consistent with mine pollution. Ken Silver, *Toxicological report for Residents of Essequibo Riverian Communities*, 2001.

415 Office of the Prime Minister and Senior Minister Public Works, Communications and Regional Development, Press Release, 2 September 1995.

416 *Report of Commission of Inquiry Into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, Addendum; terms of reference, pp60-1.

417 Omai Gold Mines Limited's operations were closed for a total of six months, from August 1995 until

February 1996.

418 Embassy of Guyana, *Guyana Update*, October 1995, Washington DC, available at: www.guyana.org/GuyNews/octnews1.htm (accessed 28 October 2013)

419 Robert Ramraj, "The Omai disaster in Guyana", *Geographical Bulletin* 43, No.2, 2001, p89. The newspaper *Stabroek News* reported in September 1995 that Cambior's President Luis Gignac wrote a letter to Prime Minister Samuel Hinds suggesting the Commission complete its investigations within one month, allowing the company to resume operations by 1 December 1995. He is quoted as having written "Accordingly, it would be unfortunate given the financial and other interests of the government, Omai employees, Omai, and its respective stakeholders if Omai were prevented from resuming operations due to unfinished Commission business or for any other reason." "Omai ready to restart operations by December", *Stabroek News*, 21 September 1995. Also see Andrew McIntosh "Cambior lobbies Guyana's PM to reduce scope of Omai probe", *Montreal Gazette*, 28 September 1995.

420 Public Interest Research Associates (PIRA) Communications, *Cambior Puts Economic Gun to Commission's Head*, 27 September 1995.

421 Morgan Schmidt-Feng, Dennison Smith and Brad Marshland, *The Midas Curse: a tragedy of mythic proportions*, Berkeley, Canada, 1998, Video documentary, Pactolous River Productions.

422 Amnesty International communication with US-based legal advisor Steven D Smith (who provided legal support and advice to the Guyana Research Education and Environment Network (GREEN)), 31 May 2010, on the report that a representative of the World Bank's Multilateral Investment Guarantee Agency (MIGA) addressed the parliament and stated that the Bank would consider any new environmental regulations placed on the Omai gold mine as tantamount to nationalization. However, Smith explained that an official from MIGA appeared surprised at this account and told Smith that MIGA did not interfere in the internal affairs of member countries. Community leaders from affected communities later raised this issue in a letter dated 8 November 1999 to MIGA's Senior Advisor for Guarantees, Gerald T West, asking him to explain MIGA's position on the enactment of new environmental regulations in Guyana. Also see Tebtebba and Forest Peoples Programme, *Extracting Promises: indigenous peoples, extractive industries and the World Bank*, Baguio City, 2005, Tebtebba Foundation, p74. In a

meeting held at the Prime Minister's office on 30 October 1995, a MIGA representative is reported to have said that "the Cambior's insurance with EDC [Export Development Canada] and reinsurance by MIGA covered indirect expropriation which might [unintelligible] frustration of the benefit of the bargain." Working People's Alliance, minutes of meeting held at the office of the Prime Minister, 30 October 1995.

423 Dam Review Committee, *Preliminary Report – Omai Tailings Dam Failure*, 16 November 1995, section 4.0 "Implications for Existing and Proposed Structures".

424 Dam Review Committee, *Final Report on Technical Causation Omai Tailings Dam Failure*, January 1996, p33.

425 UN Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995, p10, and Harry L Allen and David W Charters, *Detailed Itinerary and Trip Report, Omai Mine Spill, Guyana*, 13-24 September 1995, p5.

426 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p18.

427 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p16.

428 This hypothesis is strongly contested in Ken Silver's toxicological report. The lack of overall baseline data on environmental or human health conditions in areas nearest to the mine prior to the spill made it very difficult to understand the interrelation between old and new contamination, as well as between contamination and local poverty and their separate or combined effects on human health. The lack of sufficient baseline data on ground-water quality and the presence of heavy metals in the environment would later complicate negotiations between lawyers on whether and how to deal with the impacts of the Omai spill. Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001.

429 The Socio-Economic Survey was later criticized by Candice Ramessar whose own impact assessment study revealed very different results. She argues that in some cases the sample surveyed was less than 10 per cent of the population (only 2 per cent of the population in Bartica, for example). She further warns that questions may have been difficult to interpret by a majority of residents who only had primary education, and that the multiple-choice questionnaires included some vague answers or offered no alternatives for those who did not agree with any of the choices. Finally, she maintains that the results were

inaccurate because they assumed that un-surveyed populations did not suffer losses. Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p36.

430 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p56.

431 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, p54.

432 UN Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995, p10, and Harry L Allen and David W Charters, *Detailed Itinerary and Trip Report, Omai Mine Spill, Guyana*, 13-24 September 1995.

433 This was an issue the opposition party, the Working People's Alliance, was particularly angry about, stating that the Commission's report had failed to condemn Omai Gold Mines Limited for negligently endangering the safety and security of residents of the Essequibo river basin. Robert Ramraj, "The Omai disaster in Guyana", *Geographical Bulletin*, Vol 43, No.2, 2001, p88.

434 The effluent treatment plant would treat the tailings pond effluent before releasing it into the Essequibo river.

435 *Report of Commission of Inquiry into Discharge of Cyanide and other Noxious Substances into the Omai and Essequibo Rivers*, 5 January 1996, pp57-9.

436 Problems associated with the lack of capacity and resources of both the Environmental Protection Agency and the Guyana Geology and Mines Commission were reported in a study on Amerindians and mining published by the North-South Institute in 2002. Marcus Colchester, Jean La Rose and Kid James, *Mining and Amerindians in Guyana: final report of the APA/NSI project on "Exploring Indigenous Perspective on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean"*, 2002, North-South Institute/L'Institut Nord-Sud, 2002, p39.

437 Critics have pointed out that Omai Gold Mines Limited paid for equipment for the Environmental Protection Agency and trained their staff, potentially compromising the agency's capacity to operate autonomously. Lead plaintiff Elizabeth David similarly questioned the extent to which the government was in a position to perform its regulatory role independently when the very laboratory tasked with carrying out testing at Omai was funded and trained by the company it was

supposed to monitor. Elizabeth David, Amnesty International interview, 23 June 2010. In 1997 Cambior reported that it donated C\$100,000 to a regulatory agency in Guyana “for equipment and laboratory facilities to improve the government’s environmental monitoring capability”. Cambior, *Environment, Health and Safety Report*, 1997, p15, available at: www.corporateregister.com/a10723/cam97-ehs-ca.pdf (accessed 28 October 2013)

438 “Omai apologizes”, *Stabroek News*, 30 August 1995. According to this article, affected communities were outraged by the reference to the spill as an “industrial accident”.

439 Judith David, *Women Transform the Mainstream*, presentation at UN Division for Sustainable Development: Day of Women at CSD-6, New York, 20 April 1998, pp34-40. Also see Phillip Preville, “Coming home to roost”, *Montreal Mirror*, March 1997.

440 C\$1 = US\$0.7423 (rate during September 1995), available at: www.oanda.com/currency/historical-rates (accessed 28 October 2013). US Department of State, *Guyana Human Rights Practices*, 1995, March 1996, available at: dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_ara/Guyana.html

441 Andrew McIntosh, “Cambior pays off poor Guyanese at \$150 a pop”, *The Montreal Gazette*, 9 September 1995.

442 Andrew McIntosh, “Cambior pays off poor Guyanese at \$150 a pop”, *The Montreal Gazette*, 9 September 1995.

443 Robert Ramraj, “The Omai disaster in Guyana”, *Geographical Bulletin*, Vol 43, No.2, 2001, p88. Patricia Adams, executive director of Canada-based Probe International was quoted as saying, “It’s unconscionable to try and cap their liability at a time when the long-term impacts caused by the spill remain unknown.” Andrew McIntosh, “Cambior pays off poor Guyanese at \$150 a pop”, *The Montreal Gazette*, 9 September 1995.

444 GY\$1 = US\$0.0070 (rate during September 1995), available at: www.oanda.com/currency/historical-rates (accessed 28 October 2013)

445 Interview with woman at fish market. *Omai Gold Mine: a continuing disaster*, 2003, Spotlight video production.

446 GY\$ 1 = US\$0.0056 (year average for 2002), available at: www.oanda.com/currency/historical-rates/ (accessed 28 October 2013)

447 Interview with a logger in Riversview. Candice Ramessar, *Water is More Important than Gold: local impacts and perceptions of the 1995 Omai cyanide spill, Essequibo River, Guyana*, Virginia, May 2003, thesis submitted to Virginia Polytechnic Institute and State University, p88.

448 Golden Star Resources, *Annual Report*, 1999, pp34-5. Class actions were not possible under the Guyanese legal system at the time, so it is likely that this statement was referring to the institution of a representative action.

449 According to the Québec Court’s August 1998 judgment, at least 900 individuals had complained in Guyana against Omai Gold Mines Limited (OGML). Of these claims, 225 appeared to have already been settled and a further 250 legal claims were pending. *Recherches Internationales Québec v. Cambior Inc., Home Insurance and Golder and Associates Limited* [1998] QJ No.2554, Québec Super Ct, 14 August 1998, p28. An online report by the InterNet Bankruptcy Library (IBL) suggests that by 2002 OGML had settled over 95 per cent of 522 writs representing 881 claimants. Cambior, “Guyana court dismiss \$100 M suit over Omai dam failure”, in IBL, *Class Action Reporter*, 26 February 2002, Vol 4, No.40, available at: bankrupt.com/CAR_Public/020226.MBX (accessed 28 October 2013). However, it is not clear who benefitted from these settlements, how they were negotiated or how much was paid.

450 In the period immediately preceding the Omai spill, local media reported that the Omai mine had not yet become profitable. “Delay in Omai payments may cost government US\$78 million”, *Stabroek News*, 9 March 1995. Also see Roger Moody, *Swords in the Shield: Canada’s Invasion of the Guyanas*, a Report for the Amerindian Peoples Association of Guyana, June 1995.

451 US Department of State, *Guyana Country Report on Human Rights Practices for 1996*, released 30 January 1997, available at: www.state.gov/www/global/human_rights/1996_hrp_report/guyana.html (accessed 28 October 2013)

452 *Recherches Internationales Québec v. Cambior Inc*, (later *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*), [1998] QJ No.2554, Québec Super Ct, 14 August 1998, *Motion for Authorisation to Institute a Class Action* (Articles 1002 ff, CCP), No.500-06, 21 February 1997. Home Insurance was the private provider of insurance for Omai Gold Mines Limited (OGML), while Golder associés Ltée was the engineering

company that assisted OGML during the latter phase of the design and construction of the tailings dam.

453 The fear and anxiety generated by the knowledge of the presence of cyanide in the river was compounded by the villagers' memory of the 1977 Jonestown mass suicides in which cult members ingested cyanide. *Recherches Internationales Québec v. Cambior Inc.*, (later *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*), [1998] QJ No.2554, Québec Super Ct, 14 August 1998, *Motion for Authorisation to Institute a Class Action* (Articles 1002 ff, CCP), No.500-06, 21 February 1997, p3.

454 *Recherches Internationales Québec v. Cambior Inc.*, (later *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*), [1998] QJ No.2554, Québec Super Ct, 14 August 1998, *Motion for Authorisation to Institute a Class Action* (Articles 1002 ff, CCP), No.500-06, 21 February 1997, p6.

455 See a definition of the corporate veil under *Key Legal Principles* in the glossary of this book. Under this doctrine, Omai Gold Mines Limited (OGML) liabilities would not automatically be imputed to Cambior by virtue of Cambior's shareholding in OGML. See more on this issue in section 1.4 *Theories of liability* and 2.1 *The corporate veil*, in the *Legal Challenges* chapter of this book. Also see 1 *Lifting the corporate veil* in the *Legal hurdles to extraterritorial action* section of the same chapter.

456 *Recherches Internationales Québec v. Cambior Inc.*, (later *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*), [1998] QJ No.2554, Québec Super Ct, 14 August 1998, *Motion for Authorisation to Institute a Class Action* (Articles 1002 ff, CCP), No.500-06, 21 February 1997, pp3-6.

457 Defendant's Declinatory Exception, 7 July 1997. Also see *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents* [1998] QJ No.2554, Québec Super Ct (Class Action), 14 August 1998, pp6-8. Arguments for and against Cambior's liability were put forward by the two parties, but this issue was never examined and decided upon by the Court. See further, Francois Shalom, "Decision not ours: Cambior CEO; President Gignac insists Omai Gold Mines called shots in Guyana", *The Gazette*, 3 June 1998.

458 *Forum non conveniens* is a doctrine that allows

courts to decline jurisdiction on the basis that the venue chosen by the claimant is not the most appropriate venue for proceedings. Cambior argued that the residence of the parties, the location of witnesses, the location of harm and the location of assets suitable for covering costs should Omai Gold Mines Limited be found liable were all in Guyana and that the suit should be heard there. It also argued that any mandatory injunction approved in Québec would have to be enforced in Guyana, making Guyana's courts a more reasonable forum to hear and enforce any potential decision.

459 While Cambior argued that the Guyanese legal system was adequate to hear the case, it insisted that the pre-trial examination of evidence be held in the United States. Dermot Travis from Public Interest Research Associates (PIRA) Communications believes Cambior wanted to avoid pre-trial being held in either Montreal or Georgetown, because of the potential 'media frenzy' that would be generated in its home country if pre-trial were held in Montreal and, importantly, because the deficiencies of the Guyanese legal system would be revealed if pre-trial were held in Georgetown. Travis explains that one of the challenges the Guyanese courts faced in 1997 was the lack of professional stenographers. In his opinion, Cambior would not risk exposing this lack of technical capacity to hear evidence by allowing Discovery to be heard in Guyana. Pre-trial was held in Miami, USA. *Recherches Internationales Québec v. Cambior Inc, Home Insurance and Golder and Associates Limited* [1998] QJ No.2554, Québec Super Ct, 14 August 1998. Dermot Travis, Amnesty International interviews, May 2010 and June 2012.

460 William Schabas was an international human rights law expert who at the time of the case was a professor at the Québec University in Montreal and a member of the Québec Human Rights Commission.

461 Quoting the UN Human Rights Committee's 6th Annual Report to the General Assembly, para 259, UN Doc CCPR/SR.352, para 28, 34; and UN Doc CCPR/SR.354, para 12. Affidavit of William Anthony Schabas, 18 October 1997. A Harvard Law Review paper that looked into the Omai case years later also raised concerns about the Guyanese legal system, stating "Not only is the system slow to act, with actions taking as many as ten years to be heard, but the courts often fail to keep written records." International Human Rights Clinic, *All that Glitters: Gold Mining in Guyana. The failure of government oversight and the human*

rights of Amerindian communities, Cambridge, Massachusetts, March 2007, Human Rights Program, Harvard Law School, p39.

462 In 1994, a team of senior Guyanese lawyers was tasked by President Cheddi Jagan with preparing a memo on improving the country's legal system. The memo began, "The administration of law in Guyana has reached a state of collapse" and went on to list bribery, incompetence, and a lack of proper record-keeping and documentation as major concerns. *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*, Affidavit of William Anthony Schabas, 18 October 1997.

463 William Schabas highlighted the low salaries received by judges in Guyana and the difficulties this engendered in recruiting top lawyers to the bench. He warned that the Guyanese courts did not appear to have experience with technical litigation involving scientific evidence such as would be required in the Omai case, and noted the lack of equipment such as an absence of court reporters to record proceedings. He noted that only judge's instructions to the jury would be taken down in stenography. "During trials," he stated, "judges are required to take down the evidence in handwritten notes." He pointed out that judicial decisions had not been reported and published in a systematic way since the early 1970s. All in all, Schabas found that the system was at the point of collapse, lacking in judicial independence, rife with procedural delays, and a deteriorating infrastructure. *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*, Affidavit of William Anthony Schabas, 18 October 1997.

464 *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*, Affidavit of William Anthony Schabas, 18 October 1997, "Conclusion" para 57.

465 *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents*, Affidavit of Kenneth George, 12 December 1997. His statements were corroborated by other jurists who testified in the case.

466 *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents* [1998] QJ No.2554, Québec Super Ct. (Class Action), 14 August 1998.

467 *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés Ltée, co-respondents* [1998] QJ No.2554, Québec Super Ct.

(Class Action), 14 August 1998, p43.

468 Dermod Travis, from Public Interest Research Associates (PIRA) Communications, Amnesty International interview, 31 June 2009. Dermod Travis also explained that as the judge's decision was largely opinion based, the claimants could not find a clear error of law on the basis of which they could appeal. For the impact of the application of *forum non conveniens* on claimants' right to remedy, see section 2.2 *Exercising jurisdiction: forum rules* in the *Legal Challenges* chapter of this book.

469 A local lawyer represented the riverian residents in Guyana. A Writ of Endorsement was filed on 18 August 1998 on behalf of Judith and Elizabeth David and all persons, "residing, using, working, fishing or possessing property within the Riverian area of the Banks of either and/or the Omai and/or Essequibo Rivers and its tributaries" between the Omai Gold Mines Limited site and the Atlantic Ocean. *Judith David and Elizabeth David v. Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*; the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No.867-W, Statement of Claim, 16 August 1999.

470 The plaintiffs claimed: (i) GY\$50 million dollars (approximately US\$345,000 at the time) for loss and damages resulting from the storage of "harmful, poisonous, and noxious substances, namely cyanide tailings slurry" on the banks of the Omai river; (ii) GY\$50 million dollars for loss and damages resulting from the pollution and contamination of the Omai and Essequibo rivers, rendering them dangerous to human health and the environment; (iii) GY\$50 million dollars for nuisance, "caused by the escape of a substantial quantity of harmful, poisonous, noxious substance, namely cyanide tailing slurry which escaped or spilled on or about the 19th day of August, 1995". *Judith David and Elizabeth David v. Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*; the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No.867-W, 1998 Writ of Endorsement, pp3-4. The equivalent in US dollars is based on the exchange rate of GY\$1 = US\$0.0069 (rate during August 1998), available at: www.oanda.com/currency/historical-rates (accessed 28 October 2013)

471 *Judith David and Elizabeth David v. Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*; the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No.867-W, Statement of Claim, 16 August 1999, pp15-16.

472 Guyana, with a population of approximately 800,000 people, had relatively few lawyers, in particular senior lawyers, capable of managing a representative action of the scale of the Omai suit. In his affidavit to the Québec Superior Court, Professor William Schabas had noted that the actual number of practising lawyers in Guyana had declined considerably over the years and that, at the time of his affidavit, he was told that only about 200 members of the Guyana bar were acting before the courts. *Recherches Internationales Québec v. Cambior Inc and Home Insurance and Golder associés ltée, co-respondents*, Affidavit of William Schabas, 18 October 1997, para 48.

473 US-based legal advisor Steven D Smith who provided legal support and advice to the Guyana Research Education and Environment Network (GREEN), personal communication with Amnesty International, 31 May 2010.

474 *Judith David and Elizabeth David v. Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*; the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No.867-W, Affidavit of Summons, Norman McClean for Omai Gold Mines Limited, 19 August 1999 and Affidavit of Summons, Pierre Chenard for Cambior, 18 October 1999.

475 It appears that in 1998 the lawyer who first acted on behalf of the communities filed an application for a non-personal delivery of an amended Writ of Summons to be served on all the defendants domiciled outside of Guyana, including Cambior and Golden Star Resources. The application was granted on 2 July 1999. By this time, the plaintiffs had dismissed their lawyer, and had notified the Guyana High Court of the change in attorney. Notice of Change of Attorney-at-Law, 3 May 1999. A few days after this notification, on 14 May 1999, lead plaintiff Judith David filed an application seeking the same permission for non-personal delivery, Ex-Parte Application by Way of Affidavit for Service out of the Jurisdiction. In the Matter of Order 9, Rule 1 (f) Rules of the Supreme Court, Laws of Guyana, 24 May 1999. An apparent breakdown in communication between the lawyer and the plaintiffs after the former had been fired is blamed for the duplication. The repeated filing may have led to the request being served twice on Omai Gold Mines Limited.

476 US-based legal advisor, Steven D Smith, had been providing legal support and advice to the Guyana Research Education and Environment Network (GREEN), an environmental organization formed to support the efforts of local villagers affected by the Omai

spill. In early 2000, the communities' local lawyers asked Smith if GREEN would support them in voluntarily dropping the defendants domiciled outside of Guyana from the case. Smith advised against it, convinced that the foreign defendants, and Cambior in particular, had to remain part of the action for a just resolution of the case. Steven D Smith, personal communication with Amnesty International, 31 May 2010, p10.

477 Judgment, Honourable Justice N Kissoon, in Chambers, 28 March 2000.

478 Peter Britton, a senior Guyanese attorney with no connection to Omai Gold Mines Limited, was hired. He represented the riverian residents for the duration of the case. US-based legal advisor Steven D Smith who provided legal support and advice to the Guyana Research Education and Environment Network (GREEN), personal communication with Amnesty International, 31 May 2010, p10.

479 The lack of proper record-keeping within the Guyanese judiciary had been highlighted by Professor William Schabas in his testimony to the Québec Court. According to Dela Britton, a senior attorney based in Georgetown and daughter of the late Peter Britton who represented the riverian residents, no written records of decisions arising from the two legal actions launched by riverian residents in Guyana exist. She explained that the High Court of Guyana has not issued a written decision since 1975; all judgments are verbal. They do keep minutes books, but these are not public. Only Courts of Appeal issue written judgments. Dela Britton, Amnesty International interview, 4 June 2010. This problem is also reported by the International Human Rights Clinic, *All that Glitters: Gold Mining in Guyana. The failure of government oversight and the human rights of Amerindian communities*, Cambridge, Massachusetts, March 2007, Human Rights Program, Harvard Law School, p39.

480 *Judith David, Richard Bowens, and Lilmattie v. Cambior Inc, Golder associés ltée and Associates, Home Insurance, and Omai Gold Mines Limited, Knight Piesold, Golden Star Resources, The Attorney General on Behalf of government of Guyana/Ministry of Public Works, JP Morgan Canada, the Royal Bank of Canada, Societe Generale Canada, Credit Lyonnais, Banque ABN AMRO NV SUCC Du Canada, National Bank of Canada and Citibank of Canada*, the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, Civil Jurisdiction.

481 Letter from Riverian Residents of the Essequibo, Guyana, entitled *Declaration of Lawsuit against Omai*,

Cambior and Associated Parties, 5 May 2003.

482 Judith David, Richard Bowens, and Lilmattie v. *Cambior Inc, Golder associés ltée and Associates, Home Insurance, and Omai Gold Mines Limited, Knight Piesold, Golden Star Resources, The Attorney General on Behalf of government of Guyana/Ministry of Public Works, JP Morgan Canada, the Royal Bank of Canada, Societe Generale Canada, Credit Lyonnais, Banque ABN AMRO NV SUCC Du Canada, National Bank of Canada and Citibank of Canada*, the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, Civil Jurisdiction. para 21(l).

483 US-based legal advisor Steven D Smith who provided legal support and advice to the Guyana Research Education and Environment Network (GREEN), personal communication with Amnesty International, 31 May 2010, p11.

484 A case of this nature and scale was unprecedented in Guyana. As explained to Amnesty International by US-based legal advisor Steven D Smith, it was charting new ground for everyone. There was little expertise on environmental cases in Guyana at the time. In addition, the local lawyer representing the residents faced significant operational challenges such as the difficulties in accessing relevant information. Steven D Smith, personal communication with Amnesty International, 31 May 2010.

485 There is no record of this decision in the High Court's files, and it appears that the decision was issued verbally by the presiding judge. In the absence of a written decision, the reasons for the dismissal were emailed to Amnesty International from the case file notes made by the late Peter Britton in June 2010.

486 As with the former claim, many aspects of this new claim were obscure. Judith David explained to Amnesty International that she received a letter from the High Court of Guyana requesting that both Judith and her sister, Elizabeth, appear in court in June 2009 to decide on the Omai claim. This was three years after the second lawsuit had been dismissed. The letter stated that failure to appear would result in the case being dismissed. The Plaintiffs were unsure about what the letter referred to since, to their knowledge, both representative actions had been dismissed years before.

487 In 2013 the World Bank categorized Papua New Guinea as a "lower middle income" country. It estimates that 37.5 per cent of the population lives below the national poverty line. Data available at: data.worldbank.org/country/papua-new-guinea

(accessed 17 October 2013). Up until 2012, Papua New Guinea was rated as a "low-income economy", placing it in the group of poorest countries in the world. United Nations Development Programme, *MDG Coordination and Implementation Programme, Project Fact Sheet*, 2011, available at:

www.undp.org.pg/docs/projects/PROJECT_BRIEF_MDG.pdf (accessed 28 October 2013). According to the United Nations Development Programme's "International Human Development Indicators" (which measure three basic dimensions of human development: health, education and income), PNG ranks 156 out of 187 countries with comparable data. A graph showing the trend from 1980 to today indicates that the country has consistently remained below the regional average and along the "low human development" line since at least 1980, available at:

hdrstats.undp.org/en/countries/profiles/PNG.html (accessed 17 October 2013)

488 In 1982 the mining and petroleum sector only accounted for 8 per cent of GDP, but by 1992 it had risen to 20 per cent, rising again to 25 per cent by 1996 at which point export earnings in the sector had reached 68 per cent of the country's total export earnings. Ainsley Harper and Mark Israel, *The Killing of the Fly: state-corporate victimisation in Papua New Guinea*, Working Paper No.22, Australia, 1999, Australian National University, Resource Management in Asia-Pacific Project. In 2002 the mining sector contributed an estimated 15.5 per cent of the nation's GDP, the petroleum sector contributed about 9 per cent and 70 per cent of Papua New Guinea's export income was derived from these two sectors. Travis Q Lyday, *The Mineral Industry of Papua New Guinea*, 2002, available at: minerals.usgs.gov/minerals/pubs/country/2002/ppmyb02.pdf (accessed 17 October 2013)

489 According to Ok Tedi Mining Limited (OTML), the Ok Tedi mine is the single largest business contributor to the economy of both the Western Province and Papua New Guinea. In 2010, OTML's export earnings represented 18 per cent of the country's GDP, whilst in 2007 export sales represented approximately 32 per cent of Papua New Guinea's total exports, and contributed 22.9 per cent of the country's GDP. See the *OTML at a Glance* section of the OTML website, available at: www.oktedi.com/index.php?option=com_content&view=article&id=49:otml-at-a-glance&catid=44:website-content&Itemid=58 (accessed 17 October 2013)

490 BHP commenced operations with a 30 per cent stake in OTML. In 1987, BHP became the operator of

the mine. In 1993, the company's shareholding moved from 30 to 60 per cent. In 1998, BHP transferred 8 per cent ownership to the Papua New Guinea government. BHP finally withdrew from the business, with equity transferred to PNG Sustainable Development Program Limited, in 2002. For more on the history of OTML see the *Key Historical Dates* section of their website available at: www.oktedi.com/index.php?option=com_content&view=article&id=52&Itemid=61 (accessed 17 October 2013)

491 BHP merged with Billiton Plc on 15 June 2001. See Billiton's chronology available at: www.bhpbilliton.com/home/aboutus/ourcompany/Documents/2012/Billiton%20Chronology_May%202012.pdf (accessed 17 October 2013)

492 The Papua New Guinea government took an initial 20 per cent shareholding in OTML. In 1998, it acquired an additional 10 per cent shareholding held on behalf of the people of the Western Province. See the *Key Historical Dates* section of the OTML website available at: www.oktedi.com/index.php?option=com_content&view=article&id=52&Itemid=61 (accessed 17 October 2013)

493 The original consortium partners included America's Amoco Minerals Corporation and a German industrial conglomerate with a 30 and 20 per cent interest respectively. Inmet Mining Corporation acquired 20 per cent as the Canadian subsidiary of one of the original German partners in the early 1990s. In 1998 it transferred 2 per cent to the Papua New Guinea government, retaining 18 per cent in OTML.

494 See the *OTML at a Glance* section of the Ok Tedi Mining Limited website, available at: www.oktedi.com/index.php?option=com_content&view=article&id=49:otml-at-a-glance&catid=44:website-content&Itemid=58 (accessed 17 October 2013)

495 Mining (Ok Tedi Agreement) Act, 1976.

496 The mine wastes comprise waste rocks from the mine, limestone that is deliberately mined and dumped into the water to limit the production of sulphuric acid (acid rock drainage) and tailings from the copper concentrate plant. Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007, p5. Tailings are the materials left over after the process of separating the valuable fraction from the uneconomic fraction of an ore. Mine tailings are usually produced from the mill in slurry form (a mixture of fine mineral particles and water). For more information see www.tailings.info/ (accessed 17 October 2013)

497 United Nations Economic and Social Council, *Safety*

Guidelines and Good Practices for Tailings Management Facilities, UN Doc ECE/CP.TEIA/2008/9, 12 August 2008, available at:

www.unece.org/fileadmin/DAM/env/documents/2008/TEIA/ECE_CP_TEIA_2008_9E.pdf (accessed 17 October 2013). A 1979 feasibility study recommended that a permanent tailings dam should be built for the treatment or disposal of wastes and tailings on the Ok Ma river, a tributary of the Ok Tedi. Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p2. In 1983 construction of the tailings dam began on the Ok Ma, about 15km south of the mine. See Mining, Minerals and Sustainable Development, *Mining for the Future Appendix H: Ok Tedi riverine disposal case study*, April 2002, p7, a report commissioned by the International Institute for Environment and Development.

498 Mining (Ok Tedi Agreement) Act as modified by the Fifth and Sixth Supplemental Agreements. The obligation to construct a permanent waste storage facility was deferred until January 1990. See Mining, Minerals and Sustainable Development, *Mining for the Future Appendix H: Ok Tedi riverine disposal case study*, April 2002, p8, a report commissioned by the International Institute for Environment and Development. Also see Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p2.

499 OTML environmental study on the basis of which the government supposedly took this decision was not made public. Amnesty International requested a copy of this study from OTML in September 2009 and July 2012 and from BHP Billiton in July 2010 and July 2012, but neither was able to provide a copy. For further details on the tailings containment, see J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds) *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p147. Instead of requiring a tailings dam, the government chose to establish an "Acceptable Particulate Level" limit and OTML was required to monitor and report to the government on the mine's environmental impact on the river system. Mining, Minerals and Sustainable Development, *Mining for the Future Appendix H: Ok Tedi riverine disposal case study*, April 2002, p8, a report commissioned by the International Institute for Environment and Development.

Also see L Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p4.

500 According to OTML, this is equivalent to around 90 million tonnes of mine waste per year. See the *Impacts of Mining* section of the OTML website available at: www.oktedi.com/index.php?option=com_content&view=article&id=79&Itemid=88 (accessed 17 October 2013). Although the annual volume of waste has varied over the years, it has always remained high.

501 It is estimated that about 50,000 people have been directly affected by the mine. See the *People* section of the OTML website available at: www.oktedi.com/index.php?option=com_content&view=article&id=69&Itemid=78 (accessed 17 October 2013). Also see Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007, p5.

502 Numerous studies have been carried out over the years that document the adverse environmental and social impact of the mine, including Stuart Kirsch, "Social impact of the Ok Tedi mine on the Yonggom Villages of the North Fly, 1992," *Ok Fly Social Monitoring Programme Report No.5*, July 1993 and Bill Townsend (engineer working for the PNG government and involved in the mine negotiations) "Giving away the river: environmental issues in the construction of the Ok Tedi mine, 1981-84," in J C Pernetta (ed), *Potential Impacts of Mining on the Fly River*, 1988, available at: www.unep.org/regionalseas/publications/reports/RSRS/pdfs/rsrs099.pdf (accessed 17 October 2013). In 1993 the Australian Conservation Foundation published a detailed report highlighting the environmental and social impacts caused by the disposal of the mine's waste rock into the Ok Tedi river. Helen Rosenbaum, *Report on the impacts of the Ok Tedi mine in Papua New Guinea*, Melbourne 1993, Australian Conservation Foundation. More recent reports include Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007.

503 Surveys suggest that the number of fish species may have declined by as much as 30 per cent, with some areas experiencing a decline of between 60 and 95 per cent. Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007, p33.

504 Sago is a powdery starch made from the processed pith found inside the trunks of the sago palm. Sago is a staple food source in the region. Peter S Adler, Janesse

Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, pi.

505 Alan Tingay, Letter of Endorsement, 16 April 2007, in attachment "B" of the *Memorandum of Agreement. Outcome of the 2006/07 CMCA Review*, 29 June 2007.

506 See Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007, pp16-17. Alan Tingay was hired as an independent scientist by the Working Group of the Community Mine Continuation Agreements (CMCAs) to advise community leaders on the environmental and health impacts of the mine (see more on the CMCAs under the heading of Community Mine Continuation Agreements in the Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea case study in this book). In June 2006, he began his study based on reviews of scientific research by OTML, BHP and independent researchers.

507 Many villagers interviewed by Amnesty International said they were scared of using the river water and wished they were provided with permanent sources of potable water. Some villagers, as well as local health workers, said that many local people suffer from skin sores and itchiness believed to be caused by contact with the river water. One health worker interviewed by Amnesty International also said that cases of diarrhoea increase during flooding. Amnesty International interviews, September 2009.

508 Betrut Ambetu, Amnesty International interview, 25 September 2009.

509 In his letter of endorsement dated 16 April 2007, Alan Tingay explains that very little, if anything can be done to mitigate the existing environmental impacts. The large quantity of waste discharged since the beginning of mine operations cannot be removed. The waste will continue to be transported downstream and accumulate in the main river channels, off-river lagoons and lakes. Alan Tingay, Letter of Endorsement, 16 April 2007, in attachment "B" of the *Memorandum of Agreement. Outcome of the 2006/07 CMCA Review*, 29 June 2007.

510 Ian Wood, OTML Environment Manager from 1992 to 1995 (currently BHP Billiton's Vice-President for Community Relations and Sustainability), explained to Amnesty International that OTML was requested to monitor a number of environmental indicators and report to the government on an annual basis. He explained that the monitoring programme did not intend to look at the effect of environmental impacts on people's "quality of

life", as there was no evidence to suggest a reason to do so. However, monitoring would indirectly look at the impact on people through indicators such as fish catches, metal levels in fish or aggradation. Ian Wood, Amnesty International interview, 9 September 2009.

511 Quoted in Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute," *Melanesian Law Journal*, 1 January 1997, p1.

512 According to OTML, a tailings containment facility was not feasible given the unstable terrain, geological formations and very high rainfall of the region. See the *Managing Mine Waste* section of the OTML website, available at: www.oktedi.com/index.php?option=com_content&view=article&id=80&Itemid=89 (accessed 17 October 2013). Many believe that it was the cost of building the dam and the impact this would have had on the project's economic viability which was at the heart of the company's position. See C Filer, "West side story: the state's and other stakes in the Ok Tedi mine", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p58. Also see J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, pp142, 147. Ian Wood, OTML's Environment Manager from 1992 to 1995 (currently BHP Billiton's Vice-President for Community Relations and Sustainability), told Amnesty International that many alternative sites for a tailings dam were examined, but none of them appeared technically feasible. He admitted that with enough money an alternative tailings containment option might have been available, but that this would have been unaffordable to the mine and would have likely led to its closure. Amnesty International interview, 7 September 2009.

513 The 1988 Dome Petition from the Yonggom People, reproduced and translated in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, Appendix 2, p221.

514 Gabia Gagarimabu, local landowner from the village of Sepe, and lead plaintiff in the 2000 enforcement proceedings against BHP and OTML, told Amnesty International that they decided to bring their concerns to the company and first met with company representatives

in Sepe, in 1987. He recalls how in this meeting the company challenged his assertion that the mine was polluting the rivers. Amnesty International interview, 29 September 2009. For an account of direct action, petitions, letters of complaint and demonstrations see John Burton, "Terra Nugax and the Discovery Paradigm: how Ok Tedi was shaped by the way it was found and how the rise of political process in the North Fly took the company by surprise," in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia 1997, National Centre for Development Studies: Australian National University and J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, pp27, 141.

515 J Gordon, "Environmental Litigation, the Ok Tedi Experience", *A Guide to Environmental Law in Western Australia: Proceedings of the EDO's inaugural seminar, A community guide to environmental law in WA*, 1997, Environmental Defenders Office, p18; J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University; Brian Brunton, lawyer who took over from Slater & Gordon, Amnesty International interview, 6 May 2009.

516 Slater & Gordon agreed to take on the case on a fee deferred basis. J Gordon, barrister, Amnesty International interview, 14 September 2009.

517 J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p151. The cases were: No.5782 of 1994 *Rex Dagi and Others v. The Broken Hill Proprietary Company Limited (CAN 004 028 077) and Ok Tedi Mining Limited*; No.5980 of 1994 *Barry John Shackles and Daru Fish Supplies Pty. Ltd. v. The Broken Hill Proprietary Company Limited (CAN 004 028 077) and Ok Tedi Mining Limited*; No.6861 of 1994 *Baat Ambetu and Others v. The Broken Hill Proprietary Company Limited (CAN 004 028 077) and Ok Tedi Mining Limited*; and No.6862 of 1994 *Alex Maun and Others v. The Broken Hill Proprietary Company Limited (CAN 004 028 077) and Ok Tedi Mining Limited*. Further writs were filed in the National Court in Port Moresby in September 1994 against Broken Hill Proprietary Company Limited and the PNG government. The main purpose of

the PNG filings was to prevent the statutes of limitation from barring the villagers' claims. J Gordon, barrister, Amnesty International interview, 14 September 2009.

518 Concerns related to the adequacy of the laws, the sufficiency of compensation amounts the courts could award and the almost certain excessive duration of the litigation. Dair Gabara, local lawyer, Amnesty International interview, 30 September 2009 and J Gordon, barrister, Amnesty International interview, 14 September 2009.

519 *British South Africa Co v. Companhia de Moçambique* [1893] A C 1 602.

520 "Loss of amenity" is a form of non-financial harm suffered by a claimant and for which they are entitled to recover damages, such as the loss of enjoyment of quality of life, (for example, the loss of the enjoyment of land).

521 Ok Tedi Eighth Supplemental Agreement. If approved, it would have been endorsed by a new law called the Mining (Ok Tedi Eighth Supplemental Agreement) Act 1995.

522 This compensatory regime envisaged a fixed amount of money which would cap the total amount due to villagers and limit what could have been a much larger award if determined by the courts.

523 Broken Hill Proprietary Company Limited (BHP) solicitors' reference could be read at the bottom of a draft of the bill which was faxed to Slater & Gordon's offices. J Gordon, barrister, Amnesty International interview, 14 September 2009. BHP's involvement in drafting the legislation gave rise to a contempt of court action in the Supreme Court of Victoria.

524 *Dagi, Rex & Ors v. BHP Ltd & Ok Tedi Mining Ltd*, Supreme Court of Victoria, unreported, 27 September 1995 (case No.5782 of 1994, Judgment on Contempt of Court).

525 These findings were based on a series of documentary and testimonial evidence, including drafts of the agreements negotiated between Broken Hill Proprietary Company Limited (BHP) and the PNG government, testimonies regarding BHP solicitors' input into the drafts, and copies of the drafts bearing the solicitors' reference in their word processing format. For the full text of the judgment see: vsc.sirsidynix.net.au/Judgments/Civil/1990+/492814.pdf (accessed 17 October 2013). For a personal account of the issue, see J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development

Studies: Australian National University, p157.

526 *The Broken Hill Proprietary Company Ltd v. Dagi and Others* [1996] 2 VR 117. Under Victorian statutory law, this right is generally only exercisable by the Attorney General.

527 The draft legislation was widely condemned by groups including the International Commission of Jurists and the Council for Civil Liberties. J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p158.

528 The PNG government was careful to present the new law as being the sole product of the government. The barrister J Gordon, told Amnesty International that the contempt of court action in Australia and the adverse initial findings by Justice Cummins exposed Broken Hill Proprietary Company Limited's conduct and added further pressure on the company as it could no longer deny that it had a connection with the new criminal law. J Gordon, Amnesty International interview, 14 September 2009.

529 PNG Kina 1 = US\$0.8470 (rate on 3 January 1995), Bank of PNG.

530 The total sum had been agreed between OTML and the PNG government with no participation from communities. It was calculated on the basis of the amount of waste produced and ore excavated per year.

531 Villagers would be bound by the compensation package offered, or could seek a personal agreement with OTML. Failing agreement people could resort to administrative determination of compensation under the 1992 Mining Act. Restated Eighth Supplemental Agreement, Appendix 1.

532 The Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995, Clause 5 "Compensation Proceedings".

533 The Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995, Schedule 1 (Restated Eighth Supplemental Agreement), Clause 29A, "Election to Become a Non-eligible Person".

534 J Gordon, barrister, Amnesty International interview, 14 September 2009. Local lawyer Dair Gabara also described the pressure and fear he was working under. He told Amnesty International that he received several phone calls from PNG officials telling him to cease acting for the villagers, and that over two consecutive years his professional certificate was not renewed meaning he could not practise his profession. Dair Gabara, Amnesty International interview, 30 September 2009. Also see

Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p22.

535 PNG Kina 1 = US\$ 0.8470 (rate on 3 January 1995), Bank of PNG.

536 The Compensation (Prohibition of Foreign Legal Proceedings) Act 1995, Clauses 4, 5 and 6.

537 Alex Maun, "The impact of the Ok Tedi Mine on the Yonggom People", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p115.

538 Brian Burton, lawyer who took over from Slater and Gordon, Amnesty International Interview, 6 May 2009. Lawrence Kalinoe and M J Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p18. Also referenced in J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia 1997, National Centre for Development Studies: Australian National University, p159.

539 Concerns over the impact of the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995 on access to judicial remedy were raised as recently as March 2011 by the Committee on the Elimination of Racial Discrimination in a letter to PNG's Permanent Representative to the UN, H E Mr Robert Guba Aisi, dated 11 March 2011, available at: www2.ohchr.org/english/bodies/cerd/docs/PapuaNewGuinea_11March2011.pdf (accessed 17 October 2013)

540 J Gordon, "The Ok Tedi lawsuit in retrospect", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, p160. These events gave rise to a contempt of court action in PNG against the PNG foreign affairs officials involved who disobeyed a court order obtained by local lawyer Dair Gabara requesting the release of the Australian lawyer. For this, the foreign affairs officials were convicted and imprisoned. J Gordon, barrister, Amnesty International interview, 14 September 2009 and Dair Gabara, Amnesty International interview, 30 September 2009.

541 Dair Gabara, local lawyer, Amnesty International interview, 30 September 2009.

542 PNG Kina 1 = US\$0.7815 (rate on 11 June 1996,

the date on which the settlement was announced), Bank of PNG.

543 PNG Kina 1 = US\$0.7815 (rate on 11 June 1996, the date on which the settlement was announced), Bank of PNG.

544 The total amount was broken down into fixed yearly payments. It was agreed that trusts would be set up to administer the funds. The extra PNG Kina 40 million (US\$31 million) for the most impacted areas would be distributed in annual payments to landowners and land users, to a Future Generations Fund and to a Community and Development Fund. See "The Ok Tedi Settlement and text of the Agreement", in Glenn Banks and Chris Ballard (eds), *The Ok Tedi Settlement: issues, outcomes and implications*, Australia, 1997, National Centre for Development Studies: Australian National University, Appendix 1, p207. Also see Broken Hill Proprietary Company Limited, *BHP and Ok Tedi*, Discussion Paper, October 1999, p13.

545 In a personal interview with Amnesty International, local lawyer Dair Gabara expressed the view that they should never have accepted the settlement. In his opinion, the construction of a tailings dam would have been possible and they should have insisted on this. Amnesty International interview, 30 September 2009.

546 OTML, *OTML Releases Environmental Impact Options Reports*, 11 August 1999. The company considered four options: the first was to continue mining along with dredging of tailings downstream; the second was to continue mining with a dredging and piping system to a storage area; the third was to continue mining with no mitigating system; and the fourth was to close the mine. The main conclusions are contained in Business Risk Strategies, *Mine Waste Management Project Risk Assessment*, August 1999. For a short summary, see the *Managing Mine Waste* section of the OTML website, available at:

www.oktedi.com/index.php?option=com_content&view=article&id=80&Itemid=89 (accessed 17 October 2013)

547 BHP, *BHP and Ok Tedi*, 11 August 1999.

548 According to BHP Billiton's public statements at the time of its exit, the company favoured early closure and recommended this to the other OTML shareholders. "BHP Billiton would have preferred the mine to close early. That was unacceptable to the PNG government because of the adverse social and economic impacts which would have flowed from the loss of the income which the mine generates for the PNG economy." BHP Billiton, *Background Briefing on Ok Tedi*, 12 December

2001. Also see BHP Billiton, *BHP Billiton Withdraws from Ok Tedi Copper Mine and Establishes Development Fund for Benefit of Papua New Guinea People*, 8 February 2002.

549 World Bank, *Ok Tedi Mining Ltd. Mine Waste Management Project. Risk Assessment and Supporting Documents*, technical note, Washington, 2000, available at: www.abc.net.au/4corners/content/2000/worldbankreview.doc (accessed 17 October 2013)

550 Mining Monitor, published by the Mineral Policy Institute, Vol 4 No.3, September 1999. Also see S Kirsch, "Mining, indigenous peoples and human rights: a case study of the Ok Tedi Mine, Papua New Guinea", in Tebtebba Foundation, *Indigenous Perspectives, The Myth of Sustainable and Responsible Mining*, Vol 5, No.1, June 2002, p80 and S Kirsch, "An incomplete victory at Ok Tedi", in Carnegie Council on Ethics and International Affairs, *Human Rights Dialogue: Litigating Human Rights: promise v. perils*, series 2, No.2, 2000, p10.

551 Other alternatives were not considered by the company (this could have included, for example, the more costly alternative of committing to pay for the cost of rehabilitation). S Kirsch, "Mining, indigenous peoples and human rights: a case study of the Ok Tedi Mine, Papua New Guinea", in Tebtebba Foundation, *Indigenous Perspectives, The Myth of Sustainable and Responsible Mining*, Vol 5, No.1, June 2002, p80. Furthermore, a fifth option favoured by environmental groups whereby the mine would close almost immediately but with continued OTML involvement in the rehabilitation of the river and the transition of local people towards a sustainable livelihood was not contemplated. Mining Monitor, published by the Mineral Policy Institute, Vol 4, No.3, September 1999, p4.

552 Cases filed before the Supreme Court of Victoria: *Rex Dagi v. The Broken Hill Proprietary Company Limited and Ok Tedi Mining Limited* No.5002 of 2000; and *Gabia Gagarimabu v. The Broken Hill Proprietary Company Limited and Ok Tedi Mining Limited* No.5003 of 2000. Rex Dagi filed a private action on his own behalf, whereas Gabia Gagarimabu filed on his own behalf as well as on behalf of approximately 35,000 individual plaintiffs. In addition to forcing BHP and OTML to implement a tailings containment option and pay damages, Gagarimabu's action also sought to enforce payments to landowners OTML were leaving out of the compensation package, as well as commitments regarding the provision of infrastructure and development opportunities. Gabia Gagarimabu, Amnesty International interview, 29 September 2009. The company denied

that it had breached any of these commitments.

553 See the PNG Sustainable Development Program Limited (PNGSDP) website available at: www.pngsdp.com (accessed 17 October 2013). Notwithstanding its purpose to benefit the people of PNG, many were disappointed with the amount devoted to affected regions, as well as the way in which fund allocation would be decided. Only a fraction of the company's net income is devoted to the Western Province, with the largest part being devoted to a Long Term Fund or a National Fund for PNG as a whole. See the *Funds Management* section of the PNGSDP website available at: www.pngsdp.com/index.php?option=com_content&view=category&layout=blog&id=4&Itemid=21, and the *New Rules of the PNG Sustainable Development Program* available at: www.pngsdp.com/images/documents/program_rules_210404.pdf (both accessed 17 October 2013). The PNGSDP Board of Directors is responsible for approving the projects for which funding is allocated. Impacted communities have no say in this process. The Board of Directors consists of seven directors, three of whom are appointed by BHP Billiton, one by the PNG Chamber of Commerce and Industry, one by the Bank of PNG, one by the PNG Treasury Minister and an independent director who must reside in Singapore. See *Memorandum and Articles of Association of PNG Sustainable Development Program Limited*, available at: www.pngsdp.com/images/documents/memorandum_and_articles_of_association.pdf (accessed October 2013)

554 The Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001, Clause 5.

555 BHP Billiton, *Background Briefing on Ok Tedi*, 12 December 2001, p4.

556 See BHP Billiton's chronology available at: www.bhpbilliton.com/home/aboutus/ourcompany/Documents/2012/Billiton%20Chronology_May%202012.pdf (accessed 17 October 2013)

557 See BHP Billiton, *BHP Billiton Withdraws from Ok Tedi Copper Mine and Establishes Development Fund for Benefit of Papua New Guinea People*, 8 February 2002, and Western Province Alliance for a Sustainable Future, *Western Province Mine Affected People Continue Their Struggle for Justice*, 30 November 2005.

558 BHP Billiton, *Background Briefing on Ok Tedi*, 12 December 2001, p3. In paragraph 5, the company states: "As we will have no future financial benefits coming from the mine's operations, the agreement will also provide protection for us against future liabilities."

Also see BHP Billiton, *BHP Billiton Withdraws from Ok Tedi Copper Mine and Establishes Development Fund for Benefit of Papua New Guinea People*, 8 February 2002. The statement specifies that in addition to being released from “all demands and claims associated with future environmental impacts” as part of the Community Mine Continuation Agreements compensation to local communities, the PNG Sustainable Development Program would indemnify BHP Billiton (and the PNG government) against any claims for damages relating to loss from pollution or damage to the environment arising from the operation of the Ok Tedi mine following BHP Billiton’s exit date.

559 PNG NGO Environmental Watch Group, *Ok Tedi Mine Shut Down by Blockade*, 26 November 2001, available at: www.converge.org.nz/pma/rob00319.htm (accessed 17 October 2013)

560 Ok Tedi Fly Wara Newsletter, January 2002.

561 The impacted area was divided into six Community Mine Continuation Agreement (CMCA) regions. Payments would be made to community members and/or special funds. These varied from CMCA to CMCA with each agreement individually specifying the funds to which the payments would be made and the yearly amounts. It was agreed that payments would last for as long as the mine was in operation which was at the time expected to be until 2010. Environmental predictions were included in Schedules to the CMCA.

562 Clause 12 “Communities’ releases”, common to all six Community Mine Continuation Agreements (CMCA). The CMCA established that the only possible remedy for environmental damage in excess of that predicted by OTML was a right to discuss a revision of the payments with the company. Community Mine Continuation Agreements, Clause 27 “Relationship of Payments to Environmental Predictions”.

563 Community Mine Continuation Agreements, Clause 13. This refers to the 2000 enforcement proceedings aimed at forcing the company to comply with the 1996 out-of-court settlement.

564 The Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001, Clause 4, and the Community Mine Continuation Agreements, Clause 12.

565 Community Mine Continuation Agreements, Clause 19.

566 The only measure agreed to mitigate the environmental impact was the continuation on a permanent basis of the dredging of sediments in the lower Ok Tedi. A trial river dredging programme had been initiated in mid-1998 in order to remove sediment

from the lower Ok Tedi and reduce downstream sedimentation impacts. It was now decided that the dredge would continue on a permanent basis. See the *Managing Mine Waste* section of the OTML website, available at: www.oktedi.com/index.php?option=com_content&view=article&id=80&Itemid=89 (accessed 17 October 2013)

567 The expected effects of continuing mine waste disposal included: continuing dirty water affecting the ability of communities to use river water for drinking or cooking; continuing sand build-up and flooding, affecting water travel, farm lands and walking tracks and causing trees, including sago trees, and other plants to die; and continuing decrease in fish numbers. Much of the predicted damage was expected to persist for over 50 years. Schedules to the Community Mine Continuation Agreements.

568 The Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001, Clause 8.

569 When the lead claimants found that Broken Hill Proprietary Company Limited lawyers had been entering into agreements with individuals, they sought urgent injunctive relief from the Supreme Court of Victoria in order to prevent the company from getting any more signatures. Around 1,500 affidavits by landowners from over 50 villages opposing the signing of the Community Mine Continuation Agreements (CMCA) were also filed, claiming that the landowners “didn’t give their consent to these agreements, they don’t want to be bound by them and they want to continue to prosecute their claims in this proceeding”. *Dagi v. BHP and Gagarimabu v. BHP*. The Court provisionally ordered OTML to refrain from securing further signatures to the CMCA up until a date fixed in early 2002 when court discussions were to be continued. By the time the hearing was due, the parties had reached a compromise on the basis of certain undertakings given by OTML.

570 Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, p10.

571 Some villages have been left out of the Community Mine Continuation Agreement (CMCA) compensation packages despite their claims that they should be included in the group of those affected. For example, the village of Drimdenasuk, in the Upper Fly river has been left out of the CMCA process while neighbouring villages such as Timindemesuk are included. Villagers who spoke to Amnesty International maintain that they have suffered severe impacts from sedimentation and

overbank flooding. They said that OTML sent people to conduct tests and collect fish samples on many occasions, but the villagers were never shown the results. According to village leader David Asso, his village formally requested that OTML include them in the 2007 CMCA at which time the CMCA were being revised, but this request was rejected. It appears that the decision was based on OTML information, but this information does not seem available. Villagers have not seen the results of impact assessments and have not been given explanations regarding the reasons for rejecting their request. They insist they should be eligible for CMCA compensation. Amnesty International field visit, 23 September 2009. Letter to the Development Committee Members, Drimdenasuk Village, from Leonard Lagisa, OTML Manager Community Relations, 10 May 2007.

572 PNG Kina 1 = US\$0.2625 (rate on 2 January 2002), Bank of PNG.

573 Leonard Lagisa, Executive Manager Community Support, Amnesty International interview, 26 September 2009.

574 Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, p9. Dair Gabara, local lawyer, Amnesty International interview, 30 September 2009.

575 Ok Tedi Fly Wara Newsletter, January 2002.

576 They pointed out that the only available information was produced by the mine, which they mistrusted.

577 Western Province Alliance for a Sustainable Future, *Western Province Mine Affected People Continue Their Struggle For Justice*, 30 November 2005.

578 The impacted area along the river corridor was divided into nine affected regions which in turn represented 157 affected villages. The Keystone Center, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, 24 August 2007, pp1, 11.

579 See the Terms of Reference for the Working Group on the 2006 CMCA Review, Section 1, available at: www.paxpopulus.com/wanbelistap/downloads.html (accessed 10 January 2014)

580 Measures were put in place to address some of the major criticisms of previous negotiations. Importantly, it was agreed that there would be no separate negotiations with different regions. Everything would be done with all the regions together in the same room. Furthermore, negotiations followed a facilitated model and included

independent observers and advisors, including a legal advisor. The Keystone Center acted as the lead facilitator for the negotiation process. According to the Keystone Center, a total of 500 meetings were held throughout the entire negotiation process. Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, pp10-13. For all documentation related to this process, see www.paxpopulus.com/wanbelistap/downloads.html (accessed 10 January 2014)

581 See Terms of Reference for the Working Group on the 2006 CMCA Review, Section 1, p1 available at: www.paxpopulus.com/wanbelistap/downloads.html (accessed 10 January 2014)

582 *Memorandum of Agreement, Outcome of the 2006/07 CMCA Review*, 29 June 2007.

583 *Memorandum of Agreement, Outcome of the 2006/07 CMCA Review*, 29 June 2007.

584 Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center.

585 Despite its initial denomination, the entity was created in 2009 as the "Ok Tedi Fly River Development Program".

586 *Memorandum of Agreement. Outcome of the 2006/07 CMCA Review*, 29 June 2007, paras 136-137, p4. OTML own 75 per cent of The Ok Tedi Fly River Development Program, while the remaining 25 per cent is owned by the PNG Sustainable Development Program. It has an Advisory Committee with representatives of all Community Mine Continuation Agreement areas, the Western Province government, and the churches. Projects must be approved by the Advisory Committee before they can be approved by the Board. Stephen Howes and Eric Kwa, *Papua New Guinea Sustainable Development Program Review*, 29 December 2011, p15.

587 Women representatives from all 9 Community Mine Continuation Agreement regions have recently drawn up an action plan for the use of the money. This however has not been without controversy and some women interviewed by Amnesty International said they had not been consulted about this plan and as a consequence objected to it.

588 Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, p18.

589 Leonard Lagisa, Executive Manager Community Support, Amnesty International interview, 26 September 2009.

590 PNG Kina 1= US\$0.4810 (rate on 6 August 2012), Bank of PNG.

591 Email communication between Amnesty International and Leonard Lagisa, OTML's Executive Manager for Community Support, 6 August 2012. Whereas the relation between the level of impact and amount of compensation is clear, it is not so clear between the amount of compensation and "level of population". The level of compensation an individual receives should be determined by the level of impact suffered, not by the population size in his or her region. Amnesty International put this point to OTML but received no answer.

592 In the history of the mine, only two mitigation options have been put in place: the dredging of material from the lower Ok Tedi river to reduce damage from sedimentation (in operation since mid -1998), and a tailings plant to remove pyrite from tailings and reduce the potential impact of copper on the river ecosystem caused by acid rock drainage. Once pyrite is removed from the tailings at a mine site plant, the waste is discharged into the river. The pyrite is transported through a pipeline to storage pits in Bige. This project, named the Mine Waste Tailings Project, was conditionally approved by the government in December 2006 although the project only effectively began in 2009. Both mitigation measures have been criticized for being too late in coming and utterly insignificant compared to the extent of environmental damage. The dredge was built 14 years after dumping began in 1984 and actual pyrite removal began after 25 years.

593 In their final report the facilitators explain that OTML chose to reserve the issue of new mitigation measures for its own decision making rather than seek agreement with those affected. Peter S Adler, Janesse Brewer and Caelan McGee, *The Ok Tedi Negotiations: rebalancing the equation in a chronic sustainability dilemma*, Colorado, 2007, The Keystone Center, p21.

594 Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007. The civil society delegate for environmental concerns at the Community Mine Continuation Agreement Working Group, Matilda Koma, told Amnesty International that her main concerns regarding environmental protection and remediation, especially after mine closure, had not been addressed.

She expressed serious concern over the state of the environment once the mine closed, as well as the health of the local population and their ability to sustain themselves. Matilda Koma, Amnesty International interview, 2 October 2009.

595 OTML devised an environmental regime that was adopted by the state in December 2001 when the PNG Parliament passed the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001.

596 The purpose is to provide the state with the level of information and commentary needed to allow it to make informed decisions concerning mine operations based on the effects on downriver communities and the receiving environment. See OTML, *Annual Environmental Report FY03*, September 2003, section 2, available at: www.oktedi.com/index.php?option=com_content&view=category&layout=blog&id=54&Itemid=117 (accessed 28 October 2013)

597 Alan Tingay, scientist, Amnesty International interview, 23 July 2012. In his November 2007 report, Alan Tingay points at flaws in both the scope and methodology of OTML's Environmental Regime. He refers to the lack of balance in research efforts between affected regions and to the total neglect of social impacts. He points at defects in the methodology utilized to measure certain values and the inadequate assessment of important health, social and economic factors. With regard to food edibility, for example, he indicates that only small samples of crops and fish from only a few villages were studied and that this was unlikely to adequately reflect the levels of metals in food for all of the communities and families in the region. He criticizes the lack of assessment on resources and impacts at each village and household level and explains that this approach in such a vast region yields inconclusive and/or misleading conclusions and generalizations. Furthermore, he notes that a critical issue such as food security is not investigated in any detail. Changes in nutrition due to the loss of traditional food crops from gardens and sago swamps and local reductions in the availability of fish and forest animals and their impact on individual households are not assessed. Potential social impacts are not addressed either. These include the potential destruction and difficulties caused by increased flooding and a reduction in the availability of sago and other food items traditionally obtained from forest areas affected by sediment deposition; forced relocation of gardens; loss of traditional water supplies and dependence on erratic and inadequate supplies during the dry season;

increases in mosquito populations and malaria and other diseases due to increased flooding; the implications of having to travel longer distances and use greater labour to obtain smaller quantities of sago and the difficulties facing women as a result of social impacts and the reduction in food sources. Alan Tingay, *The Ok Tedi Mine, Papua New Guinea, A Summary of Environmental and Health Issues*, November 2007.

598 Issues for priority assessment were suggested, including the social and economic impacts of flooding; changes in water sources at village level and strategies for the provision of safe, adequate and permanent water supplies; the cause of reduced quality and production of sago palms and changes in the amount and quality of garden produce. *Memorandum of Agreement, Outcome of the 2006/07 CMCA Review*, 29 June 2007, p11.

599 A study to assess the “total metal uptake pathways of villages inside the mine’s impact footprint as well as similar control villages” was carried out over a period of three years, resulting in a two volume “Community Health Study”. Centre for Environmental Health Pty Ltd, *Community Health Study: volume 2*, 19 May 2007, available at: www.oktedi.com/index.php?option=com_content&view=category&layout=blog&id=56&Itemid=120 (accessed 28 October 2013). No other significant study on the state of health and wellbeing of the riverine population has been carried out. Leonard Lagisa, Executive Manager Community Support, told Amnesty International that plans for monitoring health and socio-economic impacts were still in development as part of the mine closure plan. Leonard Lagisa, Amnesty International interview, 26 September 2009. This is contrary to commitments in the 2007 Memorandum of Agreement (MoA) and means that, to our knowledge, no programme to monitor current impacts as suggested by the MoA is in place.

600 To our knowledge, this information on the lack of monitoring programmes and reporting remains up-to-date. While Amnesty International sent this case study to OTML in January 2014, we received no response.

601 A technical advisor working for the PNG Department of Health told Amnesty International that the department had had no recent collaboration with OTML on health monitoring. This is despite acknowledging that serious health problems such as long term build up of mercury and other chemicals in the human body could arise. Amnesty International interview, 1 October 2009.

602 Following original plans to close the mine in 2013, feasibility studies were undertaken to consider two options, closure in 2015, and mine life extension to

2025. OTML, *Annual Environmental Report FY12*, September 2012, available at: www.oktedi.com/attachments/460_FY12%20Annual%20Environmental%20Report.pdf (accessed 28 October 2013).

603 See the *Introduction* section of the Ok Tedi Mining Limited website, available at: www.oktedi.com/index.php?option=com_content&view=article&id=342&Itemid=125 (accessed 28 October 2013)

604 OTML, *Ok Tedi Communities Support Mine Life Extension*, 31 December 2012, available at: www.oktedi.com/images/stories/corporate_reports/ok%20tedi%20communities%20support%20mine%20life%20extension.pdf (accessed 20 October 2013). Also see M Namorong, *Free prior informed consent needed on Ok Tedi #PNG*, available at: namorong.blogspot.co.uk/2013/09/free-prior-informed-consent-needed-on.html (accessed 4 February 2014). This process does not appear to be free from controversy either. See Post Courier, *Ok Tedi Mine LOs [Landowners] Seek Court Order for Payment*, 5 March 2013, available at: ramumine.wordpress.com/2013/03/05/ok-tedi-mine-los-seek-court-order-for-payment/ (accessed 28 October 2013)

605 Mining (Ok Tedi 10th Supplemental Agreement) Bill 2013, draft dated 12 September 2013. Article 3 states that this Act prevails over any other Act passed in relation to the Ok Tedi mine, and takes precedence if there is any inconsistency in their interpretations. A copy of the bill is available at: ramumine.files.wordpress.com/2013/09/ok-tedi-legislation-2013.pdf (accessed 14 January 2014). In February 2014, the government was served with papers after PNGSDP challenged the nationalisation of the mine through legal proceedings initiated in Singapore, see www.pngindustrynews.net/storyview.asp?storyid=801881928§ionsourc=s0 (accessed 10 February 2014)

606 Liam Fox, *PNG government takes control of Ok Tedi mine, orders BHP Billiton to pay for pollution in the Fly River*, ABC Radio Australia, available at: ramumine.wordpress.com/2013/09/19/png-government-takes-control-of-ok-tedi-mine-orders-bhp-billiton-to-pay-for-pollution-in-the-fly-river/ (accessed 13 January 2014)

607 *Bagari and Others v. Minister for Finance of Papua New Guinea and Others*, WS 14 of 2014, Order of the National Court of Justice of Papua New Guinea (24 January 2014). The court stated that the cost of the scientific and health research was to be covered by the sum of 45 million Kina taken from the 2006 dividend payments held in the Western Province Peoples Trust Account, created by the government. Also see: *PNG PM warns landowners of consequences over Ok Tedi legal fight*, available at: www.abc.net.au/news/2014-01-28/an-

png-pm-issues-warning-over-ok-tedi-court-case/5222678 (accessed 30 January 2014)

608 The contract was arranged through its then local subsidiary Puma Energy with assistance from their usual port agents West African International Business Services.

609 Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan*, 15 November 2006, pp19-22.

610 "Neither Paul Short nor Mr Marrero could ignore the Tommy company's technical incapacity." Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan* (English translation), 15 November 2006, p62.

611 Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan*, 15 November 2006, pp92-95.

612 Internal Trafigura email dated 25 August 2006 (Rec# 9417 *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370).

613 Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu*: addendum, UN Doc A/HRC/12/ 26/Add.2, 3 September 2009, paras 30-31.

614 The dumping sparked violent demonstrations all over the city due to anger and fear within the local population. On 15 September 2006, angry residents of the Akouédo district attacked the Minister of Transport, pulling him out of his car and forcing him to inhale toxic fumes from the waste dumped there nearly a month before. On 9 October 2006, the police used tear gas to disperse about 100 demonstrators who had barricaded a main access point to the port and set tyres ablaze to protest against the storing of containers of toxic waste.

615 Javier Blas and Jack Farchy, "Trafigura raises \$500m with perpetual bond", *The Financial Times*, 10 April 2013, available at: www.ft.com/cms/s/0/31ed65f0-a1ff-11e2-8971-00144feabdc0.html#axzz2jOI89WNk (accessed 28 October 2013)

616 See the *Strength and Diversity* section of the Trafigura website available at: www.trafigura.com/about-us/the-group/ (accessed 28 October 2013)

617 Trafigura Amended Defence dated 5 December 2008 (*Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's

Bench Division, Claim No. HQ06X03370), para 28.

618 Trafigura Amended Defence dated 5 December 2008 (*Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370), p2. Trafigura now only owns 49 per cent of the Puma Energy Group. See: N Hume, "Trafigura boosted by sale of Puma Energy stake" *Financial Times*, 16 December 2013, available at: www.ft.com/cms/s/0/a0d5e05a-6414-11e3-98e2-00144feabdc0.html#axzz2qbRV5LxE (accessed 16 January 2014)

619 Trafigura Group, *Building Long-Term Growth*, corporate brochure available at: www.trafigura.com/useful_links/corporate_brochure.aspx (accessed 28 October 2013)

620 An internal Trafigura email dated 28 December 2005 gave the following technical description: "The PMI product has 1500ppm Mercaptans, high Gums, H2S [hydrogen sulphide], Cu Corrosion and low Oxidation stability." (Rec# 7696 *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370).

621 Internal Trafigura emails dated 27 December 2005 (Rec# 5893 and Rec#5914 *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370).

622 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, para 5.4. Trafigura had first attempted to wash the coker naphtha at facilities in the United Arab Emirates and Tunisia. Trafigura Libel Reply, *Trafigura Limited v. British Broadcasting Corporation* in the High Court of Justice, Queen's Bench Division, Claim No HQ09X02050, served 20 November 2009, para 315; and meeting minutes Al-Trabsa Technical Administration Al-Skhirra 15 March 2006 (Rec# 13571 from application notice for *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370). The Tunisian facility was forced to stop after an investigation by the Tunisian authorities over reports of noxious odours causing distress to local workers and the population.

623 Trafigura unsuccessfully attempted to process the slops in Malta, Italy, Gibraltar and France. Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149,

District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, para 5.8. Dutch prosecution, Evidence Overview for Trafigura Beheer BV, N Ahmed, S Chertov, p42. “Bij de politie verklaart Ahmed hieromtrent: ‘voordat wij bij APS uitkwamen hadden wij diverse agenten van bedrijven benaderd op Malta, Gibraltar en Lavera, Zuid-Franrijk. Van een van de agenten herinner ik mij nog een naam, Barwill op Malta. Vanwege het lage vlampunt van onze slops konden veel bedrijven deze slops niet verwerken en opslaan.’” Amnesty International, internal translation: “To the police Ahmed states: ‘Before we ended up at APS, we had approached several agents of companies at Malta, Gibraltar and Lavera, South of France. From one of the agents I recall the name, Barwill, on Malta. Due to the low flash point of our slops, many of the companies were not able to process and store these slops’.”

624 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, paras 5.10-5.12.

625 Testing by ATM Moerdijk found a chemical oxygen demand (COD) level of 475,600 mg/l. ATM Afvalstoffen Terminal Moerdijk, *Analysis of sample 3 July 2006*, 8 September 2006. Later testing by The Netherlands Forensic Institute identified a COD level of 720,000 mg/l. Netherlands Forensic Institute, Ministry of Justice, *Expert Report* (English), 29 January 2007, Odour incident, APS Amsterdam 10.1 p35. Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, para 8.3.3.11.

626 Trafigura Amended Defence dated 5 December 2008, *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen’s Bench Division, Claim No.HQ06X03370, para 80.

627 Email between Falcon Navigation and Bulk Maritime Agencies BV, 3 July 2006. (Rec# 4696 *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen’s Bench Division, Claim No. HQ06X03370).

628 Email between Falcon Navigation and Bulk Maritime Agencies BV, 3 July 2006. (Rec# 4696 *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen’s Bench Division, Claim No. HQ06X03370.)

629 The African Charter on Human and Peoples’ Rights, which Côte d’Ivoire is a party to, recognizes in Article 24

the right of all peoples to a “general satisfactory environment favourable to their development”. This right is more widely known as the right to a healthy environment. Articles 19 and 28 of Côte d’Ivoire’s Constitution guarantee the right to a healthy environment. The UN Committee on Economic, Social and Cultural Rights has furthermore expressed that a healthy environment is an underlying determinant of the right to health. UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, 11 August 2000.

630 Article 6 of the International Covenant on Economic, Social and Cultural Rights obliges States parties to “recognize the right to work”, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept, and to take appropriate steps to safeguard this right. States parties are under an obligation to take all necessary measures to prevent infringements of the right to gain a living through work by third parties.

UN Committee on Economic, Social and Cultural Rights, General comment 18: The right to work, UN Doc E/C.12/GC/18, 6 February 2006, para 35.

631 Evidence gathered by Amnesty International in Côte d’Ivoire in February 2009. Also see Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 29.

632 Testimonies of victims interviewed by Amnesty International in February 2009.

633 World Health Organization, *Chemical dump in Côte d’Ivoire*, 15 September 2006. Available at: www.who.int/mediacentre/news/notes/2006/np26/en/ (accessed 28 October 2013)

634 Côte d’Ivoire Institut National de Santé Publique (INSP) and Institut National d’Hygiène Publique (INHP), *Presentation: Etude Epidémiologique De L’intoxication Aux Déchets Toxiques Pétroliers Deversés A Abidjan: Rapport préliminaire sur 31060 consultations (undated)*.

635 Centre Suisse de Recherches Scientifiques en Côte d’Ivoire, *Results of Fieldwork conducted between 9 October 2006 and 28 December 2006, Document 2: Epidemiological Section*, p31.

636 Amnesty International mission in Côte d’Ivoire, February 2009.

637 Witness statement of Tiemoko Bleu, *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV*, in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370, HQ06X03393, HQ07X00599, HQ07X01068, HQ07X01604, HQ07X02192, undated, paras 14, 18 (Leigh Day translation).

638 Fifteen deaths were recorded in the findings of an independent enquiry set up by the then Ivorian Prime Minister. International Commission of Enquiry on Toxic Waste in the District of Abidjan, 19 February 2007, p2. Sixteen individuals were identified as having died as result of the waste by the Ivorian Ministry of Finance for purposes of compensating their relatives. Communiqué du porte parole de la présidence de la République relatif à l'indemnisation des victimes des déchets toxiques, 14 June 2007, available at:

www.dechetstoxiques.gouv.ci/pdf/communique-du-porte-parole-du-pr.pdf (accessed 28 October 2013). Seventeen deaths were recorded by the Ivorian Criminal court, Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008, p41. Trafigura has consistently denied that the waste could have caused deaths.

639 Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 60.

640 In Djibi village, for example, the response came weeks after the dumping, despite the fact that the head of the village had alerted authorities that the village was badly affected soon after the dumping. The failure of authorities to respond to their requests for help led the villagers to organize a televised sit-in on the Route d'Alepe, one of Abidjan's major transport routes, to get their voices heard. It was only after this that the government paid attention to their plight and the Red Cross came to investigate with government doctors. The Red Cross said they arrived late to Djibi village because they had not been notified that there were people affected there and that "Globalement la réponse du gouvernement n'a pas été bien coordonnée". Local Red Cross and Chef Motto, Amnesty International interviews, February 2009 and June 2011.

641 Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 86(f).

642 Several agencies conducted tests on the waste. The first was carried out by Amsterdam Port Services in the Netherlands and revealed the high toxicity of the waste. The most in-depth analysis was carried out by the Netherlands Forensic Institute (NFI). The available evidence confirms that the waste was "hazardous" as defined by applicable European legislation. *Evidence Overview of Amsterdam Port Services BV*, E M Uittenbosch, City Authority of Amsterdam Fact 1: section 10.37 of the Environmental Management Act, Rotterdam, 25 May 2010, I W Boogert and R S Mackor Public Prosecutors, p20 onwards. Tests were also carried out on samples from the quay and Akouédo dumpsite by the Centre Ivoirien AntiPollution (CIAPOL), part of the Ivorian Ministry of Environment. An expert testifying in the Dutch court case stated, "This waste is highly toxic, on the one hand because of the presence of concentrated sodium hydroxide, and on the other because of the presence of thiolates, salts derived from mercaptans." Criminal court hearing 21 June 2010 (notes taken by Greenpeace). Some elements of the waste have never been tested. Evidence from the criminal court case in the Netherlands suggests that an extremely toxic sediment layer in the waste was likely missed during testing due to the method used to sample the waste. Criminal court hearing in Amsterdam, 10 June 2010 (notes taken by Greenpeace).

643 A toxicologist consulted by Amnesty International and Greenpeace explained that many factors influence the impact of waste on human health, including ambient temperature, rainfall, quantity of waste dumped and its composition, method of dumping, mixing with other materials, dilution of waste after dumping and wind speed and direction. Expert Opinion by Alastair Hay PhD, OBE, Professor in Environmental Toxicology, University of Leeds, 29 October 2010. Trafigura never revealed its own assessment of these factors and the impact on the health of the population exposed to the waste. The company has based its assertions on specific modelling, the details of which have never been made public.

644 Conference of the Parties Basel Convention, *Provisional report evaluating the chemical Pollution in Côte d'Ivoire and technical assistance for the protection of the environment and health, Plan of urgent action, plan of medium term action*, Nairobi, undated, p5.

645 Dr K, Amnesty International Interview, June 2011. Another doctor who treated people in Djibi village testified: "Unfortunately, only symptomatic treatment was available, as there was nothing that we could do to address the apparent cause of the illnesses, the waste."

Witness statement of Manasse Goule, *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370.

646 Full details of the contract have never been made public. However, it has subsequently emerged that Tredi was contracted to remove 2,500 tonnes of waste.

647 Burgeap, *Environmental Audit in response to paragraph 2.2 of the protocol agreement signed on the 13/02/07 between the parties of the Côte d'Ivoire nation and Trafigura, Report of the Audit – phase 1*, pp8-9.

648 A spokesperson for Tredi who took part in an 18 October 2007 broadcast on Nova Television commented that: "There is definitely more than 6,000 tonnes of heavily polluted material. And that the new government has chosen a new approach." Available at: www.novavt.nl/page/detail/uitzendingen/5523# (accessed 28 October 2013)

649 In 2008, and then again in 2009, the UN Special Rapporteur on Toxic Waste expressed serious concern that the sites remained contaminated and continued to pose a threat to the health of thousands of people. Okechukwu Ibeanu, Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, cited in IRIN, *Côte d'Ivoire: UN warns toxic waste still a threat*, 19 August 2008, available at: www.irinnews.org/Report.aspx?ReportId=79894 (accessed 28 October 2013). Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 57.

650 Chef Motto, the head of Djibi village, explained to Amnesty International: "a minimal part of the toxic waste was sent to France. The rest was never taken away. The government sent experts from the BNETD [the Bureau National d'Etudes Techniques et de Développement] but to this day, no feedback." Amnesty International interview, February 2009. Amnesty International was advised in December 2013 that one-third of the soil in and around Djibi village still needed to be decontaminated. That soil had been excavated and put on platforms.

651 Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan*, 15 November 2006, p5.

652 The Basel Convention on the Control of

Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention). The Basel Convention is an international treaty, whose purpose is the control and regulation of waste material that requires special attention or may pose a hazard to human health or the environment. International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (the MARPOL Convention). The purpose of the MARPOL Convention is to regulate the discharge of hazardous waste into the sea.

653 Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan*, 15 November 2006, pp61-8.

654 These included Salomon Ugborogbo, the head of Compagnie Tommy; Nobah Amonkan, Director of WAIBS and other WAIBS employees including Ehouman Adja David, Essoin Kouao and Kacou Aka Eugène; Bombo Dagui Marcel, commander of the Port Captainty; three customs agents Tétialou Anne-Marie, Yoboue Théophile Ambroise and Yao Kouassi; Jean-Christophe Tibe Bi Balou, General Director of Maritime and Port Affairs; two port agents Epla Akoua Paul and Koné Kpandotien Paul, and two garage owners/mechanics Diakité Ali and Konaté Broulaye. Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008.

655 Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008. The National Commission of Enquiry refers to Kablan as Assistant General Administrator (Administrateur General Adjoint) of Trafigura's Ivorian subsidiary Puma Energy Côte d'Ivoire (Puma CI), whereas Trafigura describes him as Deputy Director. Trafigura Amended Defence dated 5 December 2008, *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen's Bench Division, Claim No. HQ06X03370. No charges were laid by the prosecution against Trafigura employees Jorge Marrero and Paul Short. It is not clear why the Ivorian authorities did not take action to bring them to account in light of the findings of the National Commission of Enquiry.

656 Dauphin and Valentini were initially charged for breaches of (i) Ivorian law provisions relating to public health and environment in respect of toxic and other harmful waste; (ii) Articles 342 (4), 343 and 348 of the Ivorian penal code; (iii) the Basel Convention and (iv) Articles 97, 99, and 101 of the Ivorian Environmental Code. Mr Kablan was initially charged for breaches of (i) Ivorian law provisions relating to public health and toxic, nuclear and noxious substances; (ii) the Basel Convention and (iii) Articles 97, 99, 101 of the Ivorian Environmental Code. The charges relating to breaches of the Basel

Convention were later discarded. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was directly applicable to this case. This Convention regulates waste material that requires special attention or may pose a hazard to human health or the environment. It defines any transboundary movement of hazardous or other wastes as illegal traffic if it is without notification, without consent or with consent obtained through falsification, misrepresentation, or fraud, if it does not conform in a material way with the documentation, or if it results in deliberate disposal (articles 2(21) and 9). The Basel Convention further states that illegal traffic in hazardous wastes or other wastes is criminal. Both the Netherlands and Côte d'Ivoire are parties to this Convention. By ratifying the Convention, States accept to prohibit the export of waste to countries which have prohibited the import of such waste; without prior notification and consent from the State of import and where there is reason to believe the waste cannot be managed in an environmentally sound manner (articles 4(1)(b), 4(1)(c), 8 and 9).

657 *Loi n° 1981-640 du 31 juillet 1981, instituant le Code pénal* (Article 97), 31 July 1981, available at: www.unhcr.org/refworld/category/LEGAL,,,CIV,3ae6b5860,0.html (accessed 28 October 2013)

658 Although the public health law (*Loi No.88-651 du 7 Juillet 1988*) is unclear on this point, it appears that corporate entities can only be held jointly liable to pay a penalty.

659 This can be very challenging in practice, particularly where there is a lack of transparency.

660 Landry Kohon and Jean-Rock Kirine, "Côte d'Ivoire: Déchets toxiques- 'le protocole est un bon arrangement'", *Fraternité Matin*, 18 March 2007, available at: fr.allafrica.com/stories/200703191773.html (accessed 28 October 2013)

661 Protocol of agreement (*Protocole d'accord*) between the State of Côte d'Ivoire and the Trafigura Parties, 13 February 2007, Article 4(2).

662 Documentary Letter of Credit, Côte d'Ivoire International Bank for Commerce and Industry (BCICI).

663 Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008.

664 Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008.

665 Court of Appeal of Abidjan Ruling No.42, Hearing of 19 March 2008.

666 Arrêt No.14 du 22/10/2008, Cour d'Assises, Cour

d'Appel Abidjan.

667 These clauses are translated from French. *Protocol of agreement (Protocole d'accord) between the State of Côte d'Ivoire and the Trafigura Parties*, 13 February 2007. Section 3.2 states: "The government of Côte d'Ivoire undertakes to: Guarantee to the Trafigura Parties that it will accept responsibility for any claim relating to the Events; Take all appropriate measures to ensure that the Victims of the Events receive compensation."

668 The settlement did not explicitly prohibit victims from pursuing a claim but rather guaranteed Trafigura that the State would take care of any claim that may be brought against it.

669 *Protocol of agreement (Protocole d'accord) between the State of Côte d'Ivoire and the Trafigura Parties*, 13 February 2007. In addition to the criminal charges, the State of Côte d'Ivoire, three victims' groups and the representatives of two deceased individuals attached their claim for damages to the prosecution as "*parties civiles*". The state of Côte d'Ivoire abandoned its "*partie civile*" claim against Trafigura as a consequence of the settlement agreement, but continued its civil claims against the other defendants. The criminal court did not make a decision on these claims at the time of the trial, and postponed its decision to a subsequent hearing. After the criminal trial, further claims commenced on behalf of deceased individuals against Trafigura and the State of Côte d'Ivoire. *Federation internationale des ligues des droits de l'Homme, "L'affaire du 'Probo Koala' ou la catastrophe du deversement des déchets toxiques en Côte d'Ivoire"*, April 2011.

670 Approximately US\$205,000 to each of the families of those who died; about US\$4,000 to 75 people who were hospitalized and US\$400 to those who were ill. Gervais Coulibaly-Delpinelpna, *Communiqué du porte parole de la présidence de la République relatif à l'indemnisation des victimes des déchets toxiques*, 21 June 2007.

671 Gervais Coulibaly-Delpinelpna, *Communiqué du porte parole de la présidence de la République relatif à l'indemnisation des victimes des déchets toxiques*, 21 June 2007.

672 Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 62: "Disputes have however arisen about the accuracy of the list, which was based on information

provided by State hospitals. Many people were, however, not registered, as they had sought medical care in clinics that were not certified by the State or through traditional healers. In addition, some victims could not register because they did not have official identity cards.”

673 Dr K, Amnesty International interview, June 2011.

674 Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 62.

675 Salif Konate, the head of a collective of garage owners located near one of the dumping points, reported to Amnesty International that 120 garages were forced to close temporarily in the weeks following the dumping. He stated that only 17 of those garages had received compensation receiving CFA250,000 (roughly US\$500) per garage, which was “insignificant” and would not even cover one day’s business activity. Amnesty International interview, February 2009. The UN Special Rapporteur on Toxic Waste also noted that: “Affected businesses, in particular in the Vridi industrial area, also claimed to have received inadequate compensation.” Human Rights Council, *Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 63.

676 RFI, *Déchets toxiques, les sous mal repartis*, 26 June 2007, available at: www.rfi.fr/actufr/articles/090/marticle_53319.asp (accessed 28 October 2013); Koffi.net, *Déchets toxiques. Répartition des 100 milliards de Trafigura - La grande magouille de la présidence*, 28 June 2007, available at: www.koffi.net/koffi/actualite/11829-Dechets-toxiques-Repartition-des-100-milliards-de-Trafigura-La-grande-magouille-de-la-presidence.htm (accessed 28 October 2013)

677 République de Côte d’Ivoire, *Ministère de l’Economie et des Finances, Situation des Paiements des Victimes des Déchets Toxiques*, 29 October 2008, available at: www.tresor.gov.ci/dgtcp/evenements/dechets_toxiques.htm (last accessed 20 November 2011).

678 The claim was brought against both Trafigura’s UK-based subsidiary Trafigura Limited, which co-ordinated the operations that led to the dumping, and Trafigura’s Dutch parent company TBBV.

679 Trafigura and Leigh Day & Co Agreed Joint

Statement, 19 September 2009, available at: www.trafigura.com/1524/16951/16957/Trafigura_and_Leigh_Day_Co_agreed_final_Joint_Statement.pdf (accessed 28 October 2013)

680 Justice MacDuff’s statement is available at: www.trafigura.com/1524/16951/16957/Official_Transcript_of_Judge_MacDuff_hearing_23_September_2009.PDF (accessed 28 October 2013)

681 *Motto & Ors v. Trafigura Ltd & Anor* [2011] EWHC 90201 (Costs) (15 February 2011), paras 70, 109.

682 The legal framework that enabled the 30,000 claimants to seek remedy in the UK has subsequently been amended and it is unlikely that such cases will be possible in the future. One reason is the cost of mounting such cases.

683 To date, Trafigura has refused to publicly disclose its reports and has only ever granted access to one Dutch journalist (K Knip, *NRC Handelsblad*) on a confidential basis. Trafigura states that it has not disclosed expert reports because they refer to private individuals, see www.trafigura.com/media-centre/probo-koala/trafigura-and-probo-koala/ (accessed 28 October 2013)

684 From witness statement of N’dja Jean Sebastien Bou, in *Yao Essaie Motto & Others v. Trafigura Limited and Trafigura Beheer BV* in the High Court of Justice, Queen’s Bench Division, Claim Nos. HQ06X03370, HQ06X03393, HQ07X00599, HQ07X01068, HQ07X01604, HQ07X02192, 20 March 2009.

685 Trafigura statement in response to the *Guardian* articles published on 14 May 2009: available at: image.guardian.co.uk/sys-files/Guardian/documents/2009/06/12/StatementofTrafigura120609.PDF (accessed 28 October 2013)

686 Georgina Stanley, “Macfarlanes responds to Newsnight witness claims”, *Legal Week*, 15 May 2009, available at: www.legalweek.com/legal-week/news/1169461/macfarlanes-responds-newsnight-witness-claims (accessed 28 October 2013)

687 As a result of the settlement agreement, Leigh Day did not pursue the matter and withdrew their allegation. As per the joint statement: “In the light of assurances given to their senior leading counsel and in view of his advice, Leigh Day withdraw any allegation that there has been impropriety on the part of Trafigura or any of its legal advisors, (including Macfarlanes) in investigating the claims.” Amnesty International is concerned that the allegations of a claimant, which were deemed credible enough to grant a temporary injunction, were not investigated.

688 Georgina Stanley, “Macfarlanes responds to Newsnight witness claims”, *Legal Week*, 15 May 2009: available at: www.legalweek.com/legal-week/news/1169461/macfarlanes-responds-newsnight-witness-claims (accessed 28 October 2013)

689 The National Coordination of Toxic Waste Victims of Côte D'Ivoire (CNVDT-C1) did not appear on any of the court documents in the UK case and the High Court confirmed that only Leigh Day had authorization under the settlement agreement to distribute the compensation money to the named claimants.

690 Tribunal of First Instance of Abidjan, 21 October 2009 and Court of Appeal of Abidjan, 22 January 2010. The account was first placed under an escrow arrangement, with Société Générale de Banques en Côte d'Ivoire as a trustee until “the competent jurisdiction gives a definitive ruling on the question of possession of the [compensation fund]”. Leigh Day Press Briefing of 12 November 2009. It was then transferred to the National Coordination of Toxic Waste Victims of Côte D'Ivoire's (CNVDT-C1) account.

691 The criminal investigation was instigated by Greenpeace who on 26 September 2006 filed a report with the Dutch Public Prosecutor requesting a criminal investigation for offences relating to the dumping of toxic waste in Côte d'Ivoire.

692 Charges were brought against Dienst Milieu en Bouwtoezicht (DMB), the environmental and building department of the Municipality of Amsterdam. DMB is responsible for maintenance, supervision and licence provision under the Environmental Management Law. VROM, *Probo Koala in Amsterdam feitenrelaas en relevante wetgeving*, 30 October 2006, p12.

693 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010.

694 Council Regulation (EEC) No.259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (European Waste Shipment Regulation). Section 18 makes it a criminal offence to export Basel waste from the European Union to the African, Caribbean and Pacific Group of States, which includes Côte d'Ivoire. This regulation was in force at the time of the dumping and has since been superseded.

695 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam,

13/846003-06 (PROMIS), 23 July 2010.

696 Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases. Amnesty International English translation, p10.

697 Verdict on Captain Chertov, LJN (National Case Number): BN2193, Rechtbank Amsterdam, 13/846004-08 (PROMIS), 23 July 2010.

698 The court held that since the “Municipality is the only institution charged with the administrative enforcement of Section 10.37” the “authority to enforce the law must ... qualify as an exclusive administrative duty”. This meant that “the Public Prosecutor's Office may not prosecute it for these acts, and is thus barred from prosecuting the case.” Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases. Amnesty International translation, p7.

699 Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases Amnesty International translation, p8.

700 Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases Amnesty International translation, p24.

701 Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases. Amnesty International English translation, pp23-4.

702 Dutch prosecution, *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases. Amnesty International English translation, p23.

703 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, para 13.3.2.

704 *Samenvatting vonnissen Broom II* (Summary of verdicts), Part III Assessment of the merits of the cases. Amnesty International English translation, p20: “Trafigura may justifiably and with reason be blamed for having done precisely that which the EWSR, the Fourth Lomé Convention and the Treaty of Basel all aim to prevent, namely the exporting of waste to the Third World and causing harm to the environment.”

705 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, paragraph 13.3.

706 Amnesty International English translation of verdict

on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS) 23 July 2010.

707 *Fine imposed on Trafigura*, Amsterdam court website available at: www.rechtspraak.nl/Organisatie/Gerechtshoven/Amsterdam/Nieuws/Pages/FineimposedonTrafigura.aspx (accessed 28 October 2013)

708 AFP, *Trafigura director can be prosecuted says Dutch court*, 30 January 2012, available at: www.business-humanrights.org/Links/Repository/1010903/link_page_view (accessed 28 October 2013)

709 *Trafigura's punishment final, top executive settles*, 16 November 2012, available at: www.om.nl/actueel-0/nieuws-persberichten/@159791/trafigura-punishment/ (accessed 28 October 2013)

710 *Trafigura Beheer BV, Statement from the Management Board of Trafigura Beheer BV*, 16 November 2012, available at: www.trafigura.com/1524/amsterdam_settlement_statement_from_trafigura_english.pdf (accessed 28 October 2013)

711 Dutch Penal Code, Article 5.1(2).

712 English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, p1. In his address during the pre-trial review on 26 June 2008, the Public Prosecutor stated: "The question whether offenses possibly committed in Côte d'Ivoire should be part of this investigation has been considered. It has been decided that it should not. It has appeared impossible to conduct an investigation in the Côte d'Ivoire, in spite of attempts to do this." ("De vraag of eventueel in Ivoorkust gepleegde strafbare feiten onderdeel zouden moeten zijn van dit onderzoek is onder ogen gezien. Hiervan is afgezien. Het is niet mogelijk gebleken om onderzoek in Ivoorkust te doen, ondanks pogingen daartoe.").

713 The complaint was made under article 12 of the Dutch Code of Criminal Procedure and various provisions of the Dutch Penal Code; relevant sections cited include: sections 173a, 287, 302, 307, 308, 309, 225 and 140.

714 In making this decision, the Court found that aspects of the complaint relating to the criminal acts (that is, manslaughter, serious bodily injury, criminally negligent homicide) were beyond the scope of Greenpeace's purpose as an organization. Judgment of the Court of Appeal of The Hague, Decision given on account of the Complaint under section 12 of the Dutch Code of Criminal

Procedure, received at the Registry of this Court of Appeal on 16 September 2009 and lodged by Stichting Greenpeace Nederland, English translation, p15.

715 The court referred, in particular, to difficulties that the Dutch authorities had experienced in seeking cooperation and legal assistance from Ivorian authorities. Judgment of the Court of Appeal of The Hague, Decision given on account of the Complaint under section 12 of the Dutch Code of Criminal Procedure, received at the Registry of this Court of Appeal on 16 September 2009 and lodged by Stichting Greenpeace Nederland, English translation, pp17-21.

716 Judgment of the Court of Appeal of The Hague, Decision given on account of the Complaint under section 12 of the Dutch Code of Criminal Procedure, received at the Registry of this Court of Appeal on 16 September 2009 and lodged by Stichting Greenpeace Nederland, English translation, pp17-21.

717 The court's failure to consider the dumping in Côte d'Ivoire as a consequence of a continuous series of events which started with its own direct failure to enforce the Basel Convention (i.e. to prevent the reloading of the waste and the *Probo Koala* from leaving Amsterdam) reflects a failure by the State to uphold its obligations under the Convention.

718 For example, a claim brought by PKL, an Ivorian baby food company which alleged that it had suffered economic prejudice as a result of contamination to its food products, was found to be inadmissible by the Dutch court. The Dutch court found that the company had not suffered direct damage as a result of the conduct for which Trafigura was being prosecuted in the Netherlands. Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23 July 2010, para 1.2.2.

719 A total of nine drivers said they gave statements to Trafigura, under duress, which stated that they had experienced no health problems following exposure to the waste. These were seven drivers, an assistant of a driver who died in 2008 and a driver who died in 2009. The nine Ivorian drivers had been hired to take the toxic waste from the *Probo Koala* to Akouédo. For more detail on these allegations, see Amnesty International and Greenpeace Netherlands, *The Toxic Truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*, 25 September 2012 AI Index: AFR 31/002/2012, pp164-7.

720 Letter from the public prosecutor (Rotterdam) to

Greenpeace Netherlands, 22 June 2012.

721 This is particularly the case where the obstacles are related to legal rules or doctrines. Finding legal representatives is a significant issue (see 2.4 *Legal Representation and equality of arms* in the *Legal Challenges* chapter of this book).

722 Many of these obstacles were examined by a group of experts during an international seminar convened by Fafo, Noref and Amnesty International in September 2009 in Oslo. The contents of the debate as well as suggestions for solutions are contained in Mark B Taylor, Robert C Thompson and Anita Ramasastry, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses*, 2010, available at: www.fafo.no/pub/rapp/20165/20165.pdf (accessed 28 October 2013)

723 This assessment is based on the obstacles identified through Amnesty International's case research, which correspond with those identified by the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises in the "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*" (endorsed by the UN Human Rights Council 16 June 2011) as well as by other academics. For example see Mark B Taylor, Robert C Thompson and Anita Ramasastry, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses*, 2010, available at: www.fafo.no/pub/rapp/20165/20165.pdf (accessed 28 October 2013)

724 This is more so with regard to private multinational corporations. Public corporations (that is, a corporation created to perform a governmental function or to operate under government control) are often placed under more stringent disclosure and transparency rules.

725 Although the definition of "parent company" tends to vary from one country to another, most tend to agree that a company that owns a majority share in another is the latter's "parent" company. The parent-subsidiary relationship however is not always that clear. For example, an investment or holding company may hold all of the shares in a "parent company", blurring the ownership or control relationship.

726 "Sister" companies (or "siblings") for example do not own shares in one another but are linked with each other through a common owner. Within a large corporate

group, there is often a succession of shareholding companies with one owning shares in the company below but being owned in turn by the company above. "Holding" companies often play this intermediary role.

727 It is common to find the same directors in both the parent company and a subsidiary, or the same personnel employed by both the parent and the subsidiary.

728 This is the approach taken in the European Union with regard to the regulation of consolidated group accounts. Under the EU Accounting Directive 2013/34/EU, an undertaking is considered a "parent undertaking" of another undertaking (a "subsidiary undertaking") where the parent undertaking: (a) has a majority of shareholders' or members' voting rights in that subsidiary undertaking, (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of that undertaking and is at the same time a shareholder in or a member of that undertaking, and (c) has the right to exercise a dominant influence over that undertaking of which it is a shareholder or member pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions, (d) is a shareholder or member of an undertaking, and (i) a majority of the members of the administrative, management or supervisory bodies have been appointed solely as a result of the exercise of its voting rights, or (ii) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking, a majority of shareholders' or members' voting rights in that undertaking. The Member States may consider an undertaking to be a subsidiary undertaking of a parent undertaking if (a) the latter has the power to exercise, or actually exercises, a dominant influence or control over that subsidiary undertaking, or (b) the latter and the subsidiary undertaking are managed on a unified basis by the parent undertaking." Article 22, EU Accounting Directive 2013/34/EU of 26 June 2013.

729 A survey of over 40 jurisdictions carried out for the UN Special Representative on Business and Human rights in 2009 showed that most of the jurisdictions surveyed had very similar approaches to the concepts of separate legal personality and limited liability and would very rarely disregard the "corporate veil" to attribute liability to a corporate owner. Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations

and other Business Enterprises, Corporate Law Project, *Overarching Trends and Observations*, July 2010.

730 Some jurisdictions have express legislative exceptions to limited liability and separate legal personality. See examples of these further below.

731 See for example *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Khulumani et al. v. Barclays National Bank Ltd*, 504 F.3d 254 (2d Cir. 2007); *Ntsebeza et al. v. Daimler A.G. et al. (In Re South African Apartheid)* 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

732 Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal*, Toronto, 1993, University of Toronto Press, p126. Also see Dan Kurzman, *A Killing Wind: inside Union Carbide and the Bhopal catastrophe*, New York, 1987, McGraw-Hill, p181 and “Lawyers on trial, an interview with Robert Hager”, *Multinational Monitor*, Vol 6, No.10, 31 July 1985.

733 This problem arose in *Lubbe v. Cape plc* for example. Cape had been requested to give its express consent to be sued in South Africa as the company was otherwise not subject to the jurisdiction of South African courts. To be subject to the jurisdiction of South African courts the defendant had to be either present or have assets in South Africa, neither of which applied to the parent company Cape plc in the case.

734 The availability of class action proceedings in England and its non-availability in South Africa in *Lubbe v. Cape plc* was given significant weight by the English court in declining to dismiss the case on *forum non conveniens* grounds.

735 See *Connelly v. RTZ Corporation plc* [1998] AC 854, para 30 onwards, in which the non-availability of financial assistance in Namibia was a factor in determining that the plaintiff would not be able to bring a claim in his home courts. The restrictions to legal aid in the UK (including its removal from fields of law such as a personal injury) have meant that this is no longer an advantage offered by the UK.

736 *Trafigura Beheer BV (TBBV)* is the group holding company, incorporated in the Netherlands. *Trafigura Limited* is based in London and acts as the coordinating entity for a substantial proportion of the group’s oil operations, including those relating to the dumping incident in Côte d’Ivoire described in this book.

737 See J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge, 2011, Cambridge University Press, pp215-234.

738 See *Barrow & Heys v. CSR Ltd & Micalco Pty Ltd* (Unreported) Supreme Court of Western Australia, Rowland J, 4 August 1988 (BC8801016); and *CSR Ltd. v. Wren* (1997) 44 N.S.W.L.R. 463 (Australia). They may also look for the parent company taking on explicit management responsibilities (see for example *CSR Ltd & Anor v. Young* (1998) 16 N.S.W.C.R. 56 (Australia)).

739 A “duty of care” is a requirement on a person to act toward others with the attention, caution and prudence that a reasonable person in the circumstances would. If a person fails to act with the expected level of caution and prudence, his or her acts are negligent, and any damages resulting may be claimed by those affected in a lawsuit for negligence.

740 For example, the UK courts use a “three stage test” to determine whether a duty of care exists i.e: (a) the harm must be foreseeable (b) the plaintiff and defendant must be in a relationship of “proximity” and (c) it must be “fair, just and reasonable” to impose a duty of care in the relevant circumstances. See *Caparo Industries plc v. Dickman* [1990] 2 AC 605, pp617-8 (per Lord Bridge).

741 In a number of Australian cases a parent company was held to have a duty of care towards employees of a subsidiary and was found to have breached this duty. See *Barrow & Heys v. CSR Ltd & Micalco Pty Ltd* (Unreported) Supreme Court of Western Australia, Rowland J, 4 August 1988 (BC8801016); *CSR Ltd & Anor v. Young* (1998) 16 N.S.W.C.R. 56 (Australia) and *CSR Ltd. v. Wren* (1997) 44 N.S.W.L.R. 463 (Australia). In *Barrow and Heys v. CSR Ltd.*, the court found that a parent company owed a duty of care to two employees of a subsidiary due to the managerial control it exercised over the subsidiary’s mining operations and budget, and the fact that employees of the parent company were involved in the supervision of operations at the mine. This sort of finding nevertheless remains exceptional and does not affect the general rule that parent companies are not charged with a duty of care to employees of foreign subsidiaries. The idea that the parent company could owe a duty of care to injured employees of a subsidiary was key to the claim against Cape plc in the UK case of *Lubbe v. Cape* (see [1998] EWCA Civ 1351) and against RTZ plc in *Connelly v. RTZ plc* (see [1998] AC 854).

742 *Chandler v. Cape plc* [2012] EWCA Civ. 525, Judgment of 25 April 2012. Note that this is a domestic case concerning a UK-based parent company, Cape plc, and its UK-based subsidiary, Cape Products.

743 *Chandler v. Cape Plc* [2012] EWCA Civ. 525,

Judgment of 25 April, 2012, paras 80-81.

744 *Chandler v. Cape Plc*, [2012] EWCA Civ. 525, Judgment of 25 April, 2012, para 80. Arden L J then sets out what these circumstances are: “Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.”

745 *Chandler v. Cape plc* [2011] EWHC 951, para 31[75].

746 *Oguru and others v. Royal Dutch Shell plc and The Shell Development Petroleum Company of Nigeria Ltd*, Case No. C/09/330891 / HA ZA 09-0579, Judgment of 30 January 2013, paras 4.4, 4.34-4.40. The court concluded that *Chandler* did not create any precedent in the *Oguru* case because “the special circumstances based on which the parent company was held liable in *Chandler v. Cape* are not so similar to those in the subject case” (para 4.39).

747 See J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge, 2011, Cambridge University Press, pp226; and, for example, *Doe I v. Unocal* 395 F 3d 932 (9th Cir. 2002). See further US Restatement (Second) of the Law of Torts § 876. For a US judicial statement of the legal elements of “aiding and abetting” a tort, see *Halberstam v. Welch* 705 F.2d 472 (D.C. Cir. 1983). In the case of “secondary” liability, it would not be necessary to prove that the parent owed a duty of care to those affected by the subsidiary’s actions, or that its acts or omissions were the primary cause of the tort (see J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge, 2011, Cambridge University Press, p226).

748 See J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in*

International Law, Cambridge, 2011, Cambridge University Press, pp223-5.

749 See J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge, 2011, Cambridge University Press, p224.

750 “... there is no reason why when the corporate veil can be lifted in the cases of tax evasions, enforcement of welfare measures relating to industrial workmen ... it cannot be lifted on purely equitable considerations in a case of tort which has resulted in a mass disaster and in which on the face of it the assets of the alleged subsidiary company are utterly insufficient to meet the just claims of multitude of disaster victims. The concept in question regarding “lifting the veil” has been an expanding concept and the Court shall fail in its duty if it does not apply the said concept in a case of the nature of the Bhopal suit.” *Union Carbide v. Union of India* Decision of the High Court of Madhya Pradesh, Jabalpur, Civil Revision No.26 of 88, 4 April 1988, para 14.02.05.

751 New Zealand Companies Act 1993, sections 271 and 272.

752 UK Insolvency Act 1986, section 214.

753 Joint Stock Corporation Act of 1965. Aktiengesetz vom 6 September 1965 (BGBl. I S. 1089).

754 Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Corporate Law Project, *Overarching Trends and Observations*, July 2010, available at: www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf (accessed on 28 October 2013)

755 See *Doe v. Unocal* 248 F 3d 915 (9th Cir. 2001), 926.

756 See more on this in Richard Meeran, ‘The Unveiling of Transnational Corporations: A Direct Approach’, in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague, 1999, Kluwer Law International.

757 Peter Muchlinski, *Multinational Enterprises and the Law*, Oxford, 1995, Blackwell, pp323-7.

758 *Amoco Cadiz* [1984] 2 Lloyd’s Rep 304, 338. The reference to “Standard” in this quote refers to Standard Oil Co (now Amoco Corporation), the parent company of the owners of the Amoco Cadiz.

759 In matters regarding tort, delict or quasi-delict, the Court of Justice of the European Union has interpreted that “the place where the harmful event occurred” can also be where the event giving rise to damage took

place. According to the Court, “the result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage”. See Case 21/76 *Handelskwekerij G. J. Bier Bv. v. Mines De Potasse D’Alsace Sa*; [1976] E.C.R. 1735. Several subsequent decisions applied the same rule. See for example, Case C-167/00 *VKI v. Henkel* [2002] E.C.R. I-8111; Case C-18/02 *DFDS Torline* [2004] E.C.R. I-1417 and Case C-189/08 *Zuid-Chemie v. Philippo’s Mineralenfabriek NV/SA* [2009] E.C.R. I-6917. Under this interpretation, claims lodged in home States for acts or omissions of a parent company within the territory of the home State might not be considered “extraterritorial”.

760 For discussion, see 1.4.2 *Piercing the corporate veil in the Legal Challenges* section of this book.

761 *Recherches Internationales Québec v. Cambior Inc.*, Defendant’s Declinatory Exception, 7 July 1997, para 15.

762 Articles of Association of Omai Gold Mines Limited, Part 19, Articles 105 and 108.

763 Articles of Association of Omai Gold Mines Limited, Part 28, Article 148.

764 Articles of Association of Omai Gold Mines Limited, Part 28, Article 149(a).

765 Cambior itself recognized that under the Mineral Agreement it had extensive powers and duties as “managing member”, which included being responsible for assisting Omai Gold Mines Limited (OGML) in the daily operations of the mine; causing OGML to prepare work programmes relating to the development and operations of the mine under Cambior’s direction; and preparing budgets and directing OGML in the execution of all decisions of the board.

766 *Recherches Internationales Québec v. Cambior Inc., Home Insurance and Golder and Associates Limited* [1998] Q.J. No.2554, Québec Super. Ct, 14 August 1998, pp8-10.

767 *Recherches Internationales Québec v. Cambior Inc., Home Insurance and Golder and Associates Limited* [1998] Q.J. No.2554, Québec Super. Ct, 14 August 1998, p9.

768 *Recherches Internationales Québec v. Cambior Inc., Home Insurance and Golder and Associates Limited* [1998] Q.J. No.2554, Québec Super. Ct, 14 August, 1998 p13.

769 For a summary of the Québec Superior Court’s Judgment, see UN Environment Program, *Compendium of Judicial Decisions on Matters Related to the Environment: National Decisions*, Volume III, October

2001, pp24-34.

770 Union Carbide Corporation statements relating to the Bhopal tragedy can be found at www.bhopal.com/ (accessed 28 October 2013)

771 *Memorandum of Law*, Michael V. Ciresi, Stanley M. Chesley and F. Lee Bailey, in *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, Misc. Nos. 21-38, 85 Civ. 2696 (JFK), US District Court for the Southern District of New York, p4.

772 Union Carbide Corporation, *Corporate Policy Manual*, 5 December 1975. Union Carbide Corporation (UCC) produced an internal manual, *Legal Control of a 50-50 Joint Venture Affiliate*, which lists a number of “devices or expedients” on how to retain control of an affiliate. Another UCC publication entitled *Master Guidelines and Check List for Matters to be Considered in Organizing and Reorganizing Equity in an Affiliate* details how to accomplish this key corporate objective.

773 Memorandum from B T Burgoyne, Union Carbide Eastern addressed to the Management Committee dated 2 December 1973 enclosing documents “Sevin Project – India, Finance Plan”, “Methyl-Isocyanate Based Agricultural Chemicals Report No.73-B” dated 12 February 1973, and “Union Carbide India Limited Methyl-Isocyanate Based Agricultural Chemical Project”.

774 *Memorandum of Law*, Michael V. Ciresi, Stanley M. Chesley and F. Lee Bailey, In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, Misc. Nos. 21-38, 85 Civ. 2696 (JFK), US District Court for the Southern District of New York, p6.

775 *UCC’s response to Plaintiff’s First Combined Set of Interrogatories and Requests for Admissions*. In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*. MDL Docket No.626 Misc. Nos. 21-38 (JFK) 85 Civ. 2696 (JFK), US District Court for the Southern District of New York, reproduced in Themistocles D’Silva, *The Black Box of Bhopal: A closer look at the world’s deadliest industrial disaster*, Victoria BC, 2006, Trafford, p250.

776 Memorandum from B T Burgoyne, Union Carbide Eastern, addressed to the Management Committee dated 2 December 1973 enclosing documents “Sevin Project – India, Finance Plan”, “Methyl-Isocyanate Based Agricultural Chemicals Report No.73-B” dated 12 February 1973, and “Union Carbide India Limited Methyl-Isocyanate Based Agricultural Chemical Project”.

777 Warren Woomer, who had served as a Special

Projects Manager in Union Carbide Corporation's Agricultural Products Division at Institute, West Virginia was appointed on a two year contract starting in 1980 as Works Manager at Bhopal's Methyl Isocyanate (MIC) unit. He stated in his deposition before the New York Court that he was provided with all the records of the Institute plant that could provide answers to questions regarding the MIC plant in Bhopal. If the records proved insufficient in any circumstance then he contacted his counterpart at the Institute directly by telex. Deposition of Warren Woome, pp80-1; 107-8; 136-46; 188; 190; and 194-200, Exhibit 25 in *Memorandum of Law*, Michael V. Ciresi, Stanley M. Chesley and F. Lee Bailey, In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, Misc. Nos. 21-38, 85 Civ. 2696 (JFK), US District Court, Southern District of New York, pp21-23.

778 Affidavit of Tota Ram Chouhan, pp2-3, *Bano v. Union Carbide Corporation* in Amended Class Action Complaint, US District Court of the Southern District of New York, Index No.99 Civ. 11329 (JFK). Tota Ram Chouhan joined Union Carbide India Limited as a trainee plant operator in 1975 and in 1982 was transferred to work at the Methyl Isocyanate plant.

779 Kamal Pareek in *The Betrayal of Bhopal* produced by World In Action, Granada Television, UK, June 1985, abridged transcript produced by the Delhi Science Forum, B1, 2 Floor, LSC, J-Block, Saket, New Delhi-17, India.

780 "Design Transfer Agreement between UCC and UCIL", 15 November 1973, reproduced in Themistocles D'Silva, *The Black Box of Bhopal: A closer look at the world's deadliest industrial disaster*, Victoria BC, 2006, Trafford, pp203-9.

781 Exhibit 8 to Ghosh Affidavit, Exhibit 11 in *Memorandum Of Law*, Michael V. Ciresi, Stanley M. Chesley and F. Lee Bailey, In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No.626, Misc Nos. 21-38, 85 Civ. 2696 (JFK), US District Court for the Southern District of New York.

782 In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), p856.

783 In "Order on Interim Relief, High Court of Madhya Pradesh, Jabalpur, 04-04-1988, Civil Revision No.26 of 88", reproduced in Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal case*, Delhi, 1990, Indian Law Institute, p380.

784 *State of Madhya Pradesh v. Warren Anderson*

(*Absconder*) and Others, in the Court of Chief Judicial Magistrate Bhopal, Madhya Pradesh, Cr. Case No.8460 / 1996 - Date of Institution 1 December 1987, Judgment of 7 June 2010, paras 11-12.

785 In the EU the rules on jurisdiction have been harmonized, first by treaty and later by what is known as the "Brussels Regulation" or "Brussels I" (Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Brussels I confirms that national courts of EU States enjoy jurisdiction over companies "domiciled" in their jurisdiction. Under article 60 of Brussels I, the "domicile" of a company, for jurisdictional purposes, is the place where it has its "statutory seat", its "central administration" or its "principal place of business." In the UK, a company may also be treated as "domiciled" in the UK if those with key decision-making roles within a company have the UK as their main place of work. See *Alberta Inc v. Katanga Mining Ltd* [2008] EWHC 2679 in which a Bermudan incorporated company was held to have English domicile on the basis that two key members of the board worked out of London, making London "the centre from which management decisions are given when necessary". In the US, rules on jurisdiction vary from state to state, but many states assert jurisdiction broadly subject only to constitutional "due process" limits. For example, under the California Code of Civil Procedure, section 410.10: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

786 Under the "Act of State" principle, the courts of one State will not "sit in judgment" on the sovereign acts of another State in its own territory. See the *Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study in this book.

787 The "Mozambique" principle determines that national courts do not have jurisdiction to hear cases related to rights to foreign property. See the *Mine waste dumping: Ok Tedi gold and copper mine in Papua New Guinea* case study in this book.

788 There is no internationally agreed definition of "International Comity". The doctrine is generally applied when courts judge that intervening in a case would amount to an interference with the sovereignty or rights of another State.

789 This is in part because courts in common law jurisdictions potentially assert jurisdiction more widely than courts in civil law jurisdictions. The use of the

forum non conveniens doctrine reduces the potential unfairness of a broad assertion of jurisdiction. *Forum non conveniens* is generally not applicable in civil law jurisdictions as it is considered inconsistent with principles of predictability and certainty. Under German law, courts have at times rejected jurisdiction on the basis of arguments very similar to *forum non conveniens*, for example a court in Nuremberg declined jurisdiction where a less expensive trial was available in another forum. However, German courts generally take a very rigid view of jurisdiction. The same is true in the rest of continental Europe and Latin America. In these jurisdictions, the *lis pendens* rule determines that the first court to be seized that has jurisdiction hears the case. An exception is Québec, which, although a civil law system, has incorporated the doctrine of *forum non conveniens* in article 3135 of its Civil Code.

790 Quoting *Piper Aircraft Co v. Reyno*, 454 U.S. 235 (1981), J Talpis and S L Kath explain how the corporate defendant preferred to see the case brought against it in the host jurisdiction that lacked the advantages of the US as to contingency fees and extensive discovery and where a settlement might be easier. Jeffrey Talpis and Shelley L Kath, *The Exceptional as Commonplace in Québec. Forum non Convenience Law: Cambior, a case in point*, 34 *Revue Juridique Themis* 761, 2000, p832 (73).

791 *Spiliada Maritime Corp v. Cansulex Ltd* [1987] AC 460.

792 The burden of proof rests on both parties. Firstly, the defendant must prove that there is an alternative court and that it is “clearly more appropriate”. The claimant subsequently must prove special circumstances that justify retaining the action in the UK courts. Those “special circumstances” that justify subverting the presumption for the “clearly more appropriate” foreign forum can be burdensome to prove. *Spiliada Maritime Corp v. Cansulex Ltd* [1987] AC 460.

793 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 8, available at: www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed 28 October 2013)

794 International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p6, available at tinyurl.com/taskforce-etj-pdf (accessed 16 January 2014)

795 International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p11, available at tinyurl.com/taskforce-etj-pdf (accessed 16 January 2014)

796 Case C-281/02, *Andrew Owusu v. N.B. Jackson*

[2005] ECR I-1383.

797 This is with respect to proceedings brought under Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), which include most civil claims against EU-domiciled defendants.

798 The doctrine continues to apply in most civil proceedings brought in English courts against defendants domiciled outside the EU.

799 *Antares Shipping Corp v. The Ship Capricorn* [1977] 2 SCR 422 and *Amchem Products Inc. v. British Columbia Workers Compensation Board*, [1993] 1 SCR 897, p423. It is up to the defendant invoking *forum non conveniens* to prove that the alternative forum is “clearly more appropriate”.

800 There is a presumption regarding the jurisdiction of the chosen court. This presumption can be overcome if the defendant shows that relevant factors relating to both the private interests of the litigants and public interest of the court clearly outweigh deference to the plaintiff's selected forum. See *Gulf Oil v. Gilbert*, 330 U.S. 501 (1946).

801 See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), pp256-266, in which the court held that the initial presumption that the plaintiff had chosen the most convenient forum applied with less force when the plaintiff resides outside the US. Human rights cases dismissed on *forum non conveniens* grounds include *Sequihua v. Texaco, Inc*, 847 F. Supp. 61 (S.D. Tex. 1994) 63-65; *Torres v. Southern Peru Copper*, 965 F Supp 899 (S.D. Tex 1996) affirmed by *Torres v. Southern Peru Copper*, 113 F.3d 540 (5th Cir., 1997) and *Delgado v. Shell Oil*, 890 F Supp 1324 (S.D. Tex. 1995).

802 *Oceanic Sun-Line Special Shipping Co. Inc. v. Fay* (1988) 165 C.L.R. 197.

803 *Dagi v. BHP (No.2)* [1997] 1 VR 428.

804 Commentators criticized the decision of the Québec court in Omai on the basis that it departed from the exceptional and restrictive application of *forum non conveniens* under article 3135 of the Québec civil code. See for example Jeffrey Talpis and Shelley Kath, *The Exceptional as Commonplace in Québec. Forum non Convenience Law: Cambior, a case in point*, 34 *Revue Juridique Themis* 761, 2000, pp776 and 818.

805 As described in the Bhopal case study, UCIL's assets were estimated at US\$175 million while the legal claim in India sought compensation for US\$3.3 billion and expert estimates of the compensation needed pointed at

anything above US\$1 billion.

806 In granting UCC's forum request the US District Court had set three conditions: 1. Union Carbide shall consent to submit to the jurisdiction of the courts of India...; 2. Union Carbide shall agree to satisfy any judgment rendered by an Indian court ... where such judgment and affirmance comport with the minimal requirements of due process; 3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure. However, the US Court of Appeals removed the second and third conditions. Although UCC was theoretically subject to the Indian courts' jurisdiction, any case for compensation could have dragged on for years, UCC could evade discovery requirements and there was no guarantee that any compensation awarded by the court would be honoured by UCC. In the criminal case against UCC and Warren Anderson, neither had submitted to the Indian courts jurisdiction and the case against them remains pending.

807 In *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (S.D.N.Y. 1986) at 867.

808 The Canadian action followed a controversial and deeply-flawed military trial in the Democratic Republic of the Congo (DRC). In 2006, a Congolese military prosecutor indicted 9 Congolese soldiers for war crimes, and 4 expatriate former employees of Anvil for complicity in war crimes. Following numerous irregularities, in June 2007, the military tribunal acquitted all the defendants, finding that the events in Kilwa were the accidental results of fighting, despite substantial evidence pointing to the commission of deliberate and serious human rights violations. See in this context UN Press Release: *High Commissioner for Human Rights concerned at Kilwa military trial in the Democratic Republic of the Congo* Geneva, 4 July 2007, available at: www.unhchr.ch/huricane/hurricane.nsf/0/9828B052BBC32B08C125730E004019C4?opendocument (accessed 28 October 2013). During the trial, the tribunal had also rejected the civil claims ("parties civiles" claims) of some of the victims as "unfounded". The survivors were denied the right to appeal in the DRC. No further domestic legal remedies were available there (an acquittal in a penal court is *res judicata* on the issue of fault in a civil proceeding based on the same facts). The plaintiffs also described the hurdles encountered in Australia where preliminary efforts to obtain disclosure of documents had to be abandoned when Congolese authorities refused to allow legal representatives for the

victims to travel to Kilwa to confirm instructions. During these efforts, the Congolese lawyers received death threats and the Australian lawyers representing the Kilwa plaintiffs desisted from the case. Despite efforts by the victims and NGOs, the plaintiffs were unable to find another Australian law firm willing to represent them. See *Anvil Mining Ltd. v. Association Canadienne Contre L'Impunity* [2012] J.Q. No.368, 2012 QCCA 117 (decision of 24 January 2012), paras 35-37.

809 Office of the High Commissioner for Human Rights, *High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo*, 4 July 2007, available at: www.unhchr.ch/huricane/hurricane.nsf/view01/9828B052BBC32B08C125730E004019C4?opendocument (accessed 22 January 2014)

810 *Association Canadienne Contre L'Impunity v. Anvil Mining Limited* [2011] J.Q. No.4382, 2011 QCCS 1966 (decision of 27 April 2011).

811 *Association Canadienne Contre L'Impunity v. Anvil Mining Limited* [2011] J.Q. No.382, 2011 QCCS 1966 (decision of 27 April 2011), para 39.

812 *Anvil Mining Ltd. v. Association Canadienne Contre L'Impunity* [2012] J.Q. No.368, 2012 QCCA 117 (decision of 24 January 2012).

813 *Anvil Mining Ltd. v. Association Canadienne Contre L'Impunity* [2012] J.Q. No.368, 2012 QCCA 117 (decision of 24 January 2012), paras 83-94.

814 Under a "forum of necessity" doctrine a court that has no jurisdiction over a case may still assume it if it finds that there is no court elsewhere in which the plaintiff could reasonably be expected to sue. It is included in article 3136 of the Québec Civil Code.

815 *Anvil Mining Ltd. v. Association Canadienne Contre L'Impunity* [2012] J.Q. No.368, 2012 QCCA 117 (decision of 24 January 2012), para 103 ("L'ACCI ne démontre pas l'impossibilité d'avoir accès à un tribunal étranger").

816 *Association Canadienne Contre L'Impunity v. Anvil Mining Limited* No. 34733 (Supreme Court decision of 1 November 2012).

817 Alien Tort Statute, 28 USC § 1350, also called the Alien Tort Claims Act.

818 The US Centre for Constitutional Rights pioneered the use of The US Alien Tort Claims Act (ATCA) in human rights cases. A first landmark victory was in *Filártiga v. Peña-Irala* (630 F 2d 876 (2d Cir 1980)), which opened the door for ATCA cases against

government officials. The successful case of *Doe v. Karadžić* (2000 WL 763851 (S.D.N.Y. 2000)) for genocide, war crimes, and crimes against humanity paved the way for cases against non-State actors. Since then, ATCA has also been used in cases involving human rights abuses by multinational corporations. See Centre for Constitutional Rights, *Corporate human rights abuse*, available at: ccrjustice.org/files/CCR_Corp.pdf (accessed 28 October 2013)

819 ATCA does not provide a cause of action for any violation of human rights. The Supreme Court has specified certain limitations. In *Sosa v. Alvarez-Machain* the Court stated that the ATS “furnish[ed] jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” *Sosa v. Alvarez-Machain et al*, 542 U.S. 692 (2004), p720

820 *Doe v. Unocal Corp., National Coalition government of the Union of Burma v. Unocal, Inc.*, 395 F.3d 978 (9th Cir. 2003).

821 Earth Rights International, *Final Settlement Reached in Doe v. Unocal*, 21 March 2005, available at: www.earthrights.org/legal/final-settlement-reached-doe-v-unocal (accessed 28 October 2013)

822 *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* were three lawsuits brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell), the head of its Nigerian operation, and Royal Dutch/Shell's Nigerian subsidiary, charging them with complicity in human rights abuses against the Ogoni people in Nigeria. For further information see: ccrjustice.org/ourcases/current-cases/wiwa-v-royal-dutch-petroleum (accessed 16 January 2014)

823 EarthRights International, *Wiwa v. Royal Dutch Shell*, available at: www.earthrights.org/legal/wiwa-v-royal-dutchshell (accessed 28 October 2013)

824 *Kiobel v. Royal Dutch Petroleum Co*, 621 F.3d 111 (2d Cir 2010), para 120. In 1995, nine activists from the Ogoni community in the Niger Delta (the ‘Ogoni Nine’), including writer and human rights campaigner Ken Saro-Wiwa, were executed by the military government in Nigeria following a politically motivated prosecution and an unfair trial. The activists had protested against the devastating impact of the oil industry in the region, in particular, Shell's operations there. A number of lawsuits were filed in the U.S. by lawyers working with some of the relatives of the executed men, and victims of violence in Ogoniland, to try to hold Shell accountable for

its involvement in human rights violations there. The *Kiobel* case was filed under the Alien Tort Statute (ATS) on behalf of Dr. Barinem Kiobel, one of the ‘Ogoni Nine,’ and eleven others. In 2010, an appeals court dismissed the case on the grounds that corporations could not be sued for human rights violations under the ATS. The plaintiffs subsequently took their case to the U.S. Supreme Court.

825 Brief for Respondents, *Kiobel v. Royal Dutch Petroleum*, No.10-1491, section IIA, p17, available at: www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondent.authcheckdam.pdf (accessed 28 October 2013)

826 Brief for Petitioners, *Kiobel v. Royal Dutch Petroleum*, No.10-1491 in the Supreme Court of the United States, available at: www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner.authcheckdam.pdf (accessed 28 October 2013)

827 Brief for the governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amicus curiae* in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum*, No.10-1491 in the Supreme Court of the United States, available at: www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamicuthegovernments.authcheckdam.pdf (accessed 28 October 2013)

828 Supplemental Brief for the United States as Amicus Curiae in partial support of affirmance, *Kiobel v. Royal Dutch Petroleum*, No.10-1491 in the Supreme Court of the United States, p5, available at: www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmanceamcuusa.authcheckdam.pdf (accessed 28 October 2013). The US government had previously supported the application of the US Alien Tort Claims Act (ATCA) in the case, arguing that a corporation's liability in an ATCA suit did not depend on the existence of a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations. Brief for the United States as Amicus Curiae supporting petitioners, *Kiobel v. Royal Dutch Petroleum*, No.10-1491 in the Supreme Court of the United States, p6, available at: www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.mauthcheckdam.pdf (accessed 28 October 2013)

829 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

830 It further found that there was no clear indication of the extraterritorial application of The US Alien Tort Claims Act, and that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), pp4, 13 and 14.

831 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), p14.

832 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), p14.

833 *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), p14.

834 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford 2006, Oxford University Press, p251.

835 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (as amended), Article 2. Also see, for example, the UN Convention against Corruption 2003, the UN International Convention for the Suppression of the Financing of Terrorism 1999 and the Council of Europe Convention on the Protection of the Environment through Criminal Law 1998.

836 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (as amended), Article 9.

837 For example, international investment arbitration.

838 *Al-Shimari v. CACI International Inc., et al.* Case No. 1:08-cv-827 (GBI/JFA) (United States District Court for the Eastern District of Virginia, Alexandria Division), Memorandum Opinion and order of 25 June 2013. The plaintiffs filed an appeal in July 2013, and oral arguments are due to commence before the US Court of Appeals for the Fourth Circuit in March 2014. See Centre for Constitutional Rights, available at: ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al (accessed 25 October 2013)

839 See the plaintiff’s brief opposing the defendant’s motion for reconsideration of the ATCA claim following the *Kiobel* case, *Al-Shimari v. CACI Premier Technology, Inc, C.A. No. 08-cv-827 GBL-JFA* (United States District Court for the Eastern District of Virginia, Alexandria Division)), available at: ccrjustice.org/files/399_2013-5.03%20Opposition%20ATS%20re%20Kiobel.pdf (accessed 25 October 2013)

840 For example see: *Balintulo et al. v. Daimler AG et al*, Civil Action No. 09-2778 (US Court of Appeals for the Second Circuit), Decision of 21 August 2013;

Ramchandra Adhikari et al v. Daoud & Partners, et al, Civil Action No. 09-1237 (S.D.T.X.), Memorandum and Order of 21 August 2013; *Linde et al v. Arab Bank, PLC*, Civil Action No. 12-1485 (E.D.N.Y.), Order granting defendant’s motion to dismiss plaintiff’s ATS claims of 23 August 2013.

841 In the US, there are a range of approaches for determining the “proper law” of a tort. The most widely used test for the “proper law” of a dispute is the law with the most significant relationship to the dispute. This requires the courts to take account of a range of both public and private concerns, such as the regulatory interests of the relevant States, the expectations of the parties, and fairness. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). Second Restatement on Conflict of Laws, para 6, 145.

842 Regulation (EC) No.864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

843 Regulation (EC) No.864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) Article 4(3) requires that it be “clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with [another] country.” Special provisions apply to cases involving pollution that crosses over a national border to another country, which can be judged either by the law of the country where the damage occurred or the law of the country where the event giving rise to the pollution took place. The wording is arguably broad enough to cover cases where a poor management decision in one country gives rise to an environmental disaster in another.

844 Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States”, *City University of Hong Kong Law Review*, Vol 3.1, 2011, p15. Meeran gives the examples of South Africa and Namibia. The laws of delict in these countries utilize concepts of legal duty, negligence and wrongfulness which although not entirely matching those of duty of care and breach of duty in English law are still likely, when applied to the facts, to produce the same result.

845 Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States”, *City University of Hong Kong Law Review*, Vol 3.1, 2011, p15. Meeran explains that the UK “*Monterrico*” case was formulated on the basis of both the English law of negligence and

the Peruvian Civil Code. The Peruvian Civil Code provides grounds for establishing liability that are akin, albeit not identical, to those under English law. To establish the liability of parent company Monterrico under Peruvian law, the plaintiffs needed to turn to a similar factual analysis of whether a relationship of ‘effective control’ existed between parent and subsidiary to that which would have been required under English law.

846 Regulation (EC) No.864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Articles 4(1) and 15. Quoting *Harding v. Wealands* [2006] UKHL 32, Meeran explains that previous to the enactment of the Rome II provision, the position under English law was that damages would be assessed in accordance with the law and procedure of the country in which the case was proceeding, even if the case was governed by host State law. See Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States”, *City University of Hong Kong Law Review*, Vol 3.1, 2011, p17.

847 For example, under Nigerian legislation (namely the Nigerian Petroleum Act and Oil Pipelines Act), land-owners and occupiers are entitled to compensation from oil companies for damage caused by oil operations and oil spills to their land, buildings, crops and productive trees. However, compensation is calculated primarily in relation to loss of “surface goods”, which leaves out many aspects for which communities cannot claim compensation. These include the long-term damage caused by a loss of livelihood when farm land or fisheries are contaminated, contamination of rivers and streams, harm to health and loss of access to communal resources including water systems. See 29 May 2012, Amnesty International, *Joint Memorandum on Petroleum Industry Bill March 2012*, AI Index: AFR 44/031/2012, pp10-11.

848 Regulation (EC) No.864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 26.

849 See: John Collier, *Conflict of Laws*, Cambridge, 2001, Cambridge University Press, p235. There is judicial support for the idea that foreign laws that violate human rights ought not to be recognized. See the decision of the UK House of Lords in *Oppenheimer v. Cattermole* [1976] AC 249 per Lord Cross of Chelsea at pp277-8, who thought that a 1941 law passed by the Nazi government of Germany depriving Jewish citizens

of their nationality (and therefore putting their property at risk of confiscation) was such a serious violation of human rights that it ought not to be recognized by the English courts. Also see *Kuwait Airways Corporation v. Iraqi Airlines Co* [2002] 2 W.L.R. 1353 in which the House of Lords held that the English courts ought to refuse to recognize foreign laws (in this case an Iraqi decree) that are contrary to international law. In the *Doe v. Unocal* litigation in the US, judge Chaney thought that human rights considerations *would* form a part of an assessment of the “proper law” to apply. The judge thought that Myanmar law ought not to be applied to the extent that it might preclude the plaintiffs’ claims based on forced labour, but that case was settled before it reached trial and no final determination on the issue was made. ‘Ruling on the Defendants’ Motion for Summary Judgment, or in the alternative, summary adjudication on each of the Plaintiffs’ tort claims’, *Doe I v. Unocal Corp.*, Nos. BC 237 980, BC 237 679, at 3-9 (Cal. Super. Ct. Jun. 7, 2002), available at: dg5vd3ocj3r4t.cloudfront.net/sites/default/files/legal/Unocal-Plaintiff-MSA-Ruling.pdf (accessed 28 October 2013)

850 In tort claims the relevant limitation period is three years under English law, two years under Peruvian law, 30 years under the law of the Democratic Republic of the Congo, and 10 years under Colombian law. Under the UK Foreign Limitation Periods Act 1984, limitation is considered a matter of substantive law. As a consequence, the foreign limitation period will as a principle apply in a foreign tort claim. However, under this Act, the court can disregard a foreign limitation if its application would constitute ‘undue hardship’ or be ‘contrary to public policy’. Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States”, *City University of Hong Kong Law Review*, Vol 3.1, 2011, p16.

851 Chief James Tela, Chairman of the Maritime Workers Union, Bodo, Nigeria, Amnesty International interview, May 2011 (referring to the financial losses incurred by the seamen/water transport workers’ branch following the Shell/Bodo oil spill disaster).

852 *Steel and Morris v. The United Kingdom*, No.68416/01, Judgment of 15 February 2005, ECHR 2005.

853 For a detailed explanation, see Richard Meeran, Leigh Day & Co, *Implications of the Jackson Civil Costs Reform Proposals for Multinational (“MNC”) Human Rights Cases*, 14 January 2011, available at: www.accessjusticeactiongroup.co.uk/home/latest-

news/jackson-multinational-corporations-human-rights-and-the-environment (accessed 28 October 2013)

854 Richard Meeran, Leigh Day & Co, *Implications of the Jackson Civil Costs Reform Proposals for Multinational ("MNC") Human Rights Cases*, 14 January 2011, para 22, available at: www.accesstojusticeactiongroup.co.uk/home/latest-news/jackson-multinational-corporations-human-rights-and-the-environment (accessed 28 October 2013)

855 The general rule on costs is that the "loser pays".

856 A public campaign which objected to the proposals was launched to raise awareness among UK Members of Parliament, available at: www.accesstojusticeactiongroup.co.uk/home/ (accessed 28 October 2013)

857 Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, United Kingdom, UN Doc CERD/C/GBR/CO/18-20, 14 September 2011, para 29.

858 A full copy of the letter is attached to the following article, Owen Bowcott, *Legal aid cuts will stop cases like Trafigura*, *UN official warns*, *The Guardian*, 16 June 2011, available at: www.guardian.co.uk/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura (accessed 28 October 2013)

859 See *The international human right to remedy* section of this book, for a fuller discussion on home State responsibilities.

860 For full details, see Amnesty International and Greenpeace Netherlands, *The Toxic Truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*, 25 September 2012, AI Index: AFR 31/002/2012, pp3 and 115-6.

861 Committee on the Rights of the Child, *General Comment 16: On State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16, 7 February 2013, para 44.

862 *Chorzów Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17, at para 73: ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.").

863 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

864 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011, "General Principles".

865 OECD, OECD Guidelines for Multinational Enterprises, 2011, page 17: "The Guidelines are addressed to all entities within a multinational enterprise"; ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1 January 2006, para 6: "the term 'multinational enterprise' is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole)".

866 For more information see: www.voluntaryprinciples.org/what-are-the-voluntary-principles/ (accessed 14 January 2014)

867 The OECD Guidelines are adhered to by 46 governments representing all regions of the world and accounting for over 85% of foreign direct investment. See: www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm (accessed 16 January 2014) and mneguidelines.oecd.org/oecddeclarationanddecisions.htm (accessed 16 January 2014). The UN Guiding Principles on Business and Human Rights were unanimously endorsed by the Human Rights Council. See: *Human Rights Council, Human Rights and Transnational Corporations and other Business Enterprises*, Resolution 17/4, UN Doc A/HRC/RES/17/4, 6 July 2011. A number of key home States and more than 20 major multinational extractive companies participate in the Voluntary Principles Initiative. See: www.voluntaryprinciples.org (accessed 16 January 2014)

868 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011, Principle 15(b). The steps of the suggested human rights due diligence process are elaborated further in Principles 17 to 21.

869 See UN Global Compact at: www.unglobalcompact.org/HowToParticipate/Business_Participation/Subsidiary_Engagement.html (accessed 16 January 2014)

870 *Mario Alberto Tabra Guerrero and others v. Monterrico Metals plc and Rio Blanco Copper SA* [2009] EWHC (2475) (Q.B.), paras 11, 26 and 27 (although it should be noted that this was for the purposes of supporting the continuation of a freezing injunction against the defendants).

871 See, for example, the UK Bribery Act 2010; the US Foreign Corrupt Practices Act 1977; the US Trafficking Victims Protection Act of 2000 (including US Executive Order 13627 (25 September 2012) – Strengthening Protections Against Trafficking in Persons in Federal Contracts); and the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

872 Swiss Federal Act on Gender Equality. Article 6 on “Reduced burden of proof” says: “In relation to the allocation of duties, setting of working conditions, pay, basic and advanced training, promotion and dismissal, discrimination is presumed if the person concerned can substantiate the same by prima facie evidence.”

873 Court of Justice of the European Union, Case No.C97/08P *Akzo Nobel v. Commission of the European Communities* [2009] ECR I-08237.

874 Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, UN Doc E/C.12/2011/1, 20 May 2011, para 5. Such expectations were reiterated by the Committee in their 2011 concluding observations on Germany, in which they raised concerns about the failure of the state to give due consideration to human rights in the context of the government’s support of investments by German companies abroad. Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations, Germany*, UN Doc E/C.12/DEU/CO/5, 20 May 2011, paras 10-11.

875 Amongst the reasons given to depart from the ordinary tort principle of personal liability (for example in certain circumstances, such as employer-employee relationships) are: that the employer is in a better position to absorb the legal costs either by purchasing insurance or increasing prices; that the imposition of liability should encourage the employer to ensure the highest possible safety standards in running the business; and that the employer makes profit from the employee’s activities therefore it is only reasonable in these circumstances that they bear any losses caused by the latter.

876 Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights

and Transnational Corporations and other Business Enterprises, *Corporate Law Project, Overarching Trends and Observations*, July 2010, p10, available at: www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf (accessed 28 October 2013)

877 Americans with Disabilities Act of 1990, (42 US\$12112(c)(2)(A)).

878 Section 8 defines an associated person as a person who performs services for or on behalf of the organisation, which may be an employee, an agent or a subsidiary. Guidance issued by the UK government on the Bribery Act 2010 specifies that “The concept of a person who ‘performs services for or on behalf of’ the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf.” See Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*, para 37, available at: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 28 October 2013). As far as subsidiaries are concerned, it is important to clarify that this does not provide for automatic liability of the parent for bribes paid by a subsidiary, but for liability only in so far as the subsidiary is doing business for or on behalf of the parent (e.g. selling the parent’s goods or services).

879 See for example the UK cases; *Connelly v. RTZ* [1997] UKHL30, *Ngcobo v. Thor Chemicals Holdings Ltd* [1995] T.L.R. 579, *Sithole v. Thor Chemicals Holdings* [1999] T.L.R. 110 and *Lubbe et al v. Cape plc* [2000] 1 W.L.R. 1545.

880 In *Lubbe v. Cape plc*, hearings took around four years. During this time approximately 1000 out of 7500 plaintiffs died. Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: an overview of the position outside the United States”, *City University of Hong Kong Review*, 2003.

881 Submission to the European Commission by the CORE Coalition, Leigh Day & Co, Trade Unions Congress (TUC), Amnesty International, Rights & Accountability in Development (RAID), One World Action, Global Witness and The Corner House, *Review of the Brussels I Regulation*, January 2010, available at: ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/collective_contribution_leigh_day_and_co_and_human_rights_orgs_en.pdf (accessed 16 January 2014)

882 This includes the 30,000 Ivorian plaintiffs in the Toxic Waste Dumping case featured in this book, who settled the claim for £30 million; the Colombia “campesinos” cases which lead to an agreed mediation and out of court settlement; *Arroyo v. BP Exploration Company (Columbia) Ltd* in the High Court of Justice, Queens Bench division, Claim no. HQ08X00328; and the case of alleged torture against mining company Monterrico Metals that also settled out of court. *Mario Alberto Tabra Guerrero and others v. Monterrico Metals plc and Rio Blanco Copper SA* [2009] EWHC (2475) (Q.B.)

883 In *Pla and Puncernau v. Andorra*, Application No. 69498101 (judgment of 13 July 2004), the European Court of Human Rights (ECHR) considered domestic courts (as public authorities) bound by Convention rights when adjudicating private disputes. The ECHR said at paragraph 59: “That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14, and more broadly with the principles underlying the Convention.”

884 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) at 338-40 and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88,100 (2d Cir. 2000).

885 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195 (2d Cir. 1987), para 40.

886 The rationale to eliminate *forum non conveniens* in cases involving claims by foreign plaintiffs against multinational corporations for alleged human rights abuses abroad may not apply to other disputes such as purely commercial matters between businesses. Amnesty International does not contend that *forum non conveniens* should be eliminated in all cases.

887 In this regard, principle 37(a) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights states that one of the measures through which States should give effect to their obligation to provide remedy is by seeking “cooperation and assistance from other concerned States where necessary to ensure a remedy.” Its commentary clarifies that this is particularly relevant

in cases in which abuses of human rights in the territory of one State are the consequence of conduct in the territory of another, such as when a subsidiary of a multinational company operates in State A but its parent company is domiciled in State B. In light of the particular obstacles to remedy that arise in these circumstances, principle 37(a) seeks to highlight the specific duties on the States concerned to cooperate with a view to removing such obstacles. Oliver De Schutter, Asbjorn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,” *Human Rights Quarterly*, Vol 34, 2012. General Comment 16 of the Committee on the Rights of the Child also addresses these duties, indicating that when rights have been abused by business enterprises operating extraterritorially, States “should provide international assistance and cooperation with investigations and enforcement of proceedings in other States.” Committee on the Rights of the Child, *General Comment 16: On State obligations regarding the impact of the business sector on children’s rights*, UN Doc CRC/C/GC/16, 7 February 2013, para 44.

888 Human Rights Committee, General Comment 34: Article 19, freedoms of opinion and expression, UN Doc CCPR/C/GC/34, 12 September 2011, para 18.

889 Human Rights Committee, *General Comment 34: Article 19, freedoms of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011, paras 18 and 19. The right to access information held by public authorities was jointly re-affirmed by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression in December 2004: “the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.” International Mechanisms for Promoting Freedom of Expression, Joint Declaration, 6 December 2004, p2.

890 *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment on merits, reparations and costs of 19 September 2006, Inter-Am. Ct. H.R., (Ser. C) No.151 (2006), para. 77, and *Társaság a*

Szabadságjogokért v. Hungary, No.37374/05, 14 April 2009, ECHR 2009, paras 26 and 35.

891 Their reports are available at: www.ohchr.org/EN/Issues/FreedomOpinion/Pages/AnnuaI.aspx (accessed 28 October 2013)

892 UN Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Submitted in Accordance With Commission Resolution 1999/36*, Mr Abid Hussain, UN Doc E/CN.4/2000/63, 18 January 2000, "Definitions".

893 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002 Banjul, The Gambia.

894 Committee on Economic, Social and Cultural Rights, General Comment 14: the right to the highest attainable standard of health (article 12), UN Doc. E/C.12/2000/4, 11 August 2000, para 11, General Comment 15: the right to water (articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, para 48, General Comment 19: The right to social security (article 9), UN Doc. E/C.12/GC/19, 4 February 2008, paras 26, 27 and 35.

895 Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (Article 12), UN Doc E/C.12/2000/4, 11 August 2000, para 11. The underlying determinants of the right to health also include access to safe and potable water and adequate sanitation and healthy occupation and environmental conditions.

896 General Comment 14 Para 12. See also General Comment 15: the right to water (articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, para 12.

897 Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (Article 12), UN Doc E/C.12/2000/4, 11 August 2000, para 35.

898 General Comment 15: the right to water (articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, para 48.

899 This problem was recently recognized by the UN Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, when raising concerns about people that are unable to benefit from the advances brought about by globalisation in his 2009 report, in which he stated: "Minorities, indigenous peoples, migrant workers, refugees and many other vulnerable communities have faced higher barriers, some of them insurmountable, to be able to fully

exercise their right to impart and also to access information...Without a means to disseminate their views and problems, these communities are in effect excluded from public debates which ultimately hinders their ability to fully enjoy their human rights." Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right To Freedom Of Opinion And Expression*, Frank La Rue, UN Doc A/HRC/11/4, 30 April 2009, para 55.

900 9 February 2010, Amnesty International, *Don't Mine us out of Existence. Bauxite Mine and Refinery devastate lives in India*, AI Index: ASA 20/001/2010, p39.

901 9 February 2010, Amnesty International, *Don't Mine us out of Existence. Bauxite Mine and Refinery devastate lives in India*, AI Index: ASA 20/001/2010, p39.

902 *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment on merits, reparations and costs of 19 September 2006, Inter-Am. Ct. H.R., (Ser. C) No.151 (2006), para 77.

903 Cecilia Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System*, Report on the American Convention on Human Rights, April 2008, pp29-30.

904 UN Water Resources Unit, *The United Nations Mission Report, Guyana*, 13-27 September 1995; Harry L Allen and David W Charters, *Detailed Itinerary and Trip Report, Omai Mine Spill, Guyana*, 13-24 September 1995; Ken Silver, *Toxicological report for the Residents of Essequibo Riverian Communities*, 2001.

905 Personal Communication with Dermot Travis, funder of Canadian based Public Interest Research Associates (PIRA) Communications, one of the Canadian organisations supporting the plaintiffs' campaign, May 2010.

906 This is even more so regarding potential human rights impacts. Potential impacts on human rights are rarely assessed in standard environmental or social impact studies. See for example 24 July 2011, Amnesty International, *Generalisations, omissions, assumptions. The failings of Vedanta's Environmental Impact Assessments for its bauxite mine and alumina refinery in India's state of Orissa*, AI Index: ASA 20/036/2011.

907. Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta*, AI Index: AFR 44/017/2009, 30 June 2009,, p48. In the case of a prospective bauxite mine in Orissa, India, Amnesty International reported that the authorities had not provided "any information to the communities on health risks that may arise due to the pollution or measures being taken to mitigate these risks, thereby leaving people in considerable uncertainty

and fear about using the water resources upon which they have traditionally relied.” 9 February 2010, Amnesty International, *Don't Mine us out of Existence. Bauxite Mine and Refinery devastate lives in India*, AI Index: ASA 20/001/2010, p63.

908 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, App. No.155/96, 27 October 2001.

909 This is a typical pattern in cases of environmental pollution. In its research on oil extraction in the Niger Delta region of Nigeria, Amnesty International found that oil companies withheld a wide range of environmental data. This was so even with regards to studies that claimed to have found no evidence to support any form of damage that could affect populations. See Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta*, AI Index: AFR 44/017/2009, 30 June 2009, p61 onwards. In his 2009 project on corporate and securities law, the UN Special Representative on business and human rights John Ruggie found that companies are generally required to disclose all information that is “material” or “significant” to their operations and financial condition, but that “none of the 40-plus jurisdictions studied specifically identify human rights-related risks as a factor in determining ‘materiality’, therefore few companies report them.” The Special Representative recommended that “Regulators should clarify that human rights impacts may be ‘material’ and indicate when they should be disclosed under current financial reporting requirements.” See Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, 9 April 2010, UN Doc A/HRC/14/27, para. 38.

910 M Taylor, “Putting Ok Tedi in perspective” in: Glenn Banks and Chris Ballard (eds) *The Ok Tedi Settlement: Issues, outcomes and implications*, Australia 1997, National Centre for Development Studies: Australian National University.

911 Amnesty International contacted both Ok Tedi Mining Limited and Broken Hill Proprietary Company Limited to obtain a copy of this book, but despite repeated requests the organisation was not provided with a copy or given any information as to where it could be found. See Ok Tedi case study for further detail on these requests.

912 See *Cyanide spills: the Omai gold mine dam*

rupture in Guyana, in *The cases* section of this book for further details.

913 Pathologist S Sriramachari, who was director of the Institute of Pathology, a government research centre, and who performed many post-mortem examinations on Bhopal victims, noted that: “Non-availability of any information about the toxicity of even the parent compound, MIC (methyl isocyanate), was a great impediment to institute detoxification measures and lay down guidelines for therapeutic intervention and management of the victims.” S Sriramachari, “The Bhopal gas tragedy: an environmental disaster”, *Current Science*, Vol 86, No.7, 10 April 2004.

914 Reported in Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p 9-10.

915 A leading chemical industry journal noted 4 years after the leak that “Union Carbide toxicologists may have the best information on MIC toxicity around, but they are treating it like a trade secret.” Ron Dagani, “Data on MIC’s toxicity are scant, leave much to be learned,” *Chemical and Engineering News*, 11 February 1989, p37. This behaviour was in stark contrast to Union Carbide Corporation’s response to a gas leak at its plant in Institute, West Virginia, USA in August 1985. Following the leak, UCC made public a detailed list of reaction products by name and quantities released, in amounts ranging from 650 pounds (295kg) to as small as seven pounds (3.2kg). *Chemical and Engineering News*, 2 September 1985, p6 in Tara Jones, *Corporate Killing: Bhopals will happen*, London 1998, Free Association Books, p51.

916 In statement by Jackson Browning, then Union Carbide Corporation’s Director of Health and Safety and Environmental Affairs. See Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p50.

917 Methyl Isocyanate is “reactive, toxic, volatile and flammable”, according to a UCC’s 1976 manual, and an “oral and contact poison.” See further Amnesty International, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004, p53.

918 Dr K. Amnesty International interview, June 2011.

919 As part of the UK settlement agreement, the company asked the independent experts who submitted reports to the proceedings to sign confidentiality agreements giving Trafigura complete control over what information would be put in the public domain. The confidentiality clauses in the agreement only apply in one direction, meaning

that while the plaintiffs cannot make the expert reports public, Trafigura can do so if it wishes.

920 Amnesty International English translation of verdict on *Trafigura Beheer BV*, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 20 June 2008 paragraph 6.8.

921 Amnesty International and Greenpeace Netherlands, *The Toxic Truth*, AI index: AFR 31/002/2012, p174.

922 Bad Information: Oil spill investigations in the Niger Delta, AI Index: AFR 44/028/2013, 7 November 2013.

923 See Amnesty International's press release, Shell Accused Over Misleading Figures on Nigeria Oil Spills, 25 January 2011, available at: <http://www.amnesty.org/en/news-and-updates/shell-accused-over-misleading-figures-nigeria-oil-spills-2011-01-25> (accessed 28 October 2015)

924 Milieudefensie, Shell Refuses Transparency on Oil Leaks in Nigeria, 24 June 2010, available at: www.milieudefensie.nl/english/shell/news/shell-refuses-transparency-on-oil-leaks-in-nigeria (accessed 28 October 2013)

925 Milieudefensie, Shell Refuses Transparency on Oil Leaks in Nigeria, 24 June 2010, available at: www.milieudefensie.nl/english/shell/news/shell-refuses-transparency-on-oil-leaks-in-nigeria (accessed 28 October 2013)

926 The “discovery” procedure is alien to civil law countries. Typically, civil law systems have an evidentiary stage during which both parties submit their evidence for cross examination and assessment by the judge. This occurs during the merits stage and it is largely down to each party to procure their own evidence. Swiss law, to give another example, does not require a company to provide information or produce documents that could be useful to resolving a dispute. An individual litigating against a company will therefore have to prove the company's guilt without having access to key documents. A campaign for greater accountability of Swiss companies in Switzerland is currently advocating for changes in the Swiss Civil Procedure Code to improve access to evidence. Specifically, it seeks a change in the law that will allow a judge to order the party in possession of useful documents to produce them, even if the burden of proof does not lie with that party. See Francois Membrez, *Legal remedies in the face of human rights violations and environmental damage committed by subsidiaries of Swiss corporations*, study commissioned by the Corporate Justice campaign, Geneva, February 2012, Executive Summary, p6,

available at: www.corporatejustice.ch/media/medialibrary/2012/06/membrez_executive_summary_def_en.pdf (accessed 28 October 2013)

927 Expert legal advice provided to Amnesty International Netherlands and SOMO by the Molengraaff Institute of Civil Law, Utrecht University, May 2012.

928 The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, No.21 of 1985, 29 March 1985, available at: <http://catimesofindia.blogspot.com/2011/04/bhopal-gas-leak-disaster-processing-of.html> (accessed 28 October 2013)

929 See *Bi v. Union Carbide Chems. and Plastics Co.*, 984 F 2d 582 (2d Cir.) cert. denied 510 US 862, 114 S Ct 179, 126 L Ed 2d 138 (1993). Because of this decision, the Appeals Court did not have to consider the question of forum.

930 Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Human Rights Council, *Report of the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu: addendum*, UN Doc A/HRC/12/26/Add.2, 3 September 2009, para 64.

931 S Kirsch, “Mining, indigenous peoples and human rights: a case study of the Ok Tedi Mine, Papua New Guinea”, in Tebtebba Foundation, *Indigenous Perspectives, The Myth of Sustainable and Responsible Mining*, Vol 5, No.1, June 2002, p77.

932 Press Release from the Office of the Prime Minister for Papua New Guinea, *NEC Approves Ok Tedi Proposal*, 26 September 2001.

933 Judith David, *Women Transform the Mainstream*, presentation at UN Division for Sustainable Development: Day of Women at CSD-6, New York 20 April 1998, pp34-40. Also see Phillip Preville, “Coming home to roost”, *Montreal Mirror*, March 1997.

934 CA\$1 = US\$0.7423 (rate during September 1995), available at: www.oanda.com/currency/historical-rates (accessed 28 October 2013)

935 Andrew MacIntosh, “Cambior pays off poor Guyanese at \$150 a pop”, *The Montreal Gazette*, 9 September 1995.

936 Robert Ramraj, “The Omai disaster in Guyana”, *Geographical Bulletin*, Vol 43, No.2, 2001, p88. Patricia Adams, executive director of Canadian-based Probe International was quoted as saying, “It's unconscionable

to try and cap their liability at a time when the long-term impacts caused by the spill remain unknown.” Andrew MacIntosh, “Cambior pays off poor Guyanese at \$150 a pop”, *The Montreal Gazette*, 9 September 1995.

937 Letter to the Group Chief Executive of BP from the US Department of Homeland Security and US Environmental Protection Agency, 20 May 2010, available at <http://www.epa.gov/bpspill/bp-hayward-dhs-epa.pdf> (accessed 15 January 2014). The letter states that “[On] May 17 2010...Mr Lamar McKay, Chairman and President of BP America, claimed that BP was making every effort to keep the public and government officials informed. Those efforts, to date, have fallen short in both their scope and effectiveness”.

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943 European Commission Competitiveness Report available at: ec.europa.eu/enterprise/policies/industrial-competitiveness/competitiveness-analysis/european-competitiveness-report/index_en.htm; KPMG International Survey of Corporate Responsibility Reporting 2011 available at: www.kpmg.com/PT/pt/IssuesAndInsights/Documents/corporate-responsibility2011.pdf (both accessed 22 January 2014). Regarding NFR costs: a French study conducted in 2011 evaluated costs of around €50,000 for companies above 500 employees and up to €500,000 for multinationals, according to French legislation. This amounts to about 1-5% of total costs invested in financial reporting. The same research concludes that NFR reporting costs would be incurred mainly in the first starting years and would decrease in the following 3-5 years, Institut RSE Management, ‘CE QUE COÛTE LE REPORTING RSE? Observatoire budgétaire de l’information extra-financière’, April 2012, p.19.

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1028 J Gordon, barrister, Amnesty International interview, 14 September 2009. Also see Lawrence Kalinoe and M. J. Kuwimb, "Customary land owners' right to sue for compensation in Papua New Guinea and the Ok Tedi dispute", *Melanesian Law Journal*, 1 January 1997, p22.

1029 J Gordon, barrister, Amnesty International interview, 14 September 2009.

1030 Dermot Travis, spokesperson for the National Committee of Defence Against Omai (NCDAO) and founder of Public Interest Research Associates (PIRA) Communications, sent letters titled "10 risks you should know before investing in Cambior Inc." to various banks considering loans to Cambior as well as Cambior's largest shareholders, raising concerns about Cambior's environmental record. The letters threatened a boycott against any financial institution that supported Cambior unless the situation in Guyana was rectified.

1031 Interview with Dermot Travis, spokesperson for the National Committee of Defence Against Omai (NCDAO) and founder of Public Interest Research Associates (PIRA) Communications, 31 June 2009. Also see Public Interest Research Associates (PIRA) Communications Press Release, *Canadian Mining Company Seeks Gag Order*, 3 September 1997.

1032 Dermot Travis, spokesperson for the National Committee of Defence Against Omai (NCDAO) and founder of Public Interest Research Associates (PIRA) Communications, personal communication with Amnesty International, 31 July 2012.

1033 See for example, a description of the Gbemre case in Nigeria, in Amy Sinden, *An Emerging Human Right to Security from Climate Change: the case against gas flaring in Nigeria*, 8 October 2008, Temple University, James E Beasley School of Law, p7.

1034 Upendra Baxi and Amita Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal case*, Delhi, 1990, Indian Law Institute pxi. "Throughout the time that the Indian courts were adjudicating on the matter, UCC played it cards skilfully (e.g. delaying proceedings, increasing the complexity of the case, asserting the separate existence of its subsidiary UCIL, filing cross-appeals, challenging the powers and jurisdiction of the Indian courts, and even conveying a veiled threat about the non-enforceability of an Indian judgment against UCC in the US) to coerce the government to enter into a settlement." Surya Deva, *Regulating Corporate Human Rights Violations, Humanizing Business*, Oxon, 2012, Routledge, p40.

1035 Stephen J Adler, "Bhopal Journal: the voiceless victims", *The American Lawyer*, April 1985, p130.

1036 Jędrzej George Frynas, "Legal change in Africa: evidence from oil-related litigation in Nigeria", *Journal of African Law*, Vol 43, No.2, 1999.

1037 "Chairman, Dow Chemicals indicated that they would be willing to contribute to such an effort voluntarily, but not under the cloud of legal liability". Note from Montek Singh Ahluwalia, Deputy Chairman of the Planning Commission, to the Indian Prime Minister on 2 December 2006, referring to The Dow Chemical Company's (Dow) reluctance to invest in India in view of the legal risks and the need to resolve the issue through an inter-Ministerial meeting.

1038 "...they [Dow] have sought a statement from Gol in the Court clarifying that Gol does not regard Dow as legally responsible for liabilities of UCC." Note from Montek Singh Ahluwalia, Deputy Chairman of the Planning Commission, to the Indian Prime Minister on 2 December 2006, referring to The Dow Chemical Company's (Dow) reluctance to invest in India in view of the legal risks and the need to resolve the issue through an inter-Ministerial meeting.

1039 Non-paper from The Dow Chemical Company's CEO, Andrew Leveris, to the Indian Ambassador to the US, Ronen Sen, entitled *Legacy Issue Resolution Proposal – India-USA CEO Dialogue Group*, 21 September 2005.

1040 Letter from Mr. Andrew Liveris, CEO, The Dow Chemical Company, to the Indian Ambassador His Excellency Ronen Sen, 8 November 2006.

1041 Note from the Department of Chemicals and Petrochemicals to the Indian Prime Minister, 26 June 2006, on the issue of application of the Department of Chemicals and Petrochemicals filed in the High Court of

Madhya Pradesh, in WP No.2802/2004 requesting the Court to direct Respondent No.4 [The Dow Chemical Company] to deposit Rs.100 crore as advance, for environmental remediation of former Union Carbide India Limited Plant Site at Bhopal.

1042 For example, during the Gbemre case in Nigeria, “When Mr Gbemre’s legal representative attended the Benin City court on 30th April 2007, he discovered that not only had Shell failed to submit the detailed scheme for the cessation of flaring activities as previously ordered, but that Justice Nwokorie had been removed from the case. It is alleged that the court file for the case had mysteriously gone missing, and no representatives of the company or government had turned up.” The London School of Economics, *The Reality of Rights, Barriers to Accessing Remedies when Business Operates Beyond Borders*, 2009, p24. In a case in Akhaltsikhe, Georgia, in which the Baku–Tbilisi–Ceyhan (BTC) pipeline project was being considered, the lawyer representing the affected communities reported being approached by the judge overseeing the case, mistaking him for the representative of BTC Co. ‘Everything will be OK’, the judge is reported to have assured the lawyer, ‘since I have received a call from the National Security Council of Georgia’. The London School of Economics, *The Reality of Rights, Barriers to Accessing Remedies when Business Operates Beyond Borders*, 2009, pp33-34.

1043 Telegram from US State Department staff in Guyana, 24 August 1995.

1044 Polaris Institute, *Can Alcan Claim to Be the Best? Its Corporate and Social Responsibility in Question, a Profile of Canadian Aluminium Giant*, 2005, pp30-31, available at: www.polarisinstitute.org/files/Alcan.pdf (accessed 28 October 2013), and “Case Study 1: The Construction of the Candonga Dam and the Communities of Santa Cruz do Escalvado, City of Rio Doce (Minas Gerais, Brazil)” in International Network for Economic, Social and Cultural Rights, *UN Human Rights Norms for Business: Briefing Kit*, January 2005, available at: http://www.escr-net.org/sites/default/files/Briefing_Kit_0.pdf (accessed 28 October 2013)

1045 In Nigeria, Shell declined to comply with the November 2005 order of the Federal High Court ordering the company to cease gas flaring activities, leading to the filing of contempt of court proceedings in December 2005. The court then softened its original order, granting the company a “conditional stay of execution” in which the company was granted an additional year until April 2007 to stop flaring.

1046 Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/8/5, 7 April 2008.



A wall painting dedicated to the memory of the victims of the 1984 Bhopal gas leak. The leak led to the deaths of some 15,000 people with more than 100,000 people continuing to suffer from associated health problems. The Bhopal disaster remains one of the 20th century's worst industrial disasters.



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Voices from Lemnos

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INJUSTICE INCORPORATED

CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY

Across the world the human rights of individuals and communities are threatened by the operations of multinational companies. For more than a decade Amnesty International has documented serious cases of abuse involving companies - from the horrendous gas leak in Bhopal, India in 1984, to the dumping of toxic waste in Abidjan, Cote d'Ivoire in 2006, to the ongoing environmental devastation wreaked by the hundreds of oil spills that occur again and again in the Niger Delta, Nigeria.

Of course, not all companies abuse human rights and some are committed to respecting rights throughout their operations. But too many companies are only willing to act responsibly if they are compelled to do so by regulators that robustly enforce the law. The reality persists. Where regulation and oversight are weak, bad practice thrives.

This book examines what happens when poor communities confront powerful multinational corporations in an effort to secure justice. It focuses on four emblematic cases and exposes how corporate, political and financial power, intertwined with specific legal obstacles, allow companies to evade accountability and deny, or severely curtail, a victim's right to remedy.

In exposing the obstacles to remedy in cases of corporate-related human rights abuse, this book looks at both the company and the State, and – critically – at the relationship between these two actors. Multinational companies often exert significant power and influence on both their home State and the States where they invest through subsidiaries or other commercial arrangements.

None of the cases documented in this book have been resolved, although some are decades old. Unless and until a human rights abuse is effectively remedied, the abuse is ongoing. In each of the documented cases the company actively obstructed access to justice – as such, in each case the company is responsible for an abuse of the right to an effective remedy in addition to the other abuses which gave rise to the requirement for a remedy in the first place.

The recommendations made in this book include – but go beyond – removing obstacles to victims' ability to access courts, including those of the company's home State. They include specific proposals to make the full scope of corporate influence on the State more transparent, thereby curtailing undue influence. This book also calls for changes in the way that home States support corporate interests abroad, mainly through foreign policy in the areas of trade and investment - support which too often reinforces corporate power and enables the corporate evasion of accountability.

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