

# *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*

Upendra BAXI\*

---

## **Abstract**

*This article addresses human rights responsibilities of multinational corporations (MNCs) in the light of what I describe as the four Bhopal catastrophes. More than thirty years of struggle by the valiant violated people to seek justice is situated in the contemporary efforts of the United Nations to develop a new discursivity for human rights and business—from the Global Compact to the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the Guiding Principles on Business and Human Rights, and the more recent process to elaborate a legally-binding international instrument.*

**Keywords:** Bhopal, Guiding Principles on Business and Human Rights, justice, mass torts, UN Draft Norms

## I. THE STATE OF THE ‘ART’

If we are to believe that the United States of America (US) is the new globalizing Empire, much talk about the linkages between human rights and multinational corporations (MNCs) remains altogether misplaced. In *Kiobel*, the Second Circuit Court of the US held that corporations are not liable to human rights law and jurisprudence,<sup>1</sup> and reconsidering that decision the US Supreme Court in 2013 ruled that the presumption against extraterritorial jurisdiction extends to the Alien Torts Statute 1789 (ATS), because of the ‘danger of unwarranted judicial interference in the conduct of foreign policy’.<sup>2</sup> There is much discussion concerning questions such as the dramatic litigation under the ATS, what *Kiobel* actually decided, the impact of this decision on human rights law and jurisprudence, and possible alternatives as ways out of it.<sup>3</sup>

---

\* Emeritus Professor of Law, University of Warwick and University of Delhi; Vice Chancellor, University of Delhi (1990–1994) and South Gujarat University (1982–1985).

<sup>1</sup> *Kiobel v Royal Dutch Petroleum Co.* 642 F 3d 111(2<sup>nd</sup> Cir. 2010).

<sup>2</sup> *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013), at 1672 (per Justice Beyer in a concurring judgment). Ingrid Wuerth discusses this decision in beautiful detail: Ingrid Wuerth, ‘The Supreme Court and the Alien Tort Statute: *Kiobel v Royal Dutch Petroleum Co.*’, Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 13–26, [http://ssrn.com/abstract\\_id=2264323](http://ssrn.com/abstract_id=2264323) (accessed 2 August 2015).

<sup>3</sup> Much scholarly literature has been well surveyed in Wuerth, note 2 and by Anna Grear and Burns H Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel*

In June 2011, the UN Human Rights Council unanimously endorsed<sup>4</sup> the Guiding Principles on Business and Human Rights.<sup>5</sup> However, on 26 June 2014, the Human Rights Council—at the initiative of Ecuador and South Africa, which was endorsed subsequently by Cuba, Venezuela, Bolivia, Algeria, El Salvador, Nicaragua, and Senegal—resolved to establish an open-ended intergovernmental working group to elaborate ‘an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.<sup>6</sup> Since state practice is an important indicator in determining *opinio juris* in the formation of international customary law, paradoxically both *Kiobel* and the work of, and the voting pattern at the Human Rights Council, remain important. Inaugural shifts are infrequent in international law and affairs but the Council’s predecessor Human Rights Commission makes this shift decisively by the un-adopted 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms).<sup>7</sup> Whether the treaty yet to be made adopts elements of either, or both, of these documents remains too early to foretell.

The question of whether corporations are subject to international law and human rights obligations is a deeply-contested one. The dominant view exists and thrives, urging that only states are proper subjects of international law, that the human rights law and jurisprudence do not apply to non-state entities and actors like MNCs, and that any submission to human rights responsibilities and obligations is at best a matter of negotiated responsibility of MNCs, international civil society, and the community of states. This submission occurs, if at all, through ‘soft’ law instruments (in the nature of codes of conduct imposing no legal obligations) and talk about corporate social responsibility (CSR).<sup>8</sup>

---

(F<sup>i</sup>note continued)

Lawscape’ (2015) 15 *Human Rights Law Review* 21. To this, I add Jordan J Paust, ‘Human Rights through the ATS After *Kiobel*: Partial Extraterritoriality, Misconceptions, and Elusive and Problematic Judicially-Created Criteria’ (2014) 6 *Duke Forum for Law and Social Change* 31; Ross J Corbett, ‘*Kiobel*, *Bauman*, and the Presumption Against the Extra Territorial Application of the Alien Tort Statute’ (2014) 13 *Northwestern Journal of International Human Rights* 50; Gregory H Fox and Yunjoo Goze, ‘International Human Rights Litigation after *Kiobel*’ (2013) *Michigan Bar Review* 44; Roger P Alford, ‘The Future of Human Rights Litigation after *Kiobel*’ (2014) *Notre Dame Law Review* 1749. Already, a fervent plea has been made as to why the EU should accept the principle of extraterritoriality: ‘The [*Kiobel*] retrenchment has provided the EU with an opportunity to step forward’ because this would ‘enable the EU to project a moral example around the world’ and ‘also help it to demonstrate a commitment to human rights leadership’. Jodie A Kirshner, ‘A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses’ (2015) 13 *Northwestern Journal of Law and Human Rights* 1, 3.

<sup>4</sup> Human Rights Council, ‘New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council’ (16 June 2011), [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E) (accessed 2 August 2015).

<sup>5</sup> Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011) (‘Guiding Principles’).

<sup>6</sup> Human Rights Council, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, A/HRC/RES/26/9 (26 June 2014), para 1. For a balanced and hopeful analysis, see Grear and Weston, note 3, 21–44, especially 40–44. See also, for a different genealogy of human rights, “‘Framing the Project’ of International Human Rights Law: Reflections on a Dysfunctional “Family” of the Universal Declaration’ in Adam Gearty and Costas Douzinas (eds.), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 17.

<sup>7</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>8</sup> On CSR, see Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2013), Chs 8 and 9 (‘Baxi, *Future*’).

On the other hand, it is plain global fact that large MNCs exist and command more influence and power than most states in the Global South; they constitute *state-like* and also *state-transcendent* collectivities, and they remain integral to the ‘nomadic’ war machine that is the state.<sup>9</sup> In her provocative and wide-ranging work, *Problems and Process: International Law and How We Use It*,<sup>10</sup> Rosalyn Higgins describes as mythical the entire distinction between ‘subjects’ and ‘objects’ of international law and instead urges that we adopt the perspective of participants in the process of making and applying that law. MNCs are clearly such participants and they at times decisively influence the making and the unmaking of international law norms, standards, and values. As such, they may not be regarded as immune from the discipline of human rights law and jurisprudence.

This view is now progressively shared but there are many difficulties still in the way; even Higgins acknowledges that international law is ‘*for the time being*’ and ‘*at this moment*’ state-centric, a mode that dwells ‘at the heart of international law’.<sup>11</sup> While from a subaltern standpoint that ‘time being’ and momentary seem to trespass on infinity, the glacial pace of international law reform seems all that is required of international relations and organizations.

There are here at least four difficulties. The first concerns the very nature of human rights; the second relates to punishment (legal liability) versus responsibility; the third is about mandatory versus voluntarist approaches to human rights responsibilities of corporations; and the last but not the least is the sway of the conflicted ideology of neo-liberalism.

First, while I previously attempted to distinguish the nature, number, limits, and justifications of human rights,<sup>12</sup> I later became more fully aware that a huge divide exists between philosophers of human rights who try to pursue the moral idea of human rights and the human rights law and jurisprudence.<sup>13</sup> Philosophies of human rights can justify human rights on the ethical grounds of dignity, autonomy, subsistence, difference, and responsibility only when they consider core human rights and standards.<sup>14</sup>

<sup>9</sup> I here use the favourite expression of Geroge Deleuze and Felix Guattari in *A Thousand Plateaus: Capitalism and Schizophrenia* (Indianapolis: University of Minnesota Press, 1987). For a critical exposition, see Guillaume Sibertin-Blanc and Daniel Richter, ‘The War Machine, the Formula and the Hypothesis: Deleuze and Guattari as Readers of Clausewitz’ (2010) 13:3 *Theory & Event*, [https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/theory\\_and\\_event/v013/13.3.sibertin-blanc.html](https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/theory_and_event/v013/13.3.sibertin-blanc.html) (accessed 30 July 2015); James C McDougall, ‘Deleuze and Guattari’s Nomadology: The War Machine and Critical Resistance in Cyberspace’ (2014–2015) 6:1 *Asia Journal of Global Studies* 48.

<sup>10</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) 39, 49.

<sup>11</sup> *Ibid.*, 39 (emphasis added). See also Anna Grear, ‘Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights’ (2007) 7:3 *Human Rights Law Review* 511.

<sup>12</sup> ‘By “nature”, I mean here, primarily, distinctions made between “enforceable” and not directly “justiciable” rights. By “number”, I refer to the distinction between “enumerated” and “unenumerated” rights, the latter often articulated by practices of judicial activism. By “limits”, I indicate here the scope of rights thus enshrined, given that no constitutional guarantee of human rights may confer “absolute” protection. The “negotiation” process is indeed complex; it refers to at least three distinct, though related, aspects: (1) judicially upheld definitions of grounds of restriction or regulation of the scope of rights; (2) legislatively and executively unmolested judicial interpretation of the meaning, content, and scope of rights; and (3) the ways in which the defined bearers of human rights chose or chose not to exercise their rights—this, in turn, presupposing that they have the information concerning the rights they have and the capability to deploy them in various acts of living.’ Baxi, *Future*, note 8, xxxiv, footnote 12.

<sup>13</sup> Upendra Baxi, ‘Reinventing Human Rights in an Era of Hyperglobalization: A Few Wayside Remarks’ in Gearty and Douzinas, note 6, 150.

<sup>14</sup> Baxi, *Future*, note 8, especially Chs 5, 6, 8, and 9. For a hard-nosed account of MNC realities as well as how far human rights responsibilities are justified by some extant theories of justice, see Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005).

In contrast, the UN production of human rights is indeed inclusively carnivalist. Opinions differ on whether there are and ought to be such rights and if so how *many*, *what*, and *how non-negotiable* these ought to be and are. Assuming that human rights discursivity extends to corporations and other non-state actors, the question always is whether they are morally and ethically responsible for violation of core norms or from the very idea of what it means to be and to remain human.<sup>15</sup>

Second, while legal liability is one aspect, the ethical or moral MNC responsibility howsoever related remains a discrete domain. Legal liability depends on the type of juristic personality, as also on the nature of law characterizing the conduct as civil or criminal wrong, and the classification of private and public law. Adjudication normally follows as choice of law the place where contract or tort took place and not on the law of foreign forum, even when in a rare case the court rules that it is an appropriate forum and even believes in extraterritorial jurisdiction for gross violation of such rights. Whether a MNC owes any moral or ethical responsibility for violation of human rights is a question decided by international law or the 'soft' law concerning human rights responsibilities of business. The question is made more complicated if stating moral responsibility is attributed with the potential of having legal effects in a pending litigation or thereafter. There is also the matter of confidentiality and privacy, obligations to subsidiaries and business affiliates, and generally to fellow MNCs. These issues have not been adequately addressed, or impliedly attended to, by soft law standards of CSR or existing instruments of 'soft' law.

The third domain belongs to the general area of progressive codification of international law under Article 12 of the United Nations Charter.<sup>16</sup> Under this mandate, the Human Rights Commission, the Human Rights Council, and the UN Secretary General are taking notable initiatives concerning business and human rights. Broadly, there is a developing consensus among UN member states that complete impunity to MNCs for transgressions of core human rights is not justified. The disagreement, which is massive, centres on voluntarism versus obligatory enforcement. The difficulties here are multiple. Should the entire body of human rights responsibilities or only some core rights be annexed to a legally-binding instrument? How far in either case ought we to be cognizant of MNCs' organizational and operational complexities? How do we approach the problematic of 'complicity' between the host and home governments?

Fourth, the road ahead is marked also by the dominant neo-liberal ideology which subscribes to a secular theology of market fundamentalism.<sup>17</sup> Most simply put, 'free market'

---

<sup>15</sup> Upendra Baxi, 'From Human Rights to the Right to Become Human: Some Heresies' (1986) 13 *India International Centre Quarterly* 185.

<sup>16</sup> See the landmark analysis by Shabati Rosenne, 'Codification Revisited after 50 Years' in Jochen A Frowein and Rudiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (London: Kluwer, 1998) 1–22. See also Alan Boyle and Christine Chinkin, *The Making of International Law. Foundations of Public International Law* (Oxford: Oxford University Press, 2007); Ramaa Prasad Dhokalia, *The Codification of Public International Law* (Manchester: Manchester University Press, 1970); Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972); Mark Villiger, 'The Factual Framework: Codification in Past and Present' in Mark Villiger (ed.), *Customary International Law and Treaties* (Dordrecht: Martinus Nijhoff, 1985) 63.

<sup>17</sup> Upendra Baxi, 'Writing about Impunity and Environment: The "Silver Jubilee" of the Bhopal Catastrophe' (2010) 1 *Journal of Human Rights and the Environment* 23. See also David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

(the principles of free association, contract, and property)—despite its social pathologies, especially the exploitation of labour—is the only agent of social and human development. The market, it is said, may through its institutions and associations assist the state to develop materiality for social welfare and inclusion; as a force for globalization it also tends to gently ‘civilize’ state power and apparatuses, providing in fact the rise and spread of market civilization;<sup>18</sup> the state must act in favour of the market rather than against it, its regulation must be orientated towards the creation of success stories of free competition; the human rights paradigm should be trade-related and market-friendly, and not the paradigm of universal human rights;<sup>19</sup> and the state should incentivize MNCs and the community of direct foreign investors.<sup>20</sup>

In turn, MNCs are said neither to be morally obligated nor legally bound by human rights law and jurisprudence: not being usually resident in all jurisdictions and operating through a network of regional and local subsidiary companies, they comply with the local law through their subsidiaries and seek to escape direct liability for their acts and omissions. When against all odds, the violated (either by way of mass disasters or toxic torts) reach the *siege social* where the MNC can be said to be usually resident, the canons of the colonial conflict of laws kicks in. The doctrine of *forum non conveniens* results in the dismissal of the suit; thus stand produced inconvenient fora and convenient catastrophes or when the foreign corporation is sued in foreign courts the applicable law is only *lex loci delicti*, the place where harm is said to have actually occurred. The final judgment of the local court is subject to recognition and enforcement by the foreign court (and as stipulated by the conditional forum dismissal in the Bhopal case subject to American due process standards).<sup>21</sup> Very often this creates unfavourable (to the violated) incentives, whether judicial or political, to settle the case. And in special cases like the ATS in the US, it has now been ruled that the presumption against extraterritorial application of statutes holds.<sup>22</sup>

The plain global social fact is that MNCs do not regard themselves as either under a moral obligation or legal responsibility for preventing mass disasters they cause. They are above any obligations to people and environs they hurt and harm; operating in a ‘morals free zone’,<sup>23</sup> they remain beyond the sanctions and cultures of guilt and shame and continue to live in a world of ‘corporate Neanderthalism’<sup>24</sup> claiming an immunity

<sup>18</sup> Stephen Gill, ‘Globalization, Market Civilization, and Disciplinary Neoliberalism’ (1995) 24 *Millennium -Journal of International Studies* 399.

<sup>19</sup> Baxi, *Future*, note 8, especially Chapter 8 and the distinction between transactional and regulatory globalization.

<sup>20</sup> See Baxi, ‘Writing about Impunity and Environment’, note 17. See also the materials cited in note 21.

<sup>21</sup> For claims made in this paragraph, see Upendra Baxi (ed.), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986); Upendra Baxi and Thomas Paul (eds.), *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1986); Upendra Baxi and Amita Dhanda (eds.), *Valiant Victims and the Lethal Litigation: The Bhopal Case* (Bombay: N M Tripathi Pvt. Ltd., 1990); Upendra Baxi, ‘Human Rights: Between Suffering and Market’ in Robin Cohen and Shirin Rai (eds.), *Global Social Movements* (London: Athlone, 1999) 32; Upendra Baxi, ‘Mass Torts, Multinational Enterprise Liability, and Private International Law’ (2000) 276 *Recueil des Cours* 301; Upendra Baxi, ‘The “Just War” for Profit and Power: The Bhopal Catastrophe and the Principle of Double Effect’ in Lene Bomann-Larsen and Oddny Wiggen (eds.), *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity* (Tokyo: United Nations University Press, 2004) 175.

<sup>22</sup> *Kiobel*, note 2.

<sup>23</sup> David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986).

<sup>24</sup> See Thomas Donaldson and Thomas W Dunfee, *Ties that Bind: A Social Contract Approach to Business Ethics* (Cambridge, MA: Harvard University Press, 1999). For notable attempts to relate human rights to MNCs, see Henry

and impunity from all socially responsive human rights law and jurisprudence. Thus arises the production and perpetuation of geographies of human rightlessness.<sup>25</sup> The task for the middle and late twenty-first century is to make reasonable advances towards a mandatory regime of multinational liability for human rights violations.

Against this backdrop, this article navigates through different narratives of Bhopal and elaborates on what I call the ‘four Bhopal catastrophes’ spread over more than thirty years. It then explores—in the light of the Draft Norms, the non-mandatory Guiding Principles, and current calls for a legally-binding treaty—ways and tasks ahead in ending corporate impunity for human rights abuses in the twenty-first century.

## II. DIFFERENT NARRATIVES OF BHOPAL

There are different and conflicting ways of telling stories about Bhopal. Not only there are different ways of juridification<sup>26</sup> but there are other different ways of narration—from the state, MNC, the UN, and intentional organization, and movement-centred narratives. In this section, I explore the state, MNC, and violated-centric languages. Privileging a mode of narrative is made impossible if we only tell the stories of the violated and miss other actors. How to make these languages somewhat concordant is a principal issue facing any attempt at a treaty regime of human rights responsibilities of MNCs.

In these three languages, the first problem is the naming of the rightless peoples. The MNC discourse speaks of ‘side effects’,<sup>27</sup> ‘accidents’, and occasionally of ‘victims’. The state discourse freely uses the term ‘victims’ and out of deference to common linguistic convention, I have at times used the language of victimhood but always thought that the conventional term ‘victims’ is too un-reflexive. It does not foreground the human rights dimensions, or the states of rightlessness and human and social suffering. The terminology of ‘victims’ denies the violated of any agency or capacity to act as ‘militant subject’; it denies them a history and future of their own; it obscures the fact that, as in Bhopal, the ‘victims’ are re-victimized by the corporate state. On the other

---

*(Note continued)*

Shue, *Basic Rights* (Princeton: Princeton University Press, 1980); Henry Shue, ‘Exporting Hazards’ (1981) 91 *Ethics* 579; James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987); Thomas Donaldson, *The Ethics of International Business* (Oxford: Oxford University Press, 1989). See also Allan Gewirth, *The Community of Rights* (Chicago: Chicago University Press, 1996). This creatively revisionist narration suggests that ‘legitimate’ business operations are those which are consistent with human rights norms, standards, and values, that duties of avoidance/minimization of ‘negative’ (read human rights-violative) side effects ought to inform corporate conduct, governance, and culture, and that business operations may only stand justified only and in so far as ‘proportionate’ and ‘necessary’ to achieve the legitimate (business) ‘objective’. The actual practice still suggests that the ‘objective’ and what remains ‘proportional’ and ‘reasonable’ remain matters of power politics and not ethics as recently shown, among others, by the exclusion of companies from the Rome State of International Criminal Court and the extreme voluntarism of the UN Global Compact.

<sup>25</sup> Upendra Baxi, ‘The Geographies of Injustice: Human Rights at the Altar of Convenience’ in Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (London, Hart, 2001) 197.

<sup>26</sup> Lars Chr Blichner and Anders Molander, ‘Mapping Juridification’ (2008) 14:1 *European Law Journal* 36. The five types of juridification they offer may well help us further grasp translation and transgression.

<sup>27</sup> Ulrich Beck, Anthony Giddens, and Scott Lash, ‘Preface’ in Ulrich Beck, Anthony Giddens, and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford: Stanford University Press, 1994).

hand, the violated speak differently to us, with distinct authorial voice, and crowd the agenda of governance and development with the voice for human rights.

I speak of a mass disaster (catastrophe) violated because the term ‘violated’ gives to very state law a sense of the future of human rights. I have unlearned a lot of law and jurisprudence in struggle waged by the violated relentlessly against a powerful business/governance combination. The scandalous judicial settlement by the Supreme Court of India and the labyrinthine proceedings in the US courts, and their utter human rightlessness have affected the struggle, voice, and authorship of the violated—that is one reason why I call this a saga of ‘valiant’ violated and ‘lethal litigation’.<sup>28</sup>

The three-decade Bhopal-violated have been subject to several catastrophes: the massive exposure to methyl isocyanate (MIC) on 2 and 3 December 1984, the forum denial by Judge Kennan and subsequent denials of air and water contamination by him and the Appeals Court, the scandalous settlement orders of the Supreme Court of India, the uphill struggles to attain meagre compensation amidst growing genetic mutations and health crises, and the battle to extradite Warren Anderson and to punish the perpetrators in the relevant jurisdictions. More than three decades later, the valiant violated continue to act as a community of suffering and human rightlessness; they continue to act as ‘indignation’ and ‘norm’ entrepreneurs resolutely addressing the ‘regulatory void’ of transnational governance.

In contrast, the MNC-centred narratives seek to absolve the parent corporation of any legal liability or moral responsibility for the act and omission of its subsidiary. While acknowledging the liability of the subsidiary company within national jurisdiction, the MNC discursivity denies that it is a resident foreign corporation within national jurisdiction subject to the competence of any court of law despite controlling a majority or near-majority share and commanding heights of worldwide chain of decision making. The MNC repudiates both any universal jurisdiction of human rights and international criminal jurisdiction and successfully combats any extradition. Knowing full well that certain decisions (the switching off of a refrigeration plant, the decaying and inapposite safety systems, the storage of large quantities of a poisonous chemical gas, as in the Bhopal case) will contribute, and even cause, mass disasters, the MNC insists for a strict legal proof of the agent of harm and that it had the means or capacity to prevent this. Ethically, this means that the relevant legal orders may be ignored with impunity, a claim to immunity from any moral responsibility, and a claim to a *moral right to do a human rights wrong*.<sup>29</sup>

The discourse of the state and law, where at least there is a pretence to formal democracy, freely deploys the language of victims. The Indian policy discourses usually justify victimage and revictimage; the state-centric narratives in terms of ‘development’ and ‘social change’ ultimately rest on the talismanic mantra of economic growth, without

---

<sup>28</sup> See Baxi and Dhanda (eds.), note 21.

<sup>29</sup> I am currently working on this important subject and struck by the paucity of research on the subject. I indicated in 1987 that human rights in class-divided societies are ultimately bourgeois rights, based on the freedom of property and transaction, and entail a right to harm others. In a capitalist and market society and economy, where exploitation is the rule and emancipation a utopia, the human right to a free competition signifies a right to cause harm to innocent and vulnerable others. See Baxi, *Future*, note 8. See, for a sustained liberal philosophy discussion, Jeremy Waldron, ‘A Right to Do Wrong’ (1981) 92 *Ethics* 21; Ori J Herstein, ‘Defending the Right to Do Wrong’ (2012) 31 *Law and Philosophy* 343.

which just distribution is just a chimera. Where a constitutional democracy exists, contentious politics<sup>30</sup> engages the multiple meanings of ‘development’. The question, in such politics, always is how far any espoused model of ‘development’ may justify sacrificial politics, where costs of ‘development’ fall heavily on the present generation of the constitutional have-nots; those violated by ‘development’ ask questions about how long, at whose cost, and for whom ‘development’ occurs.<sup>31</sup> The state discourse on these matters is shaped by international affairs and the Bretton Woods institutions as well as by MNCs. The state emerges but rarely (as in Bhopal) as a sovereign plaintiff in mass disaster situations before a foreign court. And most Global South states are only nominally *host* states but in reality *hostage* states—states held captive by foreign capital and direct foreign investment.

### III. THE FOUR BHOPAL CATASTROPHES

I have analysed in my writings and public action, the Bhopal catastrophe for the past three decades in different narrative modes.<sup>32</sup> For the sake of brevity, I refer here to four catastrophic moments.

The First Bhopal Catastrophe occurred on 3 December 1984, with the explosive escape of 47 tons of MIC from the Union Carbide Corporation (UCC) and Union Carbide India Ltd (UCIL) factory/plant located in a densely populated area in Bhopal. UCC was a majority shareholder and for all purposes made key operational decisions concerning the ultra-hazardous manufacture, storage, and safety, in blithe disregard of the best industry standards and standards of good corporate governance.

The pre-trial discovery proceedings before US District Judge John F Keenan, where for the first time a sovereign post-colonial state dared to sue a mighty MNC for causing an unprecedented mass disaster, fully established the fact that UCC preferred systematically to ignore early-warning signals of the potential for massive toxic release. Among these was the alert specially demonstrated by the 1982 gas ‘leak’ that killed two workers and its own subsequent in-house safety audit report that stressed the urgency of the need for adequate safety systems at the Bhopal plant replicating the

<sup>30</sup> I borrow this phrase-regime from Carless Tilly; this sort of politics also engages organized labour against multinationals. Charles Tilly, ‘Globalization Threatens Labor Rights’ (1995) 47 *International Labor and Working Class History* 1.

<sup>31</sup> See Upendra Baxi, “‘What Happens Next is Up to You’”: Human Rights at Risk in Dams and Development’ (2001) 16 *American University International Law Journal* 1507; Upendra Baxi, ‘Rehabilitation and Resettlement: Some Human Rights Perspectives’ in Hari Mohan Mathur (ed.), *Social Development Report: Development and Displacement* (Delhi: Oxford University Press, 2008).

<sup>32</sup> See the materials cited in notes 15, 17, 21, 25, and 32. See further David Weir, *The Bhopal Syndrome: Pesticides, Environment, and Health* (San Francisco: Sierra Club Books, 1984); Dan Kurzman, *A Killing Wind: Inside Union Carbide* (New York: McGraw Hill, 1987); Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Cambridge, MA: Ballinger, 1987); Sonjoy Hazarika, *Bhopal: The Lessons of a Tragedy* (New York: Penguin, 1987); David Dembo, Ward Morehouse, and L Wykle, *Abuse of Power: Social Performance of Multinational Corporations: The Case of Union Carbide* (New York: New Horizons Press, 1990); James Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993); Dominic Lapierre and Javier Moro, *It Was Five Minutes Past Midnight in Bhopal* (New Delhi: Full Circle, 2001); Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (London: Amnesty International Publications, 2004); Ingrid Eckerman, *The Bhopal Saga: Causes and Consequences of the World’s Largest Industrial Disaster* (Hyderabad: Universities Press India Private Ltd., 2004).



state-of-the-art digitalized safety systems of UCC's West Virginia plant, which produced and stored minuscule amounts of MIC compared with the Bhopal plant.<sup>33</sup>

It is also worth recalling that the plant was declared 'safe' by the then Chief Minister of Madhya Pradesh, Arjun Singh, whose culpability now begins at last to be as seriously discussed as that of the UCC Chief Executive Officer, Warren Anderson. Incidentally, the Bhopal-violated heard from Jairam Ramesh, the former Union Environment Minister, on the eve of the 'Silver Jubilee' of the first catastrophe that neither the subsoil nor the water was contaminated by the residual toxicity of the MIC explosion.<sup>34</sup> Eminent political leaders (who criticize Bhopal activists for dramatizing the environmental risk still aggravating the plight of the Bhopal-violated) see no harm in minimizing the long-term lethal potential of Bhopal 1984. A silver lining in the toxic cloud over the Bhopal-violated flickered bright but only briefly. Via the Bhopal Ordinance (and later the Act),<sup>35</sup> some of us were able to persuade the Indian government to assume responsibility for prosecuting UCC in a US court since UCC claimed that it was no longer under Indian jurisdiction. Judge Keenan described the first catastrophe as the largest peacetime industrial disaster, less colourfully than Justice Krishna Iyer who was to name it 'Bhoposhima'.<sup>36</sup>

The end result of this endeavour was to bring UCC back under Indian jurisdiction. Ironically, while the government of India argued that its own legal system was not geared to deliver justice to the Bhopal-violated, Judge Keenan insisted that it would constitute legal 'imperialism' were he not to recognize that the Indian judicial system had the capacity to stand 'tall' before the entire world.<sup>37</sup> Thus Judge Keenan, while constraining the UCC submission to Indian courts, was careful to subject any future UCC liability to a later determination by the New York 'small causes' or garnishee courts, leaving it to decide whether due process was accorded to UCC in the Indian trial process.

I believe it was this factor that the Indian UCC attorneys cleverly deployed: in order to serve among the top echelons of adjudicatory leadership and secure the Supreme Court of India settlement order,<sup>38</sup> the ultimate end of immunity and impunity of UCC and UCIL and their CEOs.

The Second Bhopal Catastrophe occurred when the Supreme Court passed brief settlement orders in 1989. Not only did the Supreme Court settle the UCC liability for USD 470 million against the Union of India's damage claims of over USD 3 billion, but it also sought to justify this amount and the grant of complete immunity from any criminal liability for UCC and its global affiliates. Later, of course, given the exertions of the Bhopal-violated, the Court, on review, cancelled this immunity,<sup>39</sup> although it left cruelly intact the meagre-sanctioned amount for hundreds of thousands of survivors whose real-life needs for health care and livelihood were thus rendered of little serious regard.

<sup>33</sup> See the materials cited in notes 21 and 32. See also Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London/New York: Routledge, 2012) Ch 2.

<sup>34</sup> See N D Sharma, 'Jairam Makes Light of Bhopal Gas Tragedy', *Current News*, <http://currentnews.in/jairam-makes-light-of-bhopal-gas-tragedy/> (accessed 30 July 2015).

<sup>35</sup> Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (Act 21 of 1985) (India), replacing the Bhopal Gas Leak Disaster (Processing of Claims) Ordinance 1985 (India).

<sup>36</sup> V R Krishna Iyer, 'Bhoposhima: Crime without Punishment' (1991) 26:47 *Economic and Political Weekly* 2705.

<sup>37</sup> *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 634 F Supp 842 (1986).

<sup>38</sup> *Union Carbide Corporation v Union of India* AIR 1990 SC 273.

<sup>39</sup> *Union Carbide Corporation v Union of India* AIR 1992 SC 248.

Further, the Court fully legitimized the denial of the presence and voice of the Bhopal-violated as a constitutional necessity. The settlement orders denied even the opportunity for a hearing to the Bhopal-violated parties to the case. The trend continues to grow. For example, on 14 February 1994, when Justice A M Ahmadi allowed the sale of UCC shares to the UCIL, he declined to hear the Bhopal-violated petitioner-parties before him.<sup>40</sup> Even as late as 7 June 2010, some Bhopal-violated parties were denied entry into the precincts of the Bhopal district court, as the 'integrity' of the judicial process had to be enforced by the imposition of prohibitory orders, denying even a modicum of their presence on a judgment day.<sup>41</sup>

The Third Bhopal Catastrophe occurred in the disbursement of some relief upon settlement. The tribunals which were charged with this constitutional responsibility seemed either hunted by the spectre of fake claimants or insisted on proofs which required the next of kin to show death certificates and the number of people who were present at the funeral or cremation. The multifarious, even nefarious, 'bureaucratization of justice' practised by the tribunals established for the disbursement of compensation re-victimized the already traumatized victims, who had to seek recourse to the Supreme Court for the eventual superintendence of relief operations.

The Bhopal-violated people are subjected to staggering burdens of proof concerning their severe multiple injuries, thus reducing their eventual compensation, when not altogether denied, to the lowest possible amount. As if this were not enough, the violated people were required to demonstrate the nature and extent of the injury beyond a shadow of reasonable doubt. No wonder, then, that a large number of the violated people either still await compensation or are denied their rightful share of it. There was not even a semblance of rehabilitation by the state. Further, even as late as mid-2010, the Bhopal-violated were denied the dignity of any full Supreme Court invigilation of the arbitrariness, callousness, and injustice of the administration of compensation disbursement, aggravating the Third Catastrophe.

Things would have been different indeed if the media and popular outrage had been articulated on 14–15 February 1989, when the Supreme Court passed the judicial settlement orders, or when the Court declined to admit that the settlement amount was grossly inadequate. That would probably have ameliorated the suffering of the Bhopal-violated.

Public opinion should have come down heavily on the Supreme Court decision of 13 September 1996, in which the Court diluted the charges against UCIL officials on the grounds that the principal responsibility lay with UCC rather than UCIL officials.<sup>42</sup> Public outrage was also called for on 13 July 2004, when the US government rejected the entirely justified pleas for the extradition of Warren Anderson on the grounds that no charges had yet been framed against him.<sup>43</sup> The Bhopal court's decisions declaring him

---

<sup>40</sup> See 'Former CJI Defends Verdict in Bhopal Gas Case', *Times of India*, 8 June 2010, <http://timesofindia.indiatimes.com/india/Former-CJI-defends-verdict-in-Bhopal-gas-case/articleshow/6024676.cms> (accessed 30 July 2015); S Muralidhar, *Unsettling Truths, Untold Tales: Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice* (IELRC Paper, 2004) 50, <http://www.ielrc.org/content/w0405.pdf> (accessed 30 July 2015).

<sup>41</sup> 'Prohibitory Orders Ahead of Bhopal Gas Verdict Monday', *Hindustan Times*, 7 June 2010, <http://www.hindustantimes.com/bhopal/prohibitory-orders-ahead-of-bhopal-gas-verdict-monday/article1-554170.aspx> (accessed 30 July 2015).

<sup>42</sup> *Keshub Mahindra v State of Madhya Pradesh* (1996) 6 SCC 129.

<sup>43</sup> 'Prosecution of UCC, UCE and Warren Anderson', [http://www.bhopal.net/old\\_studentsforbhopal\\_org/Assets/23UCCAndersonProsecution.pdf](http://www.bhopal.net/old_studentsforbhopal_org/Assets/23UCCAndersonProsecution.pdf) (accessed 30 July 2015).

and an official of UCC Eastern as proclaimed absconders and the failure of successive central governments to bring them to book did not shock the 'nation' much. Perhaps, all over again, political parties and their leaderships continue to fall over each other as the best defenders of the 'victims'.

The first and now the second generation of Bhopal-violated know well, in their blood and bones, that the Indian ruling classes are the great descendants of Professor William Dicey who practise to a point of perfection his advice that one must never weigh 'the butcher's meat in diamond scales'.<sup>44</sup> The question is how and why the mass media, trade unions, and activist communities, barring valiant exceptions that prove the rule, remained so indifferent for three decades. As against the political and public outcries, Chief Judicial Magistrate Tiwari proceeded with great care in deciding the only issue before him: whether the accused were guilty under Section 304-A of the Indian Penal Code (IPC).<sup>45</sup> He had no jurisdiction to go beyond what the Supreme Court mandated by way of criminal proceedings. There was little that the judge could have done other than to proceed within the confines of the indictment.

He held that 'in determining negligence' under Section 304-A, *mens rea* has no place and that 'knowledge [of likely harm] is enough to constitute the offence'.<sup>46</sup> He rejected the pleas that expert evidence, even when verified by examination and cross-examination, may not be the basis of conviction.<sup>47</sup> Further, the learned judge maintained that his decision to convict the key officials of UCIL did not involve any extension of vicarious liability for the acts of other persons—rather these officials were culpable for acts of gross negligence, as they failed to do what they should have done concerning the parlous condition of the plant and safety systems.<sup>48</sup>

Judge Tiwari further dismissed the plea of leniency in sentencing the seven UCIL officials to a two-year imprisonment under Section 304-A of the IPC, and a one-year sentence under Section 338 of the IPC, with varied associated fines.<sup>49</sup> The concluding paragraph of the judgment preserves intact every part of the case and archives it until the absconders, Warren Anderson and UCC, as well as its subsidiary UCC Eastern, appear before the court.<sup>50</sup>

A Fourth Bhopal Catastrophe is in the making, as the UCIL seven are extremely likely to prolong further reconsideration, review, and reversal of this verdict, all the way to the Supreme Court. They are also likely to press their plea that their conviction is based on some version of vicarious liability for either the acts of UCC or the defaults of their employees. Justice Ahmadi reportedly stated the day after the decision that, aside from in situations of conspiracy or abetment, Indian law does not provide for vicarious liability for the gross criminal negligent acts of others.<sup>51</sup> Given the fact that successive

---

<sup>44</sup> Albert Venn Dicey, *Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1914) 141.

<sup>45</sup> *State of Madhya Pradesh v Anderson and Others*, Cr. Case No. 8460/1996, <http://www.countercurrents.org/UCIL.pdf> (accessed 30 July 2015).

<sup>46</sup> *Ibid*, para 154.

<sup>47</sup> *Ibid*, paras 156–8.

<sup>48</sup> *Ibid*, paras 181, 184, and 190–4.

<sup>49</sup> *Ibid*, paras 199–218.

<sup>50</sup> *Ibid*, para 226.

<sup>51</sup> 'Ahmadi Rejects Criticism of Dilution of Charges', *The Hindu*, 9 June 2010, <http://www.thehindu.com/todays-paper/tp-national/ahmadi-rejects-criticism-of-dilution-of-charges/article465389.ece> (accessed 30 July 2015).

regimes in the state of Madhya Pradesh have been UCC-friendly rather than solicitous of the Bhopal-violated, their desire to seek enhanced sentence must be received with an Everest of salt. Further, some hasty appeals and revisions by activist lawyers and Bhopal-violated communities may unwittingly reinforce the case for the 'UCIL seven'.

In the process, the suffering of the Bhopal-violated communities will again become *sub judice*. Even worse, the authors of their tragic fate may eventually resume a life of immunity and impunity. If so, the most important question is how to prevent the Fourth Catastrophe from fully unfolding.

Indeed, a first step would be to 'name and shame' each and every elected official and civil servant complicit with the UCC assault on the Bhopal-violated. The elected officials must be debarred by a change in the Representation of People's Act from holding any public or constitutional office and civil servants thus named must be denied all forms of superannuated service in public or private sector, and their pensions should be reduced at least by half. We must demand that the Union of India make good its claim of more than USD 3 billion (minus the settlement amount, if so required, but with compound interest) to the Bhopal-violated community, to be disbursed by a citizens' trust by way of relief and rehabilitation of at least the first- and second-generation Bhopal-violated. Given the proud boast of the high annual GDP growth, this remains far from an insensible public demand. Additionally, an annual corporate Bhopal tax/levy may be imposed to assist the present as well as the future needs of the Bhopal-violated.

Replacing the current standard 'Bhopal clause' now included in every agreement of foreign investment limiting or eliminating liability for mass disasters, we should think of an alternative provision that requires all investors and MNCs to contribute annually a certain percentage of their net profits to a superfund that would respond to at least the minimum needs of those adversely affected.

In the interim, the 24/7 mass media should dedicate a percentage of their advertisement revenues to a public trust that will further engage the tasks of healthcare and livelihood rights of the Bhopal-violated. The media, chastizing now, and rightly so, politicians who thrive parasitically on the windfall of toxic capitalism, would carry greater credibility with suffering Indian humanity were they to do this. After all, massive profits are made by making a commodity of human and social suffering.

More fundamentally, we need to think of the Bhopal catastrophes in terms of cross-border nomadic practices of MNCs' 'terror'. The UN now has begun to describe 'terrorism' as a political project in which non-state, yet state-like, actors deploy asymmetrical and indiscriminate violence against innocent civilians with the aim to overawe lawfully-elected governments or to transform state policies.<sup>52</sup> Even as we condemn insurgent violence everywhere on the planet, we should begin to think of ways in which 'terrorist' forms of corporate governance may at least be held answerable to indictments of crimes against humanity.<sup>53</sup> Warren Anderson was in no way a counterpart

<sup>52</sup> See UN General Assembly, 'Measures to Eliminate International Terrorism', A/Res/49/60 (17 February 1995).

<sup>53</sup> An anecdote relevant here is worth a passing reference. Within four days of 9/11, I identified Bhopal also as an act of terror, on a leading national TV channel live interview. I have not been invited by the commercial TV channels since that day until now, whether or not formally blacklisted; the print media has been more hospitable. See Upendra Baxi, 'Terror of Performance', *Frontline* (3 April 2015) <http://www.frontline.in/books/terror-of-performance/article6998742.ece> (accessed 2 August 2015).

of Osama bin Laden, until you listen to the voices of suffering humanity affected by their comparable predatory ventures. The Bhopal-violated are indeed close cousins of the victims of 9/11 and 26/11 (the Mumbai attacks).<sup>54</sup>

How we may name and think through the commonalities and differences amongst these critical events is all that matters for the suffering humanity and the rightless peoples of the hyper-globalizing world. As Marx wrote in 1843, profound social transformation occurs only when thinking humanity remains capable of suffering and the suffering humanity begins to think.<sup>55</sup>

#### IV. THE DRAFT NORMS AND THE GUIDING PRINCIPLES

The evolution of human rights normativity for MNCs has paradigmatically taken the form of ‘soft law’.<sup>56</sup> Obviously, the normative standards in various codes of conduct for MNCs or the canons of CSR did not result in any legal liability or human rights responsibility for UCC nor did its successor (Dow Chemicals) acknowledge any real responsibility for the Bhopal-violated. The situation is the same for world’s other mass-disaster situations.<sup>57</sup>

The Draft Norms did fasten on MNCs some human rights responsibilities. Despite my specific criticism of the Norms’ tendencies towards ‘dense intertextuality’ and ‘one-size-fits all’ type rationality,<sup>58</sup> they charged transnational corporations and other business enterprises to ‘promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law’.<sup>59</sup> The human rights responsibility of business entities may be summated in terms of duties of non-benefit from human rights violations; duties of influence; and duties of implementation. While the state responsibility is unqualified, transnational corporations and other business enterprises bear these responsibilities only ‘within their respective spheres of activity

<sup>54</sup> See Surya Deva, ‘From 3/12 to 9/11: Future of Human Rights?’ (2004) 39 *Economic and Political Weekly* 5198.

<sup>55</sup> The precise sentence ending Marx’s letter to Arnold Ruge in May 1843 is as follows: ‘The longer the time that events allow to thinking humanity for taking stock of its position, and to suffering mankind for mobilising its forces, the more perfect on entering the world will be the product that the present time bears in its womb.’ Marxist Internet Archive, ‘Letters from the Deutsch-Französische Jahrbücher: M. to R. – Marx to Ruge, Cologne, May 1843’, [https://www.marxists.org/archive/marx/works/1843/letters/43\\_05.htm](https://www.marxists.org/archive/marx/works/1843/letters/43_05.htm) (accessed 2 August 2015).

<sup>56</sup> As a practitioner of feminism I have always caveated the expressions ‘hard’ and ‘soft’ law. If we were to insist on the terminology, we must at least identify contexts when ‘hard’ law is made ‘soft’ and vice versa. With this general caveat, see the valuable discussion in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013). See in particular David Bilchitz and Surya Deva, ‘Human Rights Obligations of Business: A Critical Framework for the Future’ 1–27 and Parts III and IV of the book. Ibid. See also Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (29 February 2012); Manoj Kumar Sinha (ed.), *Business and Human Rights* (New Delhi: Sage, 2013); Jernej Letnar Čeranič, ‘Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises’ (2008) 4 *Hanse Law Review* 71.

<sup>57</sup> For instance, even if BP and Shell paid compensation for environmental disasters caused by their business operations, they did not admit any legal liability for such wrongs.

<sup>58</sup> Upendra Baxi, ‘Market Fundamentalisms: Business Ethics at the Altar of Human Rights’ (2005) 1 *Human Rights Law Review* 1; Baxi, *Future*, note 8, Ch 9. See also David Weissbrodt and Muria Kruger, ‘Norms on Responsibility of Transnational Corporations and Other Business Entities’ (2003) 97 *American Journal of International Law* 901; Surya Deva, ‘UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?’ (2004) 10 *ILSA Journal of International & Comparative Law* 493.

<sup>59</sup> Draft Norms, note 7, para. 1.

and influence'. There is no question that the Bhopal-violated would have a judicially-mandated just compensation and restitution under these Norms.<sup>60</sup>

Professor John Ruggie, the UN Secretary General's Special Representative on business and human rights (SRSG) clearly did not believe in these Draft Norms. A staunch believer in human rights self-regulation and corporate voluntarism, he had earlier proposed the Global Compact, which had 'little impact'.<sup>61</sup> Indeed, Professor Ruggie did not offer the Draft Norms even the 'dignity of a third class funeral'.<sup>62</sup> The Guiding Principles thus produced were not designed to streamline the perceived overreach or deficiency of standards and rules set by the Draft Norms, much less geared to produce a binding code or a set of mandatory MNC obligations. The mass-disaster-violated people were denied all opportunities to be heard, although MNCs and some human rights groups were allowed audience.

The mood and the approach of SR were of self-confessed 'principled pragmatism'.<sup>63</sup> This approach, while recognizing the complexity of corporate and business 'governance systems' as 'polycentric',<sup>64</sup> insists on viewing 'international law as a tool for collective problem-solving, not an end in itself' and 'recognizes that the development of any international legal instrument requires a certain degree of consensus among states'.<sup>65</sup> Holding that,

before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly

---

<sup>60</sup> Whether private international law orthodoxies would have been dispelled by the Draft Norms-based adjudication by foreign plaintiffs or whether a universal human rights jurisdiction was so established would have perhaps remained open and vexed questions. It also remains uncertain how far these obligations extend to 'other entities'. For example, it is worth noting that a study regards it as reasonable to ask, following the Principle of Double Effect, MNCs (and other business entities) to minimize the negative side effects of a corporate decision or decision-making generally. See the study cited in United Nations Industrial Development Organization, *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries* (Vienna: UNIDO, 2002). Of course, the United Nations Industrial Development Organization, while presenting it, does not entirely endorse this position.

<sup>61</sup> Pete Engardio, 'Global Compact, Little Impact', 11 July 2004, <http://www.bloomberg.com/bw/stories/2004-07-11-commentary-global-compact-little-impact> (accessed 2 August 2015). See also Justine Nolan, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24:2 *University of Queensland Law Journal* 445.

<sup>62</sup> See John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises,' UN Doc E/CN.4/2006/97 (22 February 2006). But see Karsten Nowrot, 'The 2006 Interim Report of the UN Special Representative on Human Rights and Transnational Corporations: Breakthrough or Further Polarization?', Policy Papers on Transnational Economic Law, No. 20, Faculty of Law, Martin Luther University, Halle-Wittenberg (March 2006).

<sup>63</sup> John Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization', Regulatory Policy Program Working Paper RPP-2015-04, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, Harvard University (2015), [http://www.hks.harvard.edu/index.php/content/download/74032/1678739/version/1/file/RPP\\_2015\\_04\\_Ruggie.pdf](http://www.hks.harvard.edu/index.php/content/download/74032/1678739/version/1/file/RPP_2015_04_Ruggie.pdf) (accessed 2 August 2015). This important paper is hereafter cited as Ruggie, 'Regulating Multinationals'.

<sup>64</sup> Ruggie precisely identifies three governance systems: 'The first is the system of public law and governance, domestic and international. The second is a civil governance system involving stakeholders affected by business enterprises and employing various social compliance mechanisms such as advocacy campaigns and other forms of pressure. The third is corporate governance, which internalizes elements of the other two (unevenly, to be sure). Lacking was an authoritative basis whereby these governance systems become better aligned in relation to business and human rights, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which cumulative change can evolve over time'. Ruggie, 'Regulating Multinationals', note 63, 2.

<sup>65</sup> *Ibid.*, 12.

crafted international legal instruments for business and human rights—“precision tools” I called them—focused on specific governance gaps that other means are not reaching.<sup>66</sup>

In other words, principled pragmatism does not pursue ‘international legalization as such’ but rather ‘it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results, all the while building on the GPs’ foundation’.<sup>67</sup>

Professor Ruggie illustrates well the notion of ‘principled pragmatism’ but does not philosophically analyse it nor consider alternatives to it. He is entirely justified in calling our attention to the fact that the same Human Rights Council passed another resolution (sponsored by Argentina, Ghana, Norway, and Russia) that urged the UN system to elaborate on the implementation of guidelines and the tasks ahead in any interregnum to a treaty-based regime of business and human rights.<sup>68</sup>

Obviously, Professor Ruggie is not interested in grounding the Guiding Principles in deontological ethical and justice theory; his is typically a sub-ideal theory but still different from a deontological theory like the one offered by John Rawls, although for that reason no less crucial. Pragmatists differ widely and we are already supposed to live in a neo-pragmatist era, away from the classical American pragmatism. And less obviously the ‘principled pragmatism’ differs from crass as well as refined utilitarianism.<sup>69</sup>

There is great merit in doing philosophy in a way that human beings matter, and not just philosophers. Obviously it simply would not do to name ‘principled pragmatism’ an as an oxymoron, if only because it draws too sharp an analytical distinction between ‘principle’ and ‘pragmatism’ as if the latter is devoid of any principles. But if the pragmatic test is the benefit of masses of worst-off people, the question does arise whether the Guiding Principles are pragmatically superior to the mandatory Draft Norms. Do the former end, or at least begin to end, the regime of MNC impunity from human rights responsibilities? On this question even pragmatists, while practising ‘principled pragmatism’, may differ. When they do, is theirs a principled disagreement?

This is not a place to compressively survey the complexity and contradiction in the Guiding Principles’ commendation of a ‘tripod framework’:<sup>70</sup> the three pillars of the Guiding Principles aim to ‘protect, respect, and remedy’ human rights violations. States have ‘existing obligations to respect, protect, and fulfil human rights and fundamental freedoms’, the ‘business enterprises as specialized organs of society performing specialized functions’ stand summoned ‘to comply with all applicable laws and to

---

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, 13.

<sup>68</sup> Ibid.

<sup>69</sup> See as to varieties of pragmatist theories, Brian Z Tamnah, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law* (Oxford: Clarendon University Press, 1997); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York: NYU Press, 1996); Morris Dickstein (ed.), *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Durham: Duke University Press, 1998); John D Arras, ‘Freestanding Pragmatism in Law and Bioethics’ (2001) 22 *Theoretic Medicine* 69.

<sup>70</sup> See Deva and Bilchitz (eds.), note 56; Surya Deva, ‘Multinationals, Human Rights and International Law: Time to Move beyond the “State-Centric” Conception?’ in Jernej Letnar Čermeč and Tara Van Ho (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (The Hague: Wolf Legal Publishers, 2015) 27.

respect human rights'; and there is a 'need for rights and obligations to be matched to appropriate and effective remedies when breached'.

The Guiding Principles consist of thirty-one principles, with commentary elaborating on the juristic as well as social meanings and implications for law, policy, governance, and business conduct as well as practice. The values, goals, and norms of the Guiding Principles extend to all states and all business enterprises. The various Foundational and Operating Principles make an impressive reading until we begin to realize that MNCs are not bound by any legal obligation. Foundational Principle 11 says that: 'Business enterprises should respect human rights' which 'means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. Laudable though the clarification that 'human rights' include 'the International Bill of Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work', the commentary to Foundational Principle 12 merely says that '[d]epending on circumstances, business enterprises may need to consider additional standards'.<sup>71</sup> The 'human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them' such as the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families receive ambivalent normative protection.<sup>72</sup> And the injunction that 'in situations of armed conflict, enterprises should respect the standards of international humanitarian law' sounds majestic but remains assured of honour in breach.

Perhaps the most important principle in the Guiding Principle is that of 'due diligence'. Principle 17 adumbrates:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

---

<sup>71</sup> There is no doubt that 'the more corporate counsel integrates a robust understanding of existing international human rights into corporate decision-making, the greater the likelihood will be of consistently and predictably minimizing or eliminating conduct likely to trigger deleterious human rights consequences now and into the future. This, coupled with the spillover benefits outlined above, should weigh heavily in favor of adopting an approach that uses the Guiding Principles as a starting point, but moves quickly to enlarge and enhance its reach.' Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 *Texas International Law Journal* 33, 46. How a corporate counsel learns a 'robust' human rights approach is an important question. But if experience is any guide such insurrectionary knowledge is not permitted by the craft of legal practice and courtroom advocacy. The question must remain open where legal systems permit lay participation (typically the jury) in the administration of justice. But Blitt is surely right to say that while the ILO Charter of Philadelphia is important, 'its non-binding status necessarily render[s] it a less authoritative source of law than the core treaties. Indeed, ... the declaration within the text of the Guiding Principle ultimately come[s] at the expense of forgoing explicit reference to the core international treaties that establish a broader range of compulsory norms beyond the declaration's narrow focus. Citing the declaration as a source of minimum-recognized human rights norms is also curious insofar as the declaration has fewer parties than some of the core international human rights treaties, including the CRC and CEDAW, and offers fewer formalized tools for meaningful review, engagement, and enforcement.' *Ibid.*, 46. See also, for a searching discussion, Alan Supiot, *The Spirit of Philadelphia: Social Justice vs the Total Market* (London: Verso, 2012).

<sup>72</sup> See Anne Trebilcock, 'Due Diligence and Rights at Work: Bright Light on the Horizon or Mirage?' (2013), [http://www.upf.edu/gredtiss/\\_pdf/2013-LLRNConf\\_Trebilcock.pdf](http://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Trebilcock.pdf) (accessed 2 August 2015).



In non-mandatory codes, internalization of the relevant cluster of human rights norms is indeed important. In an optimistic vein, one may say that ‘the most important lesson for corporate counsel [is] to internalize when contemplating the evolving relationship between business and human rights’.<sup>73</sup> But the success stories of ‘how aspirational non-binding principles’, or “soft law”, can evolve continually over time into more durable and enforceable “hard law”—either in the form of a written treaty or in the consolidation of customary international practice<sup>74</sup> need to be told again and again. Perhaps, roseate optimism would have us believe that the Guiding Principles ‘aspirational today ... can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders’.<sup>75</sup> And certainly, ‘should this framework influence future practices ... or bring about renewed attention of the rights of victims’ access to justice before the domestic courts’, the Guiding Principles shall ‘become one of the cornerstones for the protection of victims of business-related abuse’.<sup>76</sup>

## V. TOWARDS A CONCLUSION

The Bhopal-violated or violated of many a business industry catastrophe-causing decisions by MNCs may well be justified in looking askance at such prognostications. No doubt, some success stories of state-industry collaboration exist and the SRSR is justified in telling these. But compared with mass disasters and toxic torts that abound, these success stories do not fully support the framework merely of the state ‘protect’ and businesses ‘respect’ human rights. Nor is howsoever hard-nosed focus on the state, especially from the Global South, likely to provide a viable approach in situations such as Bhopal: India did everything that lay within its sovereign power—including personify under the *parens patriae* Bhopal Act<sup>77</sup>—to sue as a sovereign plaintiff but its Supreme Court was led to a settlement of just under one-third of the amount it had claimed, perhaps under the apprehension that a garnishee court in the US may term any award as violative of the American judicial doctrine of ‘due process’.

Considerations of integrity of adjudicatory process and power are important but these must be held within notions of justice and human rights and it is surely time now for India’s articulation of the ‘absolute liability’ of hazardous MNCs to be accepted as a core principle of justice and human rights<sup>78</sup> so that no MNC may create future Bhopals with an assurance of impunity. For this to happen at all, MNCs should be made to accept at

<sup>73</sup> Blitt, note 71, 41.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid. But see Surya Deva, ‘Guiding Principles on Business and Human Rights: Implications for Companies’ (2012) 9:2 *European Company Law* 101.

<sup>76</sup> Angelica Bonfanti, ‘Access to Ready for Victims of Business-Related Abuse’ in Sinha (ed.), note 56, 130, 141.

<sup>77</sup> Bhopal Act, note 35, sec 3.

<sup>78</sup> The Indian principle, since then an aspect of Indian jurisprudence reiterated by the Supreme Court of India, was enunciated as follows in the sovereign plaintiff brief before Judge Keenan:

A multinational corporation has a primary, absolute and non-delegable duty to the persons and country in which it has in any manner caused to be undertaken any ultrahazardous or inherently dangerous activity. This includes a duty to provide that all ultrahazardous or inherently dangerous activities are conducted with the highest standards of safety and to provide all necessary information and warnings regarding the activity involved.

least one human right: the right to be immune from, and the human right to hold the parent MNCs absolutely liable for, catastrophe-creating decisions, which they consciously and intentionally take. Not too much ‘epistemic insubordination’,<sup>79</sup> however, is required to decolonize multinational corporate multilevel governance as the Bhopal-violated teach us.

On a wider plane, the idea of ‘international legalization’ (as Professor Ruggie would call this) has come to stay. The future battles lie, in my view, not especially in the debate, or confrontation, between those who favour a fuller discipline of human rights law and jurisprudence on MNCs (and their affiliates including related business entities) and those who would continue to favour the refinement of the soft law of the voluntary notion of corporate social and human rights responsibility. Rather, we need to tame our approach in a way that harnesses both the mandatory and the voluntaristic perspectives. A collaborative approach, and a growing learning curve, among states, international organizations, MNCs (as well as other business entities), and social movements for justice for the violated should be welcome in principle.

However, a future treaty extending to all trade and business not to violate a minimum of well-established international human rights norms and standards is not antithetical to encouraging constantly a better (that is higher and more nuanced) notion of CSR. Following the two-track approach is a necessary global public good, in a world where

---

(Footnote continued)

Defendant multinational Union Carbide breached this primary, absolute, and nondelegable duty through its undertaking of an ultrahazardous and inherently dangerous activity posing unacceptable risks at its plant in Bhopal, and the resultant escape of lethal MIC from that plant. Defendant Union Carbide further failed to provide that its Bhopal plant met the highest standards of safety and failed to inform the Union of India and its peoples of the dangers therein. Defendant Union Carbide is primarily and absolutely liable for any and all damages caused or contributed to by the escape of lethal MIC from its Bhopal plant.

Elaborating further, India argued that:

Multinational corporations by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultrahazardous or inherently dangerous. Key management personnel of multinationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law.

The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. In this manner, the multinational carries out its global purpose through thousands of daily actions, by a multitude of employees and agents. Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.

Baxi and Paul, note 21, v; ‘Amended Consolidated Complaint and the Jury Demand filed by plaintiffs on 8 July 1985’ in Baxi and Paul, note 21, 148–60.

<sup>79</sup> Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000); Walter Mignolo, ‘Globalization and the Geopolitics of Knowledge: The Role of the Humanities in the Corporate University’ (2003) 4:1 *Nepantla: Views from the South* 97. See also Eduarado Ibarra-Coldao, ‘Organization Studies and Epistemic Coloniality in Latin America: Thinking Otherness from the Margins’ (2007) 2 *Worlds and Knowledges Otherwise* 1.

politics has increasingly become business and business has another name for doing high politics. State-like and state-transcendent entities continue to grow and prosper in the name of necessary economic development. In fact, under the same rubric, there has been allowed to develop what I have called a trade-related, market-friendly paradigm of the universal human rights of all corporations de-privileging the paradigm of the universal human rights of all human beings.<sup>80</sup>

There is every danger that the debate of what should go into and what should stay out of a sparse treaty, reversing the juristic impunity of MNCs, may be ‘politicized and polarized’ thus fraught with the ‘potentially harmful consequences for impacted individuals and communities, particularly in the intentional contexts of the global South’.<sup>81</sup> While reflexive academics and social movements ought to continue to combat this deformation, the idea of a treaty laying down some human rights obligations on MNCs ought not to be fully deterred by full-throated performance of corporate voluntarism. The danger of mass disasters and toxic torts, the perils of trade-related, market-friendly human rights arose long before the idea of human rights treaty defining MNCs’ human rights obligations, as the archetypal Bhopal and other mass disasters, especially in Global South, fully indicate. And it is the world real future probability that such human and social distress will continue to grow in a regime of MNC impunity, especially in an Anthropocene era now upon us all.<sup>82</sup>

What should interest us is how the proposed work on such a treaty would describe ‘core’ human rights: what does ‘principled pragmatism’ teach us about the meanings (juristic as well as social) of the notion of core human rights? If any part of the message of principled pragmatism is that following human rights norms and standards is not practical or pragmatic for MNCs and their affiliates, we are also led logically to conclude that such norms and standards themselves are not pragmatic. We must reject such a message if only because the known history of the conduct of international negotiations, treaty-making, and customary law formation, and of international organizations, offers enough evidence to the contrary.

While Rawls-like deontological positions are clearly prescribing a moral idea of human rights as consisting of only a few articulations of core human rights that makes just global and domestic societies (and their laws and constitutions), any UN-based treaty is bound to include the crimes against human rights such as genocide, the outlawry of race- and religion-based discrimination, human rights to effect ‘empowered civic participation’,<sup>83</sup> and rights of social protections against all forms of vulnerability.

<sup>80</sup> For a detailed analysis, see Baxi, *Future*, note 8, Chs 8 and 9.

<sup>81</sup> Ruggie, ‘Regulating Multinationals’, note 63, 14.

<sup>82</sup> See the highly popular, and assiduously accurate, work of Naomi Klein, especially *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007). See also Naomi Klein, *This Changes Everything: Capitalism v Climate* (New York: Simon & Schuster, 2014). This admirable work, designed to foster activist knowledge, legality, justice, and solidarity among suffering and struggling peoples of the earth, is especially important as conveying a vivid description of tactics pursued by neo-liberal markets and governments, especially job blackmail, ‘desperation’ as means to predation, and ‘total control’. See Chapters 12 and 13 for some sage counsel.

<sup>83</sup> A fully developed version of this notion was proposed by Tara J Melish and Errol Meidinger, ‘Protect, Respect, Remedy and Participate: “New Governance” Lessons for the Ruggie Framework’ in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights* (Leiden: Martinus Nijhoff, 2012). Melish and Meidinger propose a fourth ‘Participate’ pillar to the Ruggie framework, which he seems to conceptually welcome but practically denounces. Ruggie, ‘Regulating Multinationals’, note 63, 4–7.

The Draft Norms embraced all UN-enunciated human rights norms and standards as applicable to MNCs; their future lies in a treaty proposal that is far more parsimonious.

The best bet for a resurrection of the impulse and direction animating the spirit of the Draft Norms, I believe, lies in what Nancy Fraser once called ‘perspectival dualism’,<sup>84</sup> negating the reduction of many into the same and resisting the tyranny of the singular. States and markets are relatively autonomous realms and may not be reduced to one thing but that should not preclude the recognition that that government-market conduct stands historically, and heavily, permeated by complex and interlocking intersectionality. There is surely not any *a priori* reason why that intersectionality must mark the end or silencing of enforceable human rights norms, standards, and discipline at the shores of corporate governance.

The problem with human rights is not their interpretive plurality, that they mean different things to different peoples: in fact, the right to interpretive plurality is in itself a human right. The real problem is elsewhere: it dwells in the domain of conduct that insists that non-state actors are not subject to any human rights norms or standards. This regime of human rights MNC-developed nihilism ought to come to an end in the twenty-first century, even when the new beginning is liable to be labelled partial, fractured, and tentative. The direction of human agency, I believe, lies in favour of a choice for ontological robustness of human rights norms and standards rather than their ontological fragility.

---

<sup>84</sup> Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (translated by Joel Golb et al) (London: Verso, 2003) 7, 34–37