SOME INTERNATIONAL LAW ASPECTS OF THE BHOPAL DISASTER

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Abstract—This article explores certain international law aspects of the Bhopal disaster, namely the principles and rules of international law establishing international accountability for environmental damage; the criteria for determining the liability of the Union Carbide Company (U.S.A.) for the Bhopal disaster; the criteria for determining compensation; and the international remedies available to the Indian government in the event that Bhopal victims fail to get justice within the Indian court system.


The scattered 'hard' and 'soft' jurisprudence of international environmental law establishes liability and accountability for environmental hazards. It makes both state and non-state entities liable to pay compensation to the victims of environmental pollution. This jurisprudence, in addition to domestic law analogies, can influence Indian courts in determining the amount of damages payable to the victims of the Bhopal disaster.

The authors conclude that the Bhopal disaster has demonstrated that enforceable international standards are clearly and urgently needed for hazardous industries, especially those operating in developing countries. Such standards would eliminate, or at least narrow, the gap between standards prevailing in the developed countries and those in the Third World. Even without enforcement, international standards could provide norms for measuring the performance of individual companies engaged in hazardous activities such as the manufacture of MIC at Bhopal.

Key words—Bhopal, international liability, multinational corporations, compensation (of victims), disaster relief, hazardous technologies

INTRODUCTION

The Bhopal disaster, which took place just after midnight on 3 December 1984, is undoubtedly the worst industrial accident in history. Forty tons of highly toxic methylisocyanate (MIC), which had been manufactured and stored at Union Carbide's chemical plant in Bhopal, escaped into the atmosphere and killed over 2000 people who lived in the dispersing chemical's pathway. As many as 200,000 others were injured—many seriously and some permanently [1]. Indeed, the official estimates of death and injury do not convey the enormity of the human tragedy—the families and communities disrupted, disabled, dislocated and impoverished.

This unprecedented disaster has raised serious questions about unregulated industrialization in a developing country like India. It has also questioned the coherence of industrial policy planning, the adequacy of existing industrial/corporate safety measures, the complicity of government officials, the responsibility of officers, and the accountability of an American multinational company. The Bhopal disaster is not an ordinary case of environmental pollution; it is a case of human rights violation as well. And it is a matter of international concern since international actors are involved and international rules and principles are at stake.

Looking at the projected and potential legal implications, the Bhopal case involves several branches of law. It transcends the boundaries of domestic tort, contract, criminal and environmental law. It stretches the boundaries of conflict of laws rules relating to jurisdiction, choice of law, and their underlying policies. It also invokes principles of international law relating to environment, development, human rights, and the obligations of transnational corporations. Finally, Bhopal raises the problem of enforcing a judgment in a transnational case.

The present article is designed to deal only with certain salient international law questions concerning the Bhopal disaster, namely:

(1) Do the principles and rules of international law establish any international accountability for environmental damage?

(2) If so, what are the criteria for determining the liability of the Union Carbide Company (U.S.A.) for the disaster at Bhopal?

(3) What are the criteria for determining compensation?

(4) Finally, are any international remedies available now that the U.S. court has declined jurisdiction over the Bhopal cases?

These four questions will be addressed seriatim, and several conclusions will follow.

DO THE PRINCIPLES AND RULES OF INTERNATIONAL LAW ESTABLISH ANY INTERNATIONAL ACCOUNTABILITY FOR ENVIRONMENTAL DAMAGE?

There is, of course, no world legislature in the international legal system. International law consists of principles and rules emanating from a score of
formal and informal instruments, creating both 'hard' (i.e. legally binding) and 'soft' norms of international law [2]. Prominent among these instruments are international conventions and other agreements, customs, state practices, general principles of law recognized by most nations, judicial decisions, and equity. International environmental law is simply a branch of international law.

The Magna Carta of international environmental law is the Stockholm Declaration, adopted at the first U.N. Conference on the Human Environment at Stockholm in 1972 [3]. This Conference was called to coordinate national, bilateral, regional, and international efforts to protect the human environment and to preserve and improve man's natural surroundings [4]. The Conference considered environmental issues pertaining to the atmosphere, the marine environment, the management of living marine resources, and national and international energy policies. This consideration resulted in the approval of principles, recommendations, and guidelines for the future conduct of international environmental protection and management. In particular, Principle 21 of the Stockholm Declaration articulates the responsibilities of nations to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction [3].

Although the Stockholm Declaration does not have the binding force of a treaty, it has undoubtedly legal significance. The Declaration, adopted unanimously, reflects the general will of the international community. Its reaffirmation in various international agreements relating to the environment evidences its importance and validity. One scholar characterizes Principle 21 as "declaratory of existing customary principles of international law" [5]. Another sees it as "a confirmation of the existing law" [6].

Since 1972, numerous agencies—both governmental and non-governmental—have launched national and international campaigns for protection of the environment in specific areas. Almost a hundred countries now have some environmental protection regime, and many countries regard environmental protection as a matter of high national priority. All this suggests that environmental protection has become an area of many nations' domestic law and also a norm of customary international law.

Today there are numerous international instruments that establish international standards and accountability with respect to one or another area of environmental pollution. Binding international agreements are, by custom and practice, incorporated into the domestic law of signatory states.

In addition, the recent comprehensive UN Convention on the Law of the Sea, 1982 [7], which involved most member countries of the United Nations, establishes international standards of environmental protection for the world's oceans and seas. Thus a number of global, regional, subregional, and bilateral agreements, coupled with the Stockholm Declaration, are the sources and reference points of international environmental law.

On the basis of the recommendations of the Stockholm Conference, the U.N. General Assembly created the United Nations Environment Program (UNEP) in 1972. In 1973, the International Maritime Organization established the Marine Environment Protection Committee [8, 9]. These were major breakthroughs in the evolution of international environmental institutions.

UNEP's task is to monitor significant changes in the environment and to encourage and coordinate sound environmental practices [10]. In the area of international environmental law, especially, UNEP's efforts have included the development of guidelines or principles regarding the harmonious utilization by states of shared natural resources, offshore mining and drilling; the preparation of an international convention on the ozone layer; and regional conventions for the protection of the marine environment and related technical protocols [11].

A recent and significant development in establishing international standards and accountability in environmental pollution matters was the adoption of the Montreal Rules by the International Law Commission (ILC). With regard to the application of Principle 21 of the Stockholm Declaration to a specific context, the ILC has for some time been working on the topic of "The Non-Navigational Uses of International Water-Courses," and has prepared a set of Draft Articles on the subject. (The draft has not yet been applied to specific cases.) Article 8 of this Draft, entitled "Responsibility for Appreciable Harm," states, inter alia:

The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.

Each system State is under a duty to refrain from, and to restrain all persons under its jurisdiction or control from engaging in, any activity that may cause appreciable harm to the interests of another system State . . . [12].

Article 10 of the Draft, entitled "Environmental Protection and Pollution," provides inter alia:

Unless otherwise provided by agreement among the system States concerned, no State may pollute or permit the pollution of waters of an international watercourse system in concentrations or combinations that result in loss of human life, or debilitating or disfiguring illness, in the territory of a co-system State . . .

System States shall establish, individually or jointly, regimes to ensure that their activities and activities under their jurisdiction or control cause no appreciable or irreversible environmental degradation in or by means of the international watercourse system [12].

These articles set forth obligations to notify and consult [13] concerning actual or potential transfrontier harm and to formulate an environmental protective regime for the system involved. In a parallel vein, the most recent draft of the American Law Institute's Restatement of the Law, Foreign Relations Law of the United States, focuses on the "Law of the Environment" and suggests principles of state responsibility regarding transfrontier pollution and marine pollution [4, p. 412; 14].

Various scholars including Karel Vasak, W. Paul Gormley [8, p. 255] and B. G. Ramcharan have defined a safe environment as a human right [15].
B. G. Ramcharan links the right to life and the right to a safe environment [16]. He refers to proposals that have been advanced to criminalize certain environmental hazards, e.g. Article 19 of the International Law Commission’s draft Articles on State Responsibility. With respect to the relationship between the right to life and the right to a safe environment, Ramcharan submits the following propositions [16]:

1. There is a strict duty upon States, as well as upon the international community as a whole, to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings.

2. Every State, as well as the United Nations (UNEP), should establish and operate adequate monitoring and early-warning systems to detect hazardous threats before they actually occur.

3. States which obtain information about the possible emergence of an environmental hazard to life in another State should inform the State at risk or at least alert UNEP on an urgent basis.

4. The right to life, as an imperative norm, takes priority above economic considerations and should, in all circumstances, be accorded priority.

5. States and other responsible entities (corporations or individuals) may be criminally or civilly liable under international law for causing serious environmental hazards posing grave risks to life. This responsibility is a strict one, and would arise irrespective of whether the act or omission in question is deliberate, reckless or negligent (emphasis added).

6. Adequate avenues of recourse should be provided to individuals and groups, at the national, regional or international levels, to seek protection against serious environmental hazards to life. The establishment of such avenues of recourse is essential for dealing with such risks before they actually materialize.

In summary, numerous international standards, institutions and agreements establish a legal duty to safeguard the environment. Although they are mainly addressed to sovereign states, which are the principal subjects of international law, they are also generally applicable to other subjects, including transnational corporations (TNCs). The recognition of the role of TNCs in deep-sea mining under the new Law of the Sea regime, the evolution of the U.N. Commission on Transnational Corporations’ Draft Code of Conduct of Transnational Corporations, and the adoption of a large number of transnational environmental measures support this new trend.

WHAT ARE THE CRITERIA FOR DETERMINING THE LIABILITY OF THE UNION CARBIDE COMPANY (U.S.A.) FOR THE DISASTER AT BHOPAL?

After establishing the legal duty to safeguard the environment, liability for the breach of that duty should necessarily follow. As one scholar remarked, “The law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused” [17]. Liability for the breach of international responsibility is not a recent development. In fact, the notions of reparation and restitution in the train of illegal acts had long been part of the available stock of legal concepts in Europe, and the classical writers, including Grotius, often referred to reparation and restitution in connection with unjust war [17].

Liability to pay compensation for environmental degradation has been set forth in numerous international instruments. This same liability has been affirmed in various U.S. judicial decisions, such as Sierra Club v Coleman [18], In re Agent Orange Product Liability Litigation [19]; and Allen v United States [20].

There are a number of instances where the damage caused by environmental degradation led to successful claims for compensation at the international level. In the Lucky Dragon case, for instance, the United States paid compensation to Japan for the environmental damage caused by U.S. hydrogen bomb testing in the Pacific Trust Territories. In that case, several seamen on the Japanese ship Lucky Dragon were injured; the ship’s catch of tuna was rendered unfit for consumption; and areas of the Pacific became radioactive [8, p. 13].

In a landmark 1930s case, Canada and the United States submitted to an international arbitration panel a dispute in which certain U.S. citizens sought compensation for damage to their fields and orchards caused by wind-borne fumes from a Canadian smelter at Trail, British Columbia (the Trail Smelter Case) [21]. The panel found Canada strictly liable, without proof of negligence, and ordered Canada to compensate the U.S. citizens for the damage.

In the case of W. Poror v Houilleras du Bassin de Lorraine [22], a German motel owner sued a French power plant whose emissions of soot and smoke damaged crops, flowers, and the recreation business in German territory across the border. The German court awarded damages pursuant to French law. Other examples include two recent nuisance actions involving pollution flowing across the U.S./Canada border, Michie v Great Lakes Steel [23] and Ohio v Wyandotte Chemical Corporation [24]. In Wyandotte, the Attorney-General of Ohio successfully sued for injunctive relief against Canadian and Michigan corporations responsible for mercury pollution damage in Lake Erie alleged to harm Ohio citizens [24]. In Michie, several residents of Windsor, Ontario, recovered damages in an action against a number of U.S. companies releasing air pollution from sources across the Detroit River in the United States [23].

There also seems to be a developing legal principle that makes nations liable to each other for extremely hazardous activities. For example, when a Soviet Cosmos satellite crashed in northwestern Canada in 1978, Canadian officials asked Soviet authorities for $6 million in clean-up costs. Although a 1972 treaty governed that situation, Canada also based its claim for compensation on a theory of international liability for activities that carry “a high degree of risk”. In 1980, the Soviet Union paid Canada $3 million to settle this claim [25].
The environmental preservation responsibility of non-state entities engaged in business activities (such as TNCs) proceeds from the premise that these entities should not be permitted to promote their economic interests at the cost of the environment, a common heritage of mankind [26]. The responsibility of TNCs for the protection of the environment has been set forth in the following sections of the U.N. Draft Code of Conduct on Transnational Corporations:

41. Transnational corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Transnational corporations shall/should, in performing their activities, take steps to protect the environment and where damaged to [restore it to the extent appropriate and feasible] [rehabilitate it] and should make efforts to develop and apply adequate technologies for this purpose.

42. Transnational corporations shall/should in respect of the products, processes and services they have introduced or propose to introduce in any country, supply to the competent authorities of that country on request or on a regular basis, as specified by these authorities, all relevant information concerning:

- Characteristics of these products, processes and other activities including experimental uses and related aspects which may harm the environment and the measures and costs necessary to avoid or at least to mitigate their harmful effects;
- Prohibitions, restrictions, warnings, and other public regulatory measures imposed in other countries on grounds of protection of the environment on these products, processes and services.

43. Transnational corporations shall/should be responsive to requests from Governments of the countries in which they operate and be prepared where appropriate to cooperate with international organizations in their efforts to develop and promote national and international standards for the protection of the environment [27].

This set of obligations would apply to all subsidiaries of any TNC. The logic of this rule is that a TNC often operates through various subsidiaries under a system of common decision-making, formulating coherent policies and a common strategy through one decision-making center. The subsidiaries are linked by ownership or otherwise, and one or more of them may be able to exercise a significant influence over the activities of others, often sharing knowledge, resources and responsibilities with the others [28].

This kind of relationship seems to have existed between the Union Carbide Company (U.S.A.), from whose headquarters emanated overall control of Carbide's world-wide enterprises, and the Union Carbide Company of India, the title-owner of the ill-fated pesticide plant from which the MIC gas escaped [29, 30].

The crucial determining factor in the liability of the former for the action of the latter is that of 'genuine link' and 'control'. In the Bhopal disaster case the following points indicate that link and control:

1. Although UCC (India) built and ran the Bhopal plant, in fact it was UCC (U.S.A.) which consistently exercised critical control over the establishment, structure, policy-formulation, implementation and decision-making process. Investigative journalists have generally established that American scientists and technicians employed by UCC (U.S.A.) played the leading role both in setting up the plant and in its operations before those operations were handed over to UCC (India), to be conducted under supervisory personnel chosen and trained by UCC (U.S.A.).

Neither these nor other details indicating that the scientists and technicians were employees of, acted for, and were paid by UCC (U.S.A.) were seriously contested by the UCC (U.S.A.). Nor has it been publicly denied that the Indian plant was modeled after a similar MIC-manufacturing Carbide plant in Institute, West Virginia, albeit without a matching computerized safety system.

2. All decisions relating to UCC (India) business activities have always been controlled by the UCC (U.S.A.).

3. UCC (U.S.A.) exercised its control through selection and training of personnel as well as by retaining a 50.9% majority of UCC (India)'s stock.

4. Immediately after the Bhopal disaster, Warren Anderson, the Chairman of the UCC (U.S.A.) journeyed to India and defended UCC (India), strongly suggesting that he believed that the parent company was in some measure responsible for its subsidiary's gas leak at Bhopal and its consequences.

5. In March 1986, UCC (U.S.A.) publicly offered $350 million to settle all cases brought against it by or on behalf of Bhopal victims.

In May 1986, the case was dismissed from the U.S. federal courts; and UCC (U.S.A.) agreed to submit to the jurisdiction of the Indian courts. Bhopal victims, as plaintiffs, must now establish, in the Indian courts, that UCC (U.S.A.) as well as UCC (India) breached their legal duty (a) to safeguard the environment; (b) to protect human lives by their activities; (c) to adopt the most effective safety measures to manufacture and store MIC; and (d) to inform the government of India and its people of MIC's hazards.

This breach of duty, besides establishing civil liability, also gives rise to criminal liability in accordance with the domestic law of most nations and also with emerging customary international law, reflected in the International Law Commission's Draft on "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law" [12, p. 418], still in the working stages.

There is a well established common law rule that a corporation may be penalized for its criminal acts such as deceit, false statements, or manslaughter [31]. In the Bhopal case, UCC (U.S.A.) may thus be criminally liable for several of its acts and omissions.

Moreover, article 19 of Part I of the International Law Commission's aforementioned International Liability Draft, entitled "International Crimes and International Delicts", contains, in paragraph 3, a list of acts which may constitute international crimes. These include acts of aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid, and finally "a serious
breach of international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas” [5, 12, p. 418, 32].

All of the foregoing suggests that the Bhopal disaster may give rise to civil and criminal liability on the part of the Union Carbide Company (U.S.A.). Such liability, when established in a court of law, should result in a very substantial judgment for damages in behalf of the victims of the Bhopal disaster. The criteria for determining the level of compensation will be discussed in the next section.

WHAT ARE THE CRITERIA FOR DETERMINING COMPENSATION?

While the “duty to pay compensation is a normal consequence of responsibility” [17, p. 421], the amount of compensation depends on the facts and circumstances of the particular case, the magnitude of the loss suffered by the victims, the policy of the forum, and the special circumstances which may bear on the welfare of international society.

Apart from these general notions, there is no international treaty or convention prescribing criteria for determining the amount of compensation for victims of Bhopal-type disasters. There are, however, several international conventions, which lay down provisions for compensation in case of environmental pollution by oil tankers*. In addition, the general principles of law recognized and practised by most nations in similar circumstances, and decisions of international and national tribunals, provide a rich reference base for determining the amount of compensation.

In their Report for the Citizens Commission on Bhopal [30], Morehouse and Subramaniam argue persuasively for “compensation for direct and ancillary losses, not only to date but as far into the future as the impact of the disaster will continue to affect the victims” [30, p. 54]. They note that in India, one wage earner may be responsible for supporting two or three generations. Compensation must therefore take into account the degree of dependency of other family members on the deceased and the surviving but disabled victims. If the victim were the sole earner, other family members would be more bereft, and the quantum of their damages should be greater. In addition, future deformed offspring of Bhopal victims must be entitled to compensation if their deformities are attributable to their parents’ exposure to MIC.

Morehouse and Subramaniam’s compensation calculations come to over $4 billion simply for “economic losses, relief and restitution”. They do not include compensation for pain and suffering or emotional anguish, and also do not include exemplary (punitive) damages. The two largest sums in their calculations are restitution for 60,000 disabled victims, and health care for and monitoring of 200,000 victims and their survivors for the next 30 years.

The amount of compensation will undoubtedly remain a thorny issue throughout the litigation. There are no precedents in India for tort compensation in a class action suit against a rich American corporation, and Indian lawyers and judges will have to be innovative and resourceful as well as fair minded. Morehouse and Subramaniam urge that the financial resources eventually provided by a judgment or settlement “should be invested as an endowment, so that there will be income long into the future to help meet as yet unknown needs of the victims” [30, p. 69, 33].

If Union Carbide (U.S.A.) is also found to have breached a legal duty to inform the government of India and its people of the dangers of the pesticide plant, the court may refer to the law of contracts and contract remedies of the industrial countries [34] to arrive at appropriate damages.

INTERNATIONAL REMEDIES

International law is rich in articulation but poor in implementation: Sovereign states are jealous in guarding their sovereignty. The price of justice, through international procedures and remedies, often appears to be too costly to national leaders moved by considerations of national self-interest [35].

Nonetheless, the violation of international environmental law is not without international remedies. Such remedies exist in the general body of international law, and victims may ask their government to invoke them, after exhausting domestic remedies in the forum country [36]. The doctrine of state responsibility gives rise to the responsibility of the state for acts even of private nationals [17, pp. 432–41, 37]. In international law, numerous treaty provisions define ‘nationals’ to include corporations [17, p. 409].

Accordingly, it would seem to be the responsibility of the United States to ensure that activities of transnational corporations conform with both domestic and international law. The United States also has a strong interest in deterring TNCs from exporting hazardous technologies to less developed countries, and in notifying importing countries of the nature of the hazard. Should U.S. officials fail to insure compliance with international law and practice by one of its transnational corporations, the aggrieved state may invoke international remedies. In the Bhopal case, the government of India may invoke the following international remedies:

1. Diplomatic Intervention.
2. International Arbitration.
3. Submission to the International Court of Justice.
4. Intervention of International Political Institutions.

1. Diplomatic Intervention

It is a well established rule and practice of international law that whenever the nationals of a state are victims of a wrong, the state concerned may take up their cause at the diplomatic level with the state to which the wrongdoing belongs.

This remedy does not require any procedural formality. It merely requires a policy-decision on the part of the government of India to draw the attention

*For additional information, see the article by H. Smets in this issue.
of the U.S. Department of State to reach an amicable settlement with the victims of the Bhopal disaster. One scholar has suggested that the United States government could offer money and expertise to help establish a fair and efficient claims tribunal in India [38]. The Reagan administration, committed to a laissez-faire policy toward American business activity, is unlikely to be at all receptive to diplomatic overtures by India urging U.S. government pressure on a U.S.-based multinational company. But a new president will be in office in 1989, and the next administration’s policies and attitudes could differ from those prevailing today.

2. International Arbitration

Both the U.S. government and the government of India could eventually agree to submit the Bhopal dispute to an international arbitration panel. The international arbitration panel in the Trail Smelter Case [21], between Canada and the United States, found Canada strictly liable, without proof of negligence. In any contemporary arbitration proceeding, the Trail Smelter Case could be a useful precedent. But it seems unlikely that the United States government would ever intervene so preemptively and at such financial risk, in the affairs of a private U.S.-based multinational company. But a new president is unlikely to be at all receptive to diplomatic overtures by India urging U.S. government pressure on a U.S.-based multinational company. But a new president will be in office in 1989, and the next administration’s policies and attitudes could differ from those prevailing today.

3. Submission of the Dispute to the International Court of Justice (ICJ)

In the 40-year long history of the ICJ there have been numerous occasions wherein a state party to the Statute of the ICJ invoked the Court’s compulsory jurisdiction against another state party for the protection of the rights of its nationals [39].

Both India and the United States are parties to the Statute of the ICJ. In accordance with Article 36 of the Statute, they could enter into a special agreement to seek settlement of the Bhopal dispute by the ICJ. The ICJ would then have jurisdiction to decide the question of violation of international environmental law and to determine the nature or extent of the reparation to be made for the violation. But submission to the ICJ seems highly improbable in the foreseeable future, in view of the Reagan administration’s repudiation of ICJ jurisdiction over Nicaragua’s claims against the United States [40].

4. Intervention of International Political Institutions

Politicization of a legal dispute is not uncommon in international relations. When all other avenues of conflict-resolution are exhausted or proved ineffective, states often seek the intervention of international political institutions to pressure the target state. Invariably, this strategy has a better chance of success where the victim state’s stand has moral strength and emotional appeal. The Bhopal disaster has evoked unprecedented sympathy for the victims among all nations, big and small, rich and poor. In addition, India, as a leader of both the non-aligned and developing countries, commands significant political influence in international relations. All these factors may induce India to take the Bhopal case to an appropriate organ of the United Nations. In terms of international law, this potential move would be supported by Chapter VI of the U.N. Charter, which permits the use of regional agencies or arrangements, the U.N. Security Council, or the U.N. General Assembly for the ‘Pacific Settlement of Disputes’ [41].

CONCLUSIONS

The Bhopal disaster has deeply disturbed the conscience of mankind. It has raised a large number of complicated legal issues—both national and international. It has demonstrated that enforceable international standards are clearly and urgently needed for hazardous activities, especially those operating in developing countries. Such standards would eliminate, or at least narrow, the gap between standards prevailing in the developed countries and those in the third world. Even without enforcement, international standards could provide “norms against which to measure the performance of individual companies in extremely hazardous industries” [30, p. 72] such as the Bhopal MIC plant. Strict liability for the harm caused by hazardous industrial activity seems to be a developing norm of international as well as domestic law.

Unhappily, we do not have a compulsory procedure to enforce international law and to provide quick relief to the Bhopal victims. Yet we find that there are international norms, general principles of law recognized by most nations, international institutions, constant state practice, and a peremptory obligation “to take joint and separate action in cooperation” with the United Nations for the solution of national and transnational environmental problems.

The scattered ‘hard’ and ‘soft’ jurisprudence of international environmental law establishes liability and accountability for environmental hazards. It makes both state and non-state entities liable to pay compensation to the victims of environmental pollution. This jurisprudence, in addition to domestic law analogies, can influence Indian courts in determining the amount of special damages payable to the victims of the Bhopal disaster. It is true that no amount of compensation will restore life or remove permanent disability. Yet justice demands that whenever there is a legal wrong the best possible legal remedy should be administered.

In the unlikely event that the Bhopal victims fail to get justice within the Indian court system, the government of India could invoke international remedies, including diplomatic intervention, international arbitration, judicial settlement, and intervention of international political institutions. In such a situation, the credibility and effectiveness of international law would be strongly challenged. That challenge would also offer a unique opportunity to strengthen the force of international law.
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2. ‘‘Soft’’ norms serve as guidelines or as indicators of a developing trend. As they increase in number and specificity, scholars and lawyers begin to rely on them in resolving international disputes.


7. The Law of the Sea; Official Text of the United Nations Convention on the Law of the Sea, 1983. According to Article 194 of this Convention, “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.”


10. UNEP’s programs include ‘Earthwatch’, an international surveillance network with three main components: (i) a Global Monitoring System, which monitors selected environmental parameters to provide governments with the information necessary to understand, anticipate and combat adverse environmental changes, whether man-made or natural; (ii) INFOTERRA, a computerized referral service to 20,000 sources in over 100 countries for environmental information and expertise; and (iii) the International Register of Potentially Toxic Chemicals, which works through a network of national correspondents to provide scientific and regulatory information on chemicals that may be dangerous to health and environment. UNEP is responsible for implementing the Plan of Action to combat desertification in the Sudano-Sahelian region. It is active in anti-marine pollution programs, in the development of international environmental law, and in extending technical assistance, education and training for managing the environment.


13. Notification and consultation is also a key element of the ECE Convention on Long Range Transboundary Air Pollution. See Rosencranz A. The ECE Convention of 1979 on long range transboundary air pollution. Am. J. Int. Law 75, 975, 977, 1981. President Carter, in the last days of his administration, signed an executive order requiring importers of domestically-prohibited pesticides and other banned or restricted products to notify foreign countries of the U.S ban or restriction on those products. Exec. Order No. 12. 264, C.F.R. 86, issued January 15, 1981. President Reagan rescinded that order shortly after taking office.


23. Michie v Great Lakes Steel Division, F. 2d 495, 213, 6th Circuit, 24 April, 1974.

24. Ohio v Wyandotte Chemical Corporation, No. 904, 571, Court of Appeals Ohio, 24 April, 1975.


At the second session of the United Nations Commission on Transnational Corporations, held at Lima in 1976, an Intergovernmental Working Group on a Code of Conduct was established. The Working Group started its work in January, 1977, and drafted the text of the U.N. Code on TNCs in May 1982. Many of the issues within the code have been agreed upon by all pressure groups, including TNCs. Unfortunately, the U.N. Code remains in apparently hopeless deadlock between the developed and developing countries. See Report of the Secretariat, E/C. 10/1984/S/5 (29 May 1984).


According to one legal scholar, the emerging multi-national Codes of Conduct "are meant to reflect a broad international consensus." Northwest J. L. Theories of parent company liability and the prospects for an international settlement, Tex. J. Int. Law 20, 321, 326, 1985.


29. In their brief to the U.S. District Court for the Southern District of New York, in which all Bhopal lawsuits in U.S. federal courts were consolidated, the Plaintiffs' Executive Committee, representing the Government of India as well as individual Bhopal victims, averred that Union Carbide conceived and designed the technology for the manufacture of pesticides using methylisocy-anate (MIC), which Union Carbide's literature described as "reactive, toxic, volatile and flammable" with the potential for "explosive violence". Union Carbide decided to transfer this technology to its majority-owned subsidiary in India and controlled the construction and commissioning of the Bhopal plant with United States personnel. Union Carbide sent its managers to run the Bhopal plant and tightly governed the financial operations of the plant and the affairs of its Indian subsidiary. Union Carbide continually monitored the operation at Bhopal, particularly for MIC release due to operating and maintenance problems or equipment failure. Finally, just days before the tragedy, Union Carbide executives in Danbury were considering the dismantling of their Bhopal facility. Cradle to grave, the Bhopal plant was under the pervasive control of its American parent. In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal. India in December, 1984. Memorandum of law in opposition to Union Carbide Corporation's motion to dismiss these actions on the grounds of forum non conveniens. MDL Docket No. 626, 1985.


34. On breach of contract, the rule laid down in Hadley v Baxendale (1854) 9 Ex 341. 354 is well established in common law countries. It has been reaffirmed time and again. For details see Farmston M. P. (Ed.) Cheshire and Fifoot's Law of Contract. 10th edn, pp. 537-541. Butterworths, London, 1981.


36. In a suit by Dutch individuals against a French Company for polluting the Rhine River, the district court of Rotterdam held that "general principles of international law recognized by civilized peoples are binding on individuals". In its final judgment, the court applied the Dutch law of torts as well as the rules of international law on responsibility for transboundary pollution, and found the defendant liable under both international and Dutch law. Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsacé SA. Judgment of 16 December, 1983. Arrondissements-rechtbank, Rotterdam, 1984 Ars Aequi 153 (final Judgment). In a similar vein, a French administrative court annulled a Rhine effluent discharge permit on the grounds that the permit had been issued in violation of international law. Judgment of 27 July, 1983, Tribunal Administratif de Strasbourg, in 1983 Revue Juridique de l'Environnement, pp. 344-345.

Unfortunately for the development of international environmental law, higher courts in both of the above cases affirmed the lower court judgments but relied exclusively on domestic law. Most nations refrain from applying international law directly. According to a recent reviewer, English courts consider international law to be incorporated into domestic law only "so far as it is not inconsistent with rules enacted by statutes or finally declared" by English tribunals. Chung Chi Cheung v The King. 1939 A.C. 160, 168, cited in Pallemaerts M. Judicial recourse against foreign air polluters, Harvard Env. Law Rev. 9, 143, 154, 1984. See also Oppenheim L. International Law, 8th edn, pp. 39-41. Longmans, London, 1955. India would presumably tend to follow English law and practice in this respect.


39. These cases were: Protection of French Nationals and Protected Persons in Egypt (France v Egypt); Rights of Nationals of the United States of America in Morocco (France v United States); Ambassies (Greece v United Kingdom); Anglo-Iranian Oil Company (United Kingdom v Iran); Nottebohm (Liechtenstein v Guatemala); Electricité de Beyrouth Company (France v Lebanon); Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden); Inter-handel (Switzerland v United States); Barcelona Traction, Light and Power Company Limited (Belgium v Spain); Campagne du Port, des Quais et des Entreposts de Beyrouth and Societe Radio-Orient (France v Lebanon); Trial of Pakistani Prisoners of War (Pakistan v India); and Consular Staff in Teheran (United States v Iran).

40. In October, 1985, the Reagan administration announced that the United States would no longer accept the "compulsory jurisdiction" of the World Court, as it had done since 1946. Henceforth, the U.S. would accept ICJ jurisdiction only in cases where the U.S. explicitly agreed to do so.

41. B. S. Murthy deals in detail with the role of international political institutions, including the League of Nations, the U.N. General Assembly and the U.N. Security Council, in the settlement of disputes. See Sorenson M. Ref. [37], pp. 717-728.