

***THE CLOSE INTERDEPENDENCE BETWEEN TRANSNATIONAL CORPORATIONS CRIMINALITY AND HUMAN RIGHTS AND ENVIRONMENTAL INTERNATIONAL LAW VIOLATIONS: BHOPAL CASE LESSONS***

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Summary: I. Preliminary considerations. II. Causes and effects of the Union Carbide corporation's environmental disaster on Bhopal III. The judicial saga of the Bhopal case: legalizing the disaster. 1. The civil proceedings in the U.S. courts: the long shadow cast by *forum non conveniens*. 2. The demand for criminal and civil responsibility in the Indian courts: the interminable and inefficient legal labyrinth. IV. The subsequent proceedings of the claims for environmental damage up against Dow Chemical's new corporate web: *the polluter neither pays nor repairs*. 1. The new lawsuits regarding environmental pollution, and the evolution of environmental jurisprudence in India. 2. UCC's fusion with Dow Chemical: diluting responsibilities, and corporate veil "cover-ups". VI. Conclusions.

*ABSTRACT: The Bhopal judicial saga has still not offered an honourable solution to the victims of the tragedy after more than three decades of litigation. This issue shows paradigmatically the severe limitations of international human rights and environmental law in controlling transnational corporations and holding them accountable. Massive and ongoing disasters like that caused by Union Carbide show that neither Ruggie's Guiding Principles on Business and Human Rights nor the rhetorical mantra of sustainable development can contribute towards stopping the vicious circle of impunity. That is why it is necessary to reach by consensus a binding international treaty on the subject, that can effectively prevent and punish acts such as those committed in Bhopal.*

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*KEY WORDS: Transnational corporations, human rights, international environmental law, Bhopal, India, Union Carbide, Dow Chemical.*

## **I. PRELIMINARY CONSIDERATIONS**

After an interminable legal journey of civil and criminal proceedings in a series of U.S. and Indian courts, the victims of the Bhopal catastrophe still have not received the compensation they requested. On 24 May 2016, the United States Court of Appeals for the Second Circuit of New York absolved Union Carbide of all responsibility for the deaths and environmental damage caused by the massive pollution of the groundwater in the area affected by the tragedy.<sup>1</sup> Thus the Bhopal case clearly shows the serious limitations of international (and national) human rights and environmental law in cases demanding accountability from a transnational corporation for catastrophic industrial accidents.<sup>2</sup>

Three decades after the toxic gas leak, the effects are still devastating. In addition to over 25,000 deaths caused by the toxic gas, and over half a million patients with serious illnesses, dangerous pollution is still leaking from the remains of the plant, and affecting the soil and aquifers of the neighbouring areas. Meanwhile, the transnational corporation that caused the pollution neither pays compensation nor repairs the human and environmental damage.

This judicial saga shows how the plaintiffs in this type of lawsuit are forced to make their way through a tortuous and burdensome judicial labyrinth full of legal obstacles: a test of reasonableness to prove the suitability of the forum, the impossibility of piercing the veil to show the accountability of the corporate web, invoking human and environmental rights with no effect whatsoever, and in short, litigation against legal persons, corrupt governments and high courts that should protect their interests. This tangled judicial web only re-victimizes the victims and prolongs the disaster, which not only fails to heal the wounds left by the catastrophe, but poisons and deepens them. That is why, in addition to the necessary inversion of the burden of proof in this type of lawsuit, governments and even courts should also pass a "legitimacy test" to attest to the rule of law having fulfilled its fundamental mission, namely, to protect its citizens' interests, which is the legitimizing basis of the social contract by which the State is granted power that should be used to protect those in whom sovereignty ultimately lies. However, the

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<sup>1</sup>United States Court Of Appeals for the Second Circuit, Summary Order, *Sahu, et al. v. Union Carbide Corp., et al.*, 24 May 2016, 14-3087-CV, available at [https://www.earthrights.org/sites/default/files/documents/sahu\\_appeal\\_2016\\_decision14-3087.pdf](https://www.earthrights.org/sites/default/files/documents/sahu_appeal_2016_decision14-3087.pdf).

<sup>2</sup>JUSTE RUIZ, J. & SCOVAZZI, T. (coord.), *La práctica internacional en materia de responsabilidad por accidentes industriales catastróficos*, Tirant Lo Blanch, Valencia, 2005. See particularly the chapter on Bhopal by Professor Scovazzi, pp. 95-112.

reality is that these types of “unequal legal battles”<sup>3</sup> preserve at all costs the maintenance of the dominating forces of transnational corporations.

Unfortunately, the predictions made by experts in India's legal system have come true. From the very start of the case, they did not hesitate to accuse their courts of “*servicing those who benefit from delay and non-implementation of legal norms, that is, parties who are already in possession or satisfied with the status quo*”,<sup>4</sup> a critical assessment that could be extrapolated to other national judiciaries, after what happened in the United States with the Kiobel case,<sup>5</sup> or in Spain or Belgium with the restrictions to universal justice.

As a result, the strategy of Union Carbide and other transnational corporations has prevailed: to maintain control over its subsidiaries, but if accountability is demanded, the parent corporation washes its hands of its subsidiary's decisions and actions. This excessive cover up with the corporate veil<sup>6</sup> is a blatant attempt to maximize low-cost profits and externalize the uncertainty of environmental rights and risks without assuming any legal responsibility. This was precisely one of the issues that various human rights associations demanded that John Ruggie, special representative of the Secretary General, include in his Guiding Principles.<sup>7</sup> And as everyone knows, that connecting link between the central corporation and its subsidiaries in third countries with weak governmental and judicial systems was excluded from the final rhetorical document<sup>8</sup> that was approved unanimously in the

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<sup>3</sup>PIGRAU SOLÉ, A., “The Texaco-Chevron case in Ecuador: law and justice in the age of globalization”, *Revista Catalana de Dret Ambiental*, vol. V, n° 1, 2014, pp. 1-43, available at <http://www.rcda.cat/index.php/rcda/article/view/491>

<sup>4</sup>GALANTER, M., “Law’s elusive promise: learning from Bhopal”, in LIKOSKY, M., (ed.), *Transnational legal processes. Globalisation and power disparities*, ed. Butterworths, London, 2002, pp. 172-185, p. 180.

<sup>5</sup>See the evolution since Kiobel that should have a positive effect on the proceedings open in the United States through the Alien Claims Tort Act (ACTA) given the new jurisprudence interpretation by the U.S. Courts, MARULLO, M.C. & ZAMORA CABOT, F.J., “Transnational Human Rights litigations. Kiobel’s touch and concern: a test under construction”, *Papeles El Tiempo de los derechos* n° 1, 2016, available at <https://redtiempodelosderechos.files.wordpress.com/2015/01/wp-1-16.pdf>.

<sup>6</sup>SCOVAZZI, T., “Gli incidenti industriali e il ‘velo’ delle cosietà transnazionali”, in *L’unificazione del diritto internazionale privato e processuale: studi in memoria di Mario Giuliano*, CEDAM, Padua, 1989, pp. 839-867.

<sup>7</sup>General Commentary n° 19 on 4 February 2008, CESCR, E/C.12/GC/19, paragraph 54: “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries.” WEILERT, K., “Taming the untamable? Transnational corporations in United Nations law and practice”, *Max Planck Yearbook of United Nations Law*, vol. 14, 2010, pp. 445-506, p. 498, shows his concern about this matter, referring to the Special Representative's annual report of 2009 when he states: “The special problems of TNCs are their extraterritorial branches. But the exact extraterritorial part of the ‘duty to protect’ is still nuclear”.

<sup>8</sup>DEVA, S., “Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, Cambridge, 2013, pp. 78-104.

Human Rights Council,<sup>9</sup> thereby consolidating the dense corporative veil. Given these brief precedents and the uncertain expectations generated by the implementation of these Guiding Principles through their national plans of action,<sup>10</sup> let us examine how the proceedings of these massive human and environmental disasters end up mutating into "judicial legalizations" of the disasters,<sup>11</sup> and possibly into crimes against humanity,<sup>12</sup> which only points to the failure and limitations of sustainable development.<sup>13</sup>

Hence, this paradigmatic matter forces one to provide answers and solutions to judicial, political and economic questions and issues. In short, can international law prevent another tragedy like Bhopal?<sup>14</sup> What is more, is it possible to humanize economic globalization?<sup>15</sup>

## II. CAUSES AND EFFECTS OF THE UNION CARBIDE ENVIRONMENTAL DISASTER IN BHOPAL

The origin of the case goes back almost half a century, when construction of a pesticide plant began in the lakeside town of Bhopal in the Indian State of Madhya Pradesh. The American-owned Union Carbide Corporation (UCC), within the thriving chemical industry, focussed its attention on the Indian subcontinent, not only wishing to find a foothold in the largest agricultural market in the world, but also attracted by the advantages and favours it could obtain from a government that was subservient to transnational corporate interests.

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<sup>9</sup>Human Rights Council Resolution, 6 July 2011, A/HRC/RES/17/4, 17th period of sessions. *Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para "proteger, respetar y remediar"*. A/HRC/17/31 21 March 2011.

<sup>10</sup>MÁRQUEZ CARRASCO, M.C., "La implementación de los principios rectores de las Naciones Unidas sobre empresas y derechos humanos por medio de los planes nacionales de acción", *Revista de responsabilidad social de la empresa*, n<sup>o</sup> 20, 2015, pp. 55-87.

<sup>11</sup>BAXI, U., "The Bhopal victims in the labyrinth of the law: an introduction", Baxi & Dhanda (eds.), *Valiant victims and lethal litigation: the Bhopal case*, Indian Law Institute, Delhi, 1990, p. 29, available at

<http://upendrabaxi.in/documents%5CThe%20bhopal%20victims%20in%20the%20labyrinth%20of%20the%20law.pdf>. "By 'legalization', I here signify ways in which legislative and judicial remedies are fashioned to assure justice according to the law to the victims of 'mass torts', where the numbers of people, as well as the injuries they suffer, remain indeterminate."

<sup>12</sup>MANIRABONA, A. M., "L'affaire Trafigura: vers la répression de graves atteintes environnementales en tant que crimes contre l'humanité", *Revue de droit internationale et de droit comparé*, Vol. 88, n<sup>o</sup>. 4, 2011, pp. 535-576

<sup>13</sup>PIGRAU SOLÉ, A., "España, la Unión Europea, el Derecho Internacional y el desarrollo insostenible", in *España y la Unión Europea en el orden internacional*, Actas de las XXVI Jornadas ordinarias de la AEPDIRI, Sevilla, 2016 (at press).

<sup>14</sup>HOWLAND, T., "Can International Law prevent another Bhopal tragedy?", *Denver Journal of International Law and Policy*, vol. 15, 1987, pp. 301-316

<sup>15</sup>DEVA, S., *Regulating Corporate Human Rights Violations: Humanizing Business*, Routledge, London/New York, 2012.

Indeed, the habitual strategy of creating a subsidiary company, namely, Union Carbide India Limited (UCIL), with mostly U.S. capital and controlled from the offices in Virginia, made it possible to dilute the parent company's responsibility whilst evading Indian legislation for decades. So it is no surprise that the origins of the environmental and human disaster were evident from the moment the company established itself in the Asian country.

Thus, as long ago as 1969, UCIL built the fateful chemical plant for combining methyl isocyanate with the reactive alpha naphthalene to generate the pesticide with the brand name Sevin, at a time when India's 1951 Industrial Development and Regulation Act only permitted a limited number of Indian industries to produce pesticides in the country.<sup>16</sup> This favourable treatment was repeated again in the 1970s. First, in 1972 the State of Madhya Pradesh allowed the company's factory to lease the land for a hundred years. Then, on 1 January 1974 the Central Indian Government passed the Foreign Equity Regulation Act (FERA), limiting foreign investment in Indian companies to 40% of the company's total assets. However, the Indian Government did not hesitate to reply to UCC's vehement protests, and granted them exemption from the national law, allowing the U.S. parent company to retain 50.9% of the shares, thereby maintaining control not only over the Bhopal plant's functional and budgetary operations, but also over the formula for the chemical production of Sevin.

Lastly, the company was also able to evade not only national urban, industrial and environmental legislation,<sup>17</sup> but also Bhopal's local legislation, which prohibited polluting activities within two kilometres of the railway station. Bhopal's 1975 Urban Plan also made it obligatory for industries using hazardous products to move far away from densely populated areas, a measure that a local civil servant tried unsuccessfully to make effective, given the plant's proximity to the town's slums. Moreover, months later the central Government extended UCIL's licence to cover not only the production of the fateful methyl isocyanate, but also its storage, which enabled the chemical plant to be extended under the direct supervision and orders of the parent company.<sup>18</sup>

To top off this policy of delocalization, in which environmental pollution<sup>19</sup> and labour uncertainty are externalized, Union Carbide invested eight million dollars less than it had budgeted for building the factory, cutting costs on various safety mechanisms.<sup>20</sup> This manifest lack of technological and computerized mechanisms, which was denounced, was decisive in the negligent preventive control of the deadly

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<sup>16</sup>D'SILVA, THEMISTOCLES, *The Black Box of Bhopal: A closer look at the world's deadliest industrial disaster*, ed. Trafford Victoria, Canada, 2006.

<sup>17</sup>ABRAHAM, C.M & ROSENCRAZ, A., "An evaluation of pollution control legislation in India", *Columbia Journal of Environmental Law* 11, 1986, pp. 101-118.

<sup>18</sup>AMNESTY INTERNATIONAL: *Clouds of Injustice*, AI Index: ASA 20/015/2004, London, 2004.

<sup>19</sup>LUTZ, R.E., "The export of danger: a view from the developed world", *New York University Journal of International Law and Politics* 20, 1988, pp. 629-677.

<sup>20</sup>HAZARIKA, SANJOY, *Bhopal: The Lessons of a Tragedy*, Penguin Books, New Delhi, 1987.

gas leak, as the manual supervisory system neither included an automatic alert of any incident in the plant, nor allowed for registering determining indicators such as sudden changes in temperature or pressure in the tanks where the dangerous chemical products were stored. In addition to these critical deficiencies, there was no emergency plan, and the local authorities had not been informed of the danger of the pesticide.<sup>21</sup>

All these factors were not only decisive once the disaster had been triggered on the night of 3 December 1984,<sup>22</sup> but also show that this was not an unfortunate accident. The means to prevent the disaster had existed for decades, and the evidence shows that the decision not to take these precautionary measures was deliberate and repeated, and that they *were* taken, on the other hand, in the central plant in West Virginia.<sup>23</sup> Moreover, after two incidents in the Bhopal factory, which resulted in the death of one worker and the poisoning of more than twenty others, in May 1982 a team of U.S. engineers inspected the plant, and in their report issued a warning about the fatal consequences of an accident, and the safety measures that should be applied.<sup>24</sup>

Curiously, that same year the European Community Council issued the Seveso Directive.<sup>25</sup> Thus, while in Europe only half a ton of methyl isocyanate could be stored in a factory, in Bhopal on the night of the disaster the two Union Carbide tanks contained 67 tons of the same chemical. This volume was denounced as excessive and as having been the critical factor in the scale of the disaster, in an affidavit made in the New York courts by UCIL's director general.<sup>26</sup>

Thus, all these factors and irregularities culminated in the disaster on the night of 3 December 1984, when a toxic gas leak from tank E-610 in the methyl isocyanate plant got out of control.<sup>27</sup> The deadly chemical cloud was quickly blown by the wind

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<sup>21</sup>SHRIVASTAVA, PAUL, *Bhopal: Anatomy of a crisis*. Paul Chapman Publishing London, 2nd edition, 1992.

<sup>22</sup>LAPIERRE, DOMINIQUE y MORO, JAVIER, *Era medianoche en Bhopal*, editorial Planeta, Barcelona, 2001.

<sup>23</sup>For a detailed and comparative table of the technical safety measures carried out in the West Virginia factory in the United States and in the Bhopal factory, see AMNESTY INTERNATIONAL, *Injustice incorporated. Corporate abuses and the Human Right to Remedy*. AI Index: POL30/001/2014, London, 2014, p. 36 available at <https://www.amnesty.org/es/documents/pol30/001/2014/en/>.

<sup>24</sup>Indian journalist Rajkumar Keswani warned about the danger of UCIL for the citizens of Bhopal in advance in the local newspaper, HAZARIKA, SANJOY, "Indian journalist offered warning", *New York Times*, 10 December 1984, available at <http://www.nytimes.com/1984/12/11/world/indian-journalist-offered-warning.html>.

<sup>25</sup>Council Directive 82/501/CEE, 24 June 1982, regarding the risks of serious accidents in specific industrial activities. Official Diary n° L 230 on 05/08/1982 pp. 1-18.

<sup>26</sup>INTERNATIONAL CAMPAIGN FOR JUSTICE IN BHOPAL, "1980-1984: The lead up to disaster", ICJB, available at <http://www.bhopal.net/what-happened/setting-the-stage-for-tragedy-1969-1984/1980-1984-the-lead-up-to-disaster/>

<sup>27</sup>Regarding the release factors of the toxic gas leak, cfr. INDIAN COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH: *Report on Scientific Studies on the Release Factors Related to Bhopal Toxic*

to the densely populated neighbourhood next to the railway station. The controversy as to the exact number of deaths that occurred that night still continues today, and although UCC acknowledges 3,800 deaths, victims' associations and impartial investigators estimate over 8,000 deaths and at least 150,000 injured.<sup>28</sup>

In addition to the company's widespread negligence and earlier policy of cutting corners when investing in safety measures in the Bhopal plant, there is also an element of malicious intent. After the catastrophe, the number of deaths rose unnecessarily as a result of Union Carbide's deliberate and continued policy of refusing to provide the Indian health authorities with information on the toxic properties of the chemical agents that had been released. Moreover, the company's doctors declared that the gas only had an irritant effect, while denying any longterm effects on internal organs. Yet, while company managers in Bhopal were playing down the effects of the gas, top UCC management was saying quite the opposite at a hearing before the United States Congress only days after the disaster.<sup>29</sup> And it is precisely this systematic refusal to provide information that led to the Bhopal doctors' inadequate response, as they could neither establish a protocol to follow nor administer effective antidotes to the poisoning.<sup>30</sup>

On the contrary, when a group of Bhopal doctors<sup>31</sup> decided to administer sodium thiosulfate to counter and eliminate the gas's toxic action, UCC's Health Management issued the Bhopal health authorities with instructions not to use this antidote.<sup>32</sup> Local doctors and human rights activists, such as Satinath Sarangi, an engineer and the person responsible for the Sambhavna clinic, maintain that this

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*Gas Leakage*, Nueva Dehi, 1985; KALELKAR, ASHOK S. Y LITTLE, ARTHUR D., *Investigation of Large-Magnitude Incidents: Bhopal as a Case Study*, Cambridge, Massachusetts, presented in The Institution of Chemical Engineers Conference On Preventing Major Chemical Accidents, London, May 1988, available at <http://storage.dow.com.edgesuite.net/dow.com/Bhopal/casestdy.pdf>

<sup>28</sup>LAPIERRE, DOMINIQUE and MORO, JAVIER, *Era medianoche en Bhopal*, editorial Planeta, Barcelona, 2001. All the royalties from this book of investigation and denunciation have been ceded to the Sambhavna Clinic to help the Bhopal victims. NEW SCIENTIST: "Fresh evidence on Bhopal disaster", *Daily news*, 4 December 2004, available at <https://www.newscientist.com/article/dn3140-fresh-evidence-on-bhopal-disaster/>

<sup>29</sup>Declaration on 14 December 1984 by Union Carbide's Director for Health, Safety and Environmental Matters, Jackson B. Browning, cfr. *Hazardous Air Pollutants Hearing before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce House of Representatives*, Ninety-Eighth Congress, Second Session, Serial N<sup>o</sup>. 98-192, US government Printing Office, Washington, p. 17.

<sup>30</sup>DE GRAZIA, A., *A cloud over Bhopal: causes, consequences, and constructive solutions*, Kalos Foundation, Bombay, 1985.

<sup>31</sup>Professor and Doctor Sharma of Hamidia Hospital, who treated the victims, was an eyewitness of the events. He subsequently denounced the prohibition to use the antidote sodium thiosulfate, cfr. SHARMA, N.D.: "How initial cure for Bhopal victims was scuttled", 14 January 2014, available at <https://ndsharma.wordpress.com/tag/j-mukund/>.

<sup>32</sup>BROUGHTON, EDWARD: "The Bhopal disaster and its aftermath: a review", *Environmental Health* 2005, 4:6, available at <http://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-4-6>. DHARA VR and DHARA R: "The Union Carbide disaster in Bhopal: a review of health effects", *Arch Environ Health* 2002, 57(5), pp. 391-404.

prohibition by the company was not a medical error, but a deliberate policy to prevent an effective antidote that would have proved from the very start of the disaster that the toxic gas not only affected the outside of the body, but had a lethal effect on the entire bloodstream and the internal organs. These health instructions from UCC not only increased the number of deaths during the first few days after the gas leak, but have led to a decades-long erratic and extensive supply of medicines that have worsened the survivors' side effects, thereby linking the chemical industry with the pharmaceutical industry.<sup>33</sup>

### III. THE JUDICIAL SAGA OF THE BHOPAL CASE: LEGALIZING THE DISASTER

#### 1. The civil proceedings in the United States courts: the long shadow cast by *forum non conveniens*

Less than a week after the disaster, U.S. lawyers rushed to the crime scene and within hours had extracted the signatures of victims and their families to represent them in the U.S. courts.<sup>34</sup> On one hand, ignorance and desperation led to all claims being immediately delegated to these foreign lawyers who, in exchange, would keep a large percentage of any possible compensation that was obtained.<sup>35</sup> And on the other, Indian jurists ended up advising the victims to transfer their claims to U.S. judges, not only in the hope of obtaining greater compensation for damages, but also because, after examining the possibilities of a successful civil case in India, they decided not to use this method.<sup>36</sup> Indeed, lawyers in both Delhi and Bhopal were aware that since the 18th century when the British had begun to establish common law in India, the codification of procedural, criminal and business law had been adapted to the colonizers' standards and rules, but that tort law, which should deal with civil offences committed by physical or juridical persons, had, surprisingly, not been codified. So, after assessing the limited legislative development, the jurisprudence and the lawyers' almost complete inexperience in this kind of law, it was decided that any civil action in India was doomed to failure, as its legal system was considered "underdeveloped, weak or dying".<sup>37</sup>

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<sup>33</sup>Interview on 7 March 2015 granted to the author in Bhopal by Satinath Sarangi, known as Sathyu, activist and founder of the Sambhavna ayurvedic clinic to help the victims. See The Bhopal Medical Appeal en <http://bhopal.org/about-us/sambhavna-clinic/>.

<sup>34</sup>GALANTER, M., "When Legal Worlds Collide: Reflections on Bhopal, The Good Lawyer, and the American Law School," *Journal of Legal Education* 36, 1986, pp. 292-310.

<sup>35</sup>Of course, there were exceptions, and the first lawyers to file lawsuits in U.S. Courts, such as Hoffinger, worked pro bono, as the first verdict by the New York judge declares; see the first note of the ruling of the U.S. District Court for the Southern District of New York in *Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986).

<sup>36</sup>GALANTER, M., "Legal torpor: Why so little has happened in India after the Bhopal tragedy", *Texas International Law Journal* 20, 1985, pp. 273-294.

<sup>37</sup>GALANTER, M., "Law's elusive promise: learning from Bhopal...", *op. cit.* p. 175.

However, the case in the New York district court would not be free of all manner of obstacles. The judicial path for cases demanding accountability from this type of corporation is fraught with a complex tangle of obstacles that, with their intricate legal manoeuvring, the lawyers of these companies do not hesitate to introduce tenaciously into the proceedings. In addition to the expensive compilation of medical and technical evidence regarding the causes of the disaster, there was the exorbitant expense of a very lengthy trial. And it must not be forgotten that, in view of the characteristics of a disaster of this magnitude, and one involving multiple subjects (individuals, municipal, regional and state Indian authorities, the parent company, subsidiaries...) for all practical purposes, to a U.S. judge, given the extremely individual nature of tort law, it was almost "*impossible to isolate responsibility by focusing on the individual actions or omissions of simply few actors, and 'blame' can easily be shifted from shoulder to shoulder ad infinitum*".<sup>38</sup>

Whatever the case, on 7 December 1984 the first lawsuit was filed in the United States on behalf of thousands of victims. The case of *Dawani et al. v. Union Carbide Corp.* in the Southern District Court of West Virginia was soon joined by 144 lawsuits filed in federal courts. Faced with this mass of lawsuits, the Judicial Panel on Multidistrict Litigation ruled on 6 February 1985 to combine all the lawsuits, and subsequently transferred them to the Southern District Court of New York. It must be added that in the end this judicial path omitted other extraordinary and uncertain methods of compensation, such as setting up a special court through a bilateral agreement between India and the United States.<sup>39</sup>

From the start, UCC's legal strategy was to oppose any acknowledgment of these lawsuits, by resorting to the argument of "*forum non conveniens*". This matter has been discussed in detail in the Spanish doctrine, in the pioneering analysis by professor Zamora Cabot,<sup>40</sup> who, after a historical review and critical assessment of this U.S. concept, pauses at the analysis of the Bhopal case, and runs through in detail the private and public interests of both India and the United States in the case.

So "*forum non conveniens*" was applied in the end because the Indian courts were considered adequate for trying the case, thereby avoiding all the evidence maintained by professor Galanter, and already noted. Also, said verdict was supported by arguing, on one hand, that private interests also pointed clearly to India, as the victims, witnesses and evidence were all to be found in that Asian

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<sup>38</sup>CASSELS, JAMIE, "The Uncertain Promise of Law: Lessons from Bhopal", *Osgoode Hall Law Journal* 29,1, 1991, pp. 1-50, p. 9, available at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1752&context=ohlj>.

<sup>39</sup>MAGRAW, D., "The Bhopal disaster: structuring a solution", *Colorado Law Review* 57, 1986, pp. 835-848.

<sup>40</sup>ZAMORA CABOT, F.J., "Accidentes en masa y 'forum non conveniens': el caso Bhopal", in JIMÉNEZ PIERNAS, C., (ed.), *La responsabilidad internacional. Aspectos de Derecho Internacional Público y Derecho Internacional Privado*, XIII Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales 1989, Alicante, 1990, pp. 533-564.

country,<sup>41</sup> and, on the other, that, due to that national connection, the Indian government's public interest<sup>42</sup> prevailed over the overloaded U.S. judicial system.<sup>43</sup>

Thus, in his verdict on 12 May 1986, Judge Keenan gave in to the multinational's request to apply the Gilbert-Piper test. Moreover, he tried to justify the verdict, so unfavourable to the plaintiffs' interests, by claiming that trying the case in the United States would be an act of "imperialism" regarding India. When it was precisely neocolonialism that availed itself of the impunity of transnational corporations and the humiliation of the Indian victims who showed their lack of protection in their own courts in an exercise that Nkrumah considered "*power without responsibility and exploitation without redress*".<sup>44</sup> As a result, the ruling declared:

*"to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role ... To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged".*<sup>45</sup>

Naturally, this decision was not exempt from criticism. Cassels, for one, said, "Judge Keenan made a tragic error (...) due to his optimistic faith" in both tort law and the capacity of India's judiciary.<sup>46</sup> And it must not be ignored that regardless of this "over-idealized vision of the Indian forum", there was a reasoned "interest on the

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<sup>41</sup>*In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), U.S. District Court for the Southern District of New York - 634 F. Supp. 842 (S.D.N.Y. 1986) June 10, 1986, available at <http://law.justia.com/cases/federal/district-courts/FSupp/634/842/1885973/>:

*"The presence in India of the overwhelming majority of the witnesses and evidence, both documentary and real, would by itself suggest that India is the most convenient forum for this consolidated case. The additional presence in India of all but the less than handful of claimants underscores the convenience of holding the trial in India. All the private interest factors described in Piper and Gilbert weigh heavily toward dismissal of this case on the grounds of forum non conveniens."*

<sup>42</sup>*In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986): *"The Bhopal plant was regulated by Indian agencies. The Union of India has a very strong interest in the aftermath of the accident which affected its citizens on its own soil. Perhaps Indian regulations were ignored or contravened. India may wish to determine whether the regulations imposed on the chemical industry within its boundaries were sufficiently stringent. The Indian interests far outweigh the interests of citizens of the United States in the litigation."*

<sup>43</sup>VINAIXA MIQUEL, M., *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, De conflicto legum, Estudios de Derecho Internacional Privado, Universidade de Santiago de Compostela, 2006, p. 381

<sup>44</sup>Nkrumah, K., *Neo-Colonialism: The Last Stage of Imperialism*, Thomas Nelson & Sons, Ltd, London, 1965.

<sup>45</sup>*In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986),

<sup>46</sup>CASSELS, J., *The Uncertain Promise of Law: Lessons from Bhopal*, University of Toronto Press, Toronto, 1993, p. 148.

part of the United States to subject multinationals to an appropriate standard of behaviour".<sup>47</sup> An assumption of good faith that was not echoed in the U.S. courts.

Meanwhile, it should not be forgotten that in March 1985 the Indian government passed the Bhopal Gas Leak Disaster Act with retroactive effect.<sup>48</sup> With this initiative, the central Indian government gave itself the exclusive right to represent the victims not only in Indian courts, but in any forum. This explains why India filed its own lawsuit in the U.S. court on 8 April 1985, in a manoeuvre that was utterly reactionary and detrimental to the aspirations of the victims in the legal case in New York. Above all else, it facilitated Judge Keenan's final decision when weighing up India's public interest to the detriment of that of the United States.

In addition to these harmful effects, this law passed by the Indian government resulted in a clash of interests between the State and private individuals, with the latter being deprived of their fundamental rights. Despite its violating several basic rights, this controversial law was declared to conform to the Indian Constitution in a ruling by Delhi's Supreme Court on 22 December 1989. The main argument given for its validity rested on the fact that while the Indian government litigated against UCC, it guaranteed compensation for the victims and assumed their representation under the umbrella of sovereignty.<sup>49</sup>

Despite closing the case, the New York court imposed three conditions for making the transfer to an Indian court effective: first, UCC had to agree to accept the jurisdiction of the Indian courts; second, the company had to comply effectively with any ruling by the Indian judiciary; third, UCC had to be subject to the U.S. model of evidential conditions.<sup>50</sup> However, not even these small achievements could

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<sup>47</sup>ZAMORA CABOT, *op. cit.* p. 562.

<sup>48</sup> *Bhopal Gas Leak Act Disaster (Processing of Claims) Act 21/1985*, available at <http://chemicals.nic.in/sites/default/files/Bhopal Gas file1.pdf>

<sup>49</sup>SUPREME COURT OF INDIA, Charan Lal Sahu Etc. Etc vs Union Of India And Ors on 22 December, 1989 Equivalent citations: 1990 AIR 1480, 1989 SCR Supl. (2) 597 available at <https://indiankanoon.org/doc/299215/>: "1.1 The Act is constitutionally valid. It proceeds on the hypothesis that until the claims of the victims are realised or obtained from the delinquents, namely, UCC and UCIL, by settlement or by adjudication and until the proceedings in respect thereof continue, the Central Government must pay interim compensation or maintenance for the victims."

"4.1. Section 3 provides for the substitution of the Central Government with the right to represent and act in place of (whether within or outside India) every person who has made or is entitled to make, a claim in respect of the disaster. The State has taken over the rights and claims of the victims in the exercise of sovereignty in order to discharge the constitutional obligations as the parent and guardian of the victims who in the situation as placed needed the umbrella of protection (...) 10. Though not expressly stated, the Act proceeds on 'the major inarticulate premise'. It is on this promise or premise that the State would be justified in taking upon itself the right and obligation to proceed and prosecute the claim and deny access to the courts of law to the victims on their own. If it is only so read, it can only be held to be constitutionally valid."

<sup>50</sup>*In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986): "Therefore, the consolidated case is dismissed on the grounds of *forum non conveniens* under the following conditions:

1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defenses based upon the statute of limitations;

be fulfilled, as when Keenan's verdict was appealed in the Second Circuit Court of Appeal, Judge Mansfield released the company from having to comply with the last two conditions.<sup>51</sup> With the verdict of 14 January 1987, UCC tried to temporarily evade the Bhopal court's ruling, as the court had already seized the assets of the legal person in India, as a preventive measure.

The most surprising thing about this first journey through the judiciary is the contradictory and fraudulent arguments wielded by the company's legal defence. Whilst in the New York court they praised the Indian judiciary to the skies, in order to strengthen the application of the "*forum non conveniens*" criterion and thus evade the dreaded U.S. jurisdiction, in the appeal they completely changed their arguments. Thus, once impunity was guaranteed in the United States, they sought the same objective in India, and accused the Bhopal courts specifically of violating the rules of procedure by the sudden order to seize their assets, and accused India's Judiciary Administration in general of "not observing the standards of due procedure". Thus, in an unheard of legal juggling act, they demanded that the Court of Appeals ratify the suitability of the Indian forum, while simultaneously retaining the New York court's authority to oversee the judicial activity in India and, if need be, rectify any procedural violations.<sup>52</sup> This presumption, which even the U.S. court called "frivolous" and showing "abysmal ignorance of the principles of jurisdiction", was fulfilled up to a point when Judge Keenan's condition that any judicial order issued in Bhopal be fulfilled effectively, was suppressed.

The discriminatory treatment of Indian citizens also warrants special attention, namely, the demeaning names the company's lawyers disdainfully used when referring to the victims. Indeed, in one exercise, this time effectively about judicial and ethical colonialism, they supported the arguments in favour of the suitability of the Indian courts, alleging that the values of the people living in the Bhopal slums in the "abject poverty" typical of the third world, differed from North American

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2. Union Carbide shall agree to satisfy any judgment rendered against it by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance comport with the minimal requirements of due process;

3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs."

<sup>51</sup>United States Court of Appeals, Second Circuit, *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 89 A.L.R. Fed. 217, 55 USLW 2401, 17 Env'tl. L. Rep. 20,580, available at [http://storage.dow.com.edgesuite.net/dow.com/Bhopal/Westlaw\\_Document\\_13\\_56\\_14.pdf](http://storage.dow.com.edgesuite.net/dow.com/Bhopal/Westlaw_Document_13_56_14.pdf): "Since the court's condition with respect to enforceability of any final Indian judgment is predicated on an erroneous legal assumption and its "due process" language is ambiguous, and since the district court's purpose is fully served by New York's statute providing for recognition of foreign-country money judgments, it was an error to impose this condition upon the parties."

<sup>52</sup>United States Court of Appeals, Second Circuit, *In Re Union Carbide Corp.*, p. 11: "we should protect it against such denial of due process by authorizing Judge Keenan to retain the authority, after *forum non conveniens* dismissal of the cases here, to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of UCC's right to due process as they might occur in India".

cultural values<sup>53</sup> and expectations<sup>54</sup>. In other words, the Bhopal victims only deserved a weak judicial system that could only guarantee tiny compensation at best.

This harmful “equivalence test” applied by U.S. courts in civil matters seems to have also found its echo in criminal cases in continental law, and has endorsed impunity on the other side of the Atlantic. It appears that, in an exercise of inappropriate and hardly edifying “crosspollination”, in cases of serious human rights violations, impunity has availed itself of extraterritorial elements by resorting to very similar arguments. This assessment should be viewed with the required precautions and always bearing in mind the evident difference between civil and criminal order, and between private and public law. Despite the European Court of Justice having declared in the ruling on *Andrew Owusu v. N.B. Jackson*<sup>55</sup> that the application of *forum non conveniens* by the British courts was incompatible with Brussels Convention I,<sup>56</sup> the harmful effects of that impunity on the victims have been reproduced on European soil by resorting to similar legal nit-picking.<sup>57</sup>

At this point it is enough to remember the judicial controversy that arose in Spain over the lawsuit filed against the genocide committed against the Mayan people in Guatemala, which included Spanish victims in the assault on the Embassy. This case, in which the Supreme Court judges clashed with those from the Constitutional Court, involved a fundamental clarification as to whether Spanish jurisdiction was

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<sup>53</sup>See also the final conclusions of the analysis by CUMMINGS, STEPHEN L., “International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster”, 16 Ga. J. Int’l & Comp. L. Vol. 109, 1986, pp. 109-166.

<sup>54</sup>KLLEY DRYE & WARREN, Memorandum of law in support of Union Carbide Corporation’s motion to dismiss these actions on the grounds of forum non conveniens, US District Court S.D.N.Y., 31 July 1985, available at <http://14.139.60.114:8080/jspui/bitstream/123456789/706/5/Memorandum%20of%20Law%20in%20Support%20of%20Union%20Carbide.pdf>: “The relevant public interest factors-administrative difficulties of courts with congested calendars, the burdens of jury duty, the propriety of deciding foreign controversies where they arose, the reluctance of American courts to apply foreign law and the realistic uncertainty that they can apply it correctly and fairly-also mandate an Indian forum. Indeed, the practical impossibility for American courts and juries, imbued with U.S. cultural values, living standards and expectations, to determine damages for people living in the slums or “hutments” surrounding the UCIL plant in Bhopal, India, by itself confirms that the Indian forum is overwhelmingly the most appropriate. Such abject poverty and the vastly different values, standards and expectations which accompany it are commonplace in India and the third world. They are incomprehensible to Americans living in the United States.”

<sup>55</sup>Ruling by the Court of Justice (Gran Sala) on 1st March 2005. Andrew Owusu against N. B. Jackson, who acts under the business name “Villa Holidays Bal-Inn Villas” and others. Claim of prejudicial ruling: Court of Appeal (England and Wales), Civil Division - United Kingdom at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=55027&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=197106>.

<sup>56</sup>HARTLEY, TREVOR C., “The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws”, *International and Comparative Law Quarterly*, vol. 54, 2005, pp 813-828.

<sup>57</sup>ÁLVAREZ TORNÉ, M., “El Derecho internacional privado ante las vulneraciones de derechos humanos cometidas por empresas y respuestas de la UE”, *Revista Española de Derecho Internacional*, vol. LXV, 2, 2013, pp. 157-190.

competent or whether, on the contrary, the Guatemalan courts had stronger rights to try the case. The analysis of this forum suitability led to opposing positions. While the Supreme Court demanded that cases include a national connection and criteria of reasonableness,<sup>58</sup> i.e. reasonable public and private interests, to ratify the competence of Spanish jurisdiction, as everyone knows, in a ruling on 26 September 2016 the Constitutional Court's Second Court corrected the criterion and ordered the reopening of the case.<sup>59</sup>

Soon afterwards, Spain's Audiencia Nacional began to demand the so-called "reasonability test" in order to oppose accepting cases involving international crimes on the basis of the principle of universal jurisdiction. The origin of this criterion dates back to the non-jurisdictional ruling on 3 November 2005 of the Audiencia Nacional's Criminal Court, which met to unify criteria regarding universal jurisdiction after the Constitutional Court's ruling on the Guatemala case. This non-jurisdictional ruling states: "*after verifying that the requirements demanded by internal judicial rules are met, and discarding the jurisdictions of the place where the crimes were committed and the international community, jurisdiction should, as a rule, be accepted unless there are signs of excessive abuse of law in the absolute foreignness of the matter concerning crimes and places that are totally alien and/or foreign, and the plaintiff or claimant cannot prove any direct interest or relation to them*".<sup>60</sup> However, this decision could not prevent legal cases being accepted in court, which were sensitive for Spanish diplomacy, which is why Article 23.4 of the LOPJ (Fundamental Law of Judicial Procedure) was amended on two occasions. At this point, if one examines carefully the arguments that justified these restrictions to the universal persecution of serious human rights violations, one can see in the 2009 and 2014 Minutes of the Sessions of the Spanish House of Commons and Senate<sup>61</sup> the exact same motives that promoted the development of the doctrine of "*forum non conveniens*".

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<sup>58</sup>Supreme Court ruling on the Guatemala case for genocide, Sala de lo Penal, ruling nº 327/2003, appeal nº 803/2001, at <http://sentencias.juridicas.com/docs/00184214.html>, 10th recital: Justifies "the existence of a connecting link with the national interest as a legitimizing element, within the framework of the principle of universal justice, adjusting its extension depending on criteria of reasonableness and with respect to the principle of non intervention."

<sup>59</sup>Second Court of the Constitutional Court on 26 September 2005, ruling nº 237/2005 available at [http://www.tribunalconstitucionales/jurisprudencia/Stc\\_ing/STC2007-237-2005.html](http://www.tribunalconstitucionales/jurisprudencia/Stc_ing/STC2007-237-2005.html). PIGRAU SOLÉ, A., "A propósito de la Sentencia 237/2005 del Tribunal Constitucional, de 26 de septiembre de 2005, en el caso Guatemala y de su interpretación por la Audiencia Nacional", *Revista Española de Derecho Internacional*, vol. LVII, 2005, pp. 893-910; SANTOS VARA, J., "La jurisdicción de los tribunales españoles para enjuiciar los crímenes cometidos en Guatemala", *REEI* nº 11, 2006, pp. 1-21.

<sup>60</sup>Non jurisdictional ruling by the Audiencia Nacional's Criminal Court on 3 November 2005.

<sup>61</sup>Diario de Sesiones del Congreso de los Diputados, IX Legislatura 2009, nº 95, Sesión Plenaria nº 90, 25 de junio de 2009. Cortes Generales, Diario de Sesiones del Senado, IX Legislatura, nº 54, Sesión del Pleno, 7 de octubre de 2009. Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, X Legislatura, número 180, 20 de febrero de 2014. Cortes Generales, Diario de Sesiones del Senado. Comisión de Justicia, X Legislatura, número 286, 10 de marzo de 2014.

Indeed, the parallel is disturbing. The defence of “*forum non conveniens*” by both the doctrine and the U. S. High Court dates back to the early 20th century and the argument about the “remedy (...) for the courts being overloaded with work (...) faced with cases with few local links”, which is what led to establishing “the criterion of reasonableness in the administration of justice”.<sup>62</sup> After that, the judges began to apply to these cases an “assessment test” in which they had to “assess the existence of an alternative forum” after examining the factors of private and public interest.<sup>63</sup> And in this regard, in the Bhopal case the verdict by Judge Keenan already warned that: “*When another, adequate and more convenient forum so clearly exists, there is no reason to press the United States judiciary to the limits of its capacity.*”<sup>64</sup>

Similarly, in Spain in May 2009 the president of the General Council of Judicial Power asked for the principle of universal jurisdiction to be limited, “arguing that the Spanish Judiciary was overloaded with work”.<sup>65</sup> Later, when the reform was being debated in the Spanish Parliament, the Spanish courts' inability to know about this type of matter was stressed.<sup>66</sup> This argument had already been foreseen in the dissenting vote of the Supreme Court in the Guatemala case, which said it was important to avoid “*excessive use of national judicial bodies whose competence was sought. But that will only happen if the excessive use or abuse of the judiciary is applied as a criterion for exclusion (...) This restriction is not contemplated specifically in the law, but can be assumed as a result of the principles of international criminal law, and applied as a criterion of reasonableness when interpreting rules regarding competence.*”<sup>67</sup>

But beyond these motivations, what cannot be ignored in the apparent clash of interests is that when it comes to serious human rights violations, such as genocide or crimes against humanity, regardless of whether they are committed by individuals acting alone or within the framework of corporate decisions, what really matters above all else is the universal legally protected subject, i.e., the victims and humanity as a whole. Which is why it is important to state naïvely that the forum that should try this type of act should not be conditioned by a test that assesses the private and public interests of the States implicated, but instead, the attribution of that competence is universal, given the gravity of the crimes committed. Thus, the

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<sup>62</sup>ZAMORA CABOT, *op. cit.* pp. 536-537.

<sup>63</sup>ZAMORA CABOT, *op. cit.* p. 538.

<sup>64</sup>*In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), third paragraph of the conclusion.

<sup>65</sup>¿Audiencia universal? El reto de perseguir crímenes en el mundo no puede ser la tarea prioritaria del tribunal, *Editorial El País*, 7 May 2009, available at [http://elpais.com/diario/2009/05/07/opinion/1241647201\\_850215.html](http://elpais.com/diario/2009/05/07/opinion/1241647201_850215.html)

<sup>66</sup>See intervention by Senator Díaz Tejera, among others, Cortes Generales, Diario de Sesiones del Senado, IX Legislatura, nº 54, Sesión del Pleno, 7 de octubre de 2009, p. 2575

<sup>67</sup>Personal vote on ruling nº 327/2003, appeal nº 803/2001, 11th grounds of law.

principle of *pro actione*<sup>68</sup> should prevail to the detriment of false criteria of reasonableness, subsidiarity or "*forum non conveniens*". All this does is rescue the humanist approach to law that was preached centuries ago by Hugo Grocio in his book *De Jure Belli ac Pacis*,<sup>69</sup> or Vattel in his *Ley de las Naciones o los Principios de Derecho Natural*.<sup>70</sup>

## **2. The demand for criminal and civil accountability in Indian courts: the interminable and inefficient judicial labyrinth**

After the case in New York was closed, the Indian government felt obliged to demand compensation in the *forum delicti commissi*, and so on 5 September 1986 it filed a lawsuit against UCC in the Bhopal court. In its defence the company continued to demand that the parameters of U.S. court proceedings be exported to India, after having succeeded in not having U.S. justice exported to the Indian victims.<sup>71</sup> This was all done to prevent from the start the execution of the verdicts by the Bhopal Judge Mahadeo Wamanrao Deo, who had demanded in a ruling on 17 December 1987 that UCC pay 270 million dollars in "*interim relief*".<sup>72</sup> The company expressed its disagreement with the provisional decision to alleviate the victims' suffering, and appealed the verdict while simultaneously denying having any connection with the Indian subsidiary. The Madhya Pradesh High Court accepted the appeal, and in its revisory ruling on 4 April 1988 ratified the measure, while reducing the figure considerably,<sup>73</sup> although this sum was never paid.<sup>74</sup>

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<sup>68</sup>Said ruling by the Constitutional Court's Second Court, on 26 September 2005, concluded its Fourth Grounds of Law by stating: "in short, such a rigorous restriction of universal jurisdiction contradicts the hermeneutic rule of *pro actione*, and can be condemned constitutionally for violating Article 24.1 of the Spanish Constitution.

<sup>69</sup>Hugo Grocio, as long ago as 1624, declared in his book *De Belli ac Pacis* that sovereigns should not pursue crimes that only agent them or their subjects, but should not ignore in particular serious violations of natural laws and the laws of nations. SCHIFFFRIN, L.: "Hugo Grocio y la jurisdicción penal universal", *Aportes Jurídicos para el análisis y juzgamiento de genocidio en Argentina*, REZSES (ed.), Secretaría de Derechos Humanos, Gobierno de la Provincia de Buenos Aires, 2007, pp. 167 y ss. Likewise, for precedents of universal justice, see RANDALL, K.C.: "Universal Jurisdiction Under International Law", *Texas Law Review*, vol. 66, 1988, pp.791-815. Hugo GROTIUS, *De Jure Belli ac Pacis*: "It is proper also to observe that kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their subjects, but for gross violations of the law of nature and of nations, done to other states and subjects".

<sup>70</sup>Vattel in his *Ley de las Naciones o los Principios de Derecho Natural* in 1758 declared that: "even when the jurisdiction of each State is in general limited to punishing the crimes committed in that State's territory, an exception should be made with regard to the criminals who, due to the nature and seriousness of their crimes, pose a danger to public security wherever they are and proclaim themselves enemies of the human race in its entirety", cited in SÁNCHEZ LEGIDO, *Jurisdicción universal penal y derecho internacional*, Valencia, Tirant lo Blanch, 2004, p. 42.

<sup>71</sup>CASSELS, "The Uncertain Promise of Law: Lessons from Bhopal", *op. cit.* p. 21.

<sup>72</sup>District Court of Bhopal, Union of India v. Union Carbide Corporation, Gas claim case, nº 1113 of 1986.

<sup>73</sup>High Court of Madhya Pradesh, *Union Carbide Corporation v. Union of India*, Jabalpur, Civil Revision No. 26 of 1988, 4 April 1988. The *interim relief* was reduced from 350 crore Rupees to 250 crore Rupees, and the judicial motivation for its demand was modified, putting aside procedural rules and

Both the Indian government and UCC appealed against the order of the Madhya Pradesh in the Supreme Court. The Indian government appealed against bringing down the amount of “interim relief” and UCC appealed against the award of “interim relief” and in the proceedings UCC and the Indian authorities again put forward their aspirations. In the end, the Supreme Court explained the controversy in a contentious ruling on 14 February 1989.<sup>75</sup> This judicial settlement condemned UCC and its subsidiary UCIL to pay the victims compensation of 717 crore rupees (470 million dollars). Yet the terms of the verdict imposed by Judge Raghunandan Swarup Pathak were a second and outrageous catastrophe for the Bhopal victims.<sup>76</sup> The company's lawyers, on the other hand, celebrated the verdict, and finally, for these services, the Indian jurist was elected that same year judge in the International Court of Justice.

First, the verdict violated the victims' basic right to seek justice, as this compensation was imposed without even allowing those affected to take part in the proceedings, thereby ratifying the exclusion imposed by the 1985 Bhopal Act. Moreover, this judicial settlement by the Supreme Court exceeds what is constitutionally acceptable under the rule of law, as once that compensation is paid, any judicial claim, whether past or present, and whether in Indian or in foreign courts, is considered ended. But in addition, that immunity was granted to UCC and UCIL and also to any person responsible for the catastrophe and with links to the two companies, be they workers or managers. But these despicable safeguarding clauses went even further, as the impunity was also reinforced in the Supreme Court's ruling, to the effect that it prevented the victims and any other possible claimant from ever filing another claim in the future. And as if that were not enough, in the event of that ever happening, direct responsibility was attributed to the Indian government itself, which was granted the power to order the courts to not accept any new lawsuits.

Thus, not only are the victims deprived of their right to seek justice, but the rule of law breaks down in India with this direct granting of judicial power to the Delhi executive, aimed at putting a brake on any future attempt to file a lawsuit against the companies responsible. Finally, all the ongoing criminal cases were also considered concluded, as item 3 of the settlement stated that: *“to enable the effectuation of the settlement, all civil proceedings to and arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded in terms of the*

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basing it on substantive rules.

<sup>74</sup>BAXI, U., “The bhopal victims in the labyrinth of the law”, *op. cit.*, p. xxvii.

<sup>75</sup>Supreme Court of India, *Union Carbide Corporation, Appelant v. Union of India and others, Respondents*, 14 February 1989, AIR 1990 Supreme Court 273. From AIR 1988 NOC50: 1988 MPLJ 540, Bench: Pathak, R.S. (Cj), Venkataramiah, E.S. (J), Misra Rangnath, Venkatachalliah, M.N. (J), Ojha, N.D. (J) [http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1989\\_Settlement.pdf](http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1989_Settlement.pdf).

<sup>76</sup>BAXI, U., “Writing about impunity and environment: the ‘silver jubilee’ of the Bhopal catastrophe”, *Journal of Human Rights and Environment*, vol. 1, n<sup>o</sup> 1, 2010, pp. 23-44, p. 39, available at <http://www.elgaronline.com/view/journals/jhre/1-1/jhre.2010.01.02.xml>.

*settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.”*<sup>77</sup>

And in addition to this decision, which commits a direct second victimization, is the controversy surrounding the amount of compensation to be paid, which was reached arbitrarily by Delhi's Supreme Court judges: 470 million dollars. Curiously enough, this figure is the same as that initially offered by the company to the victims, and is a far cry from the 3.3 billion dollars originally claimed by the Indian government. Moreover, the compensation would be covered almost in its entirety by the insurance companies, according to an analysis by Muchlinsky, economist and professor at the London School of Economics.<sup>78</sup> In short, the judicial settlement "was clearly a victory for Union Carbide", whose shares rocketed in the New York stock exchange.<sup>79</sup>

Despite everything, the judicial nightmare continued, and the victims' lawyers appealed the verdict. In a final ruling on 3 October 1991 the Supreme Court once again ruled that the compensation was lawful, adequate and reasonable, although the verdict was partially revoked regarding closure of the criminal lawsuits.<sup>80</sup> The Judge-Rapporteur Venkatachalliah took advantage of this resolution to defend himself against criticism and to justify that he had not acted out of "judicial arrogance", but had proceeded "to defend the victims pragmatically."<sup>81</sup>

However, the compensation should not only have been to compensate the victims for the deaths of family members, but should also have included other concepts, such as legal costs and lawyers' fees in the United States and India, and more importantly, medical treatment for the survivors. The compensation that was imposed clearly did not cover their needs at all, let alone the aspirations of the 602,435 people affected.<sup>82</sup> Which is why the Supreme Court made a provision that in the event of the established funds being insufficient, "*the deficiency is to be made good by the Union of India*",<sup>83</sup> in line with considerando 198 of the revisory ruling:

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<sup>77</sup>Supreme Court of India, *Union Carbide Corporation v. Union of India*, 14 February 1989, Order D. 14 February 1989.

<sup>78</sup>MUCHLINSKI, P. T., "The Bhopal case: controlling ultrahazardous industrial activities undertaken by foreign investor", *The Modern Law Review*, Vol. 50, Issue 5, 1987, pp. 545-587, particularly pp. 583 and ss, summary "insurance against ultrahazardous industrial activity", available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1987.tb01726.x/epdf>.

<sup>79</sup>CASSELS, "The Uncertain Promise of Law: Lessons from Bhopal", *op. cit.* p. 37.

<sup>80</sup>Supreme Court of India, *Union Carbide Corporation v. Union of India*, 3rd October 1991, 1992 AIR 248, 1991 SCR Supl. (1) 251, Bench: Venkatachalliah, M.N. (J), available at [http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1991\\_Review\\_order.pdf#page=1&zoom=auto,-20,852](http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1991_Review_order.pdf#page=1&zoom=auto,-20,852).

<sup>81</sup>Supreme Court of India, *Union Carbide Corporation v. Union of India*, 3rd October 1991, point 285 F-H.

<sup>82</sup>CASSELS, "The Uncertain Promise of Law: Lessons from Bhopal", *op. cit.* p. 44.

<sup>83</sup>Supreme Court of India, *Union Carbide Corporation v. Union of India*, 3rd October 1991, considerando 214, section viii, p. 688, available at

*“After careful thought, it appears to us that while it may not be wise or proper to deprive the victims of the benefit of the settlement, it is, however, necessary to ensure that in the - perhaps unlikely- event of the settlement fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after the fund is exhausted are not left to fend for themselves. But, such a contingency may not arise having regard to the size of the settlement fund. If it should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any. We hold and declare accordingly.”<sup>84</sup>*

In fact, this foreseeable circumstance is what has occurred in practice, and neither the sentence imposed on the company, nor the contributions paid by the government have been completely sufficient. This is because, amongst other reasons, ever since the night of the tragedy, the number of deaths, sick persons, babies born with cancer or deformities and completely handicapped has continued to rise every year. In this regard, considerando 214.d of the 1991 revisory ruling obliged the Indian government to set up an insurance system to pay compensation to all those who at that moment did not present any symptoms or visible effects. Even so, the amount of the insurance and the temporal limitation of its coverage to only eight years only covered the tiniest number of people affected. This being so, the exact number of deaths in those first days of the lethal gas leak is still unknown. Activists and human rights organizations that have been assisting the Bhopal victims since the beginning maintain that the number of deaths is much higher than the Supreme Court's final estimate of 3,828. The Indian authorities are still being denounced for having used trucks in the first days of the tragedy to dump an unknown number of bodies into unmarked graves in the jungle surrounding Bhopal and in the river Narmada, in an act that it has been impossible to investigate legally, but which was done to cover up the magnitude of the disaster, lessen social alarm and join ranks with the company's official version of the catastrophe.<sup>85</sup>

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[http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1991\\_Review\\_order2.pdf#page=1&zoom=auto,-20,842](http://storage.dow.com.edgesuite.net/dow.com/Bhopal/1991_Review_order2.pdf#page=1&zoom=auto,-20,842).

<sup>84</sup>Supreme Court of India, *Union Carbide Corporation v. Union of India*, 3rd October 1991, considerando 214, considerando 198, p. 682

<sup>85</sup>Interview in Bhopal on 7 March 2015 with Satinath Sarangi, an eyewitness of the events and the person responsible for the Sambhavna clinic to help the victims. For the controversy about the number of deaths, see AMNESTY INTERNATIONAL, *Clouds of Injustice*, AI Index: ASA 20/015/2004, 29 November 2004. AI's report estimates between 7,000 and 10,000 deaths in the three first days of the tragedy. This calculation is supported by the testimonies of the government's truck drivers who moved bodies to the hospital's morgues and to common graves, and by the evidence from suppliers of shrouds and firewood, who contributed to more than 7,000 cremations (this number only applies to cremated Hindus, as most of the population in Bhopal are muslim). The report also mentions the fact that army trucks threw dead bodies in the Narmada river. In short, “*the 2003 annual report of the Madhya Pradesh Gas Relief and Rehabilitation Department stated that a total of 15,248 people had died as a result of the gas leak by October 2003*”. Amnesty International estimated that the total number of deaths as a direct result of the gas leak comes to over 20,000 people, p. 12.

In addition to the glaring insufficiency of economic resources to alleviate the victims' suffering, is the cost of the compensation mechanism set up to enable victims to receive the compensation. In the years following the Supreme Court's rulings, claims were channeled through a Commission, thereby denying the victims the right to present in court proof of the injuries sustained, and thus not allowing for the sum of the compensation to be adjusted accordingly. The result has been that in order to finally obtain the insulting compensation of an average of 1,605 dollars for every death, and a minimum of little more than a hundred dollars for the side effects of the disaster, the claimants have had to endure onerous proceedings. This bureaucratization of their suffering meant that most of the victims had to turn to intermediaries (lawyers, agents, doctors, etc.) in order to submit the complex list of forms, proof, and medical evidence of disability, and had to bear the costs themselves, despite already being an impoverished population. Thus, these special suits presented to these commissioners, called *Lok Adalats*, gave rise to a corrupt, inefficient and totally arbitrary system that ended up "*treating the victims like culprits*".<sup>86</sup>

Meanwhile, the criminal lawsuits for the disaster continued to take steps both forward and back. The lawsuit against the chairman of UCC, Warren M. Anderson, and other CEOs began the day after the catastrophe, when they were accused of homicide by the Bhopal authorities, and arrested. However, this U.S. citizen was released on bail that same day, as a result of pressure by the U.S. Embassy in Delhi, and after signing a commitment to return to the country if a court so requested it. After several years' investigation, the authorities, i.e., India's Central Bureau of Investigation, finally filed a lawsuit against Anderson, the parent company, the subsidiary and nine other accused, which led to Bhopal's Chief Judicial Magistrate's Court issuing an international arrest warrant against the American defendant. Although the case was closed in 1989 as a result of the abovementioned ruling by India's Supreme Court, in its revisory ruling in October 1991 this same judicial ruling concluded that criminal proceedings were still open; a decision that resulted in the international arrest warrant against Anderson being re-issued in March 1992. What is striking is that the Indian government, in a strategy to place administrative obstacles and unduly delays, did not process the request to extradite the accused until 2003. The attorney general's position is surprising, as despite believing that the extradition fulfilled all the legal requirements, he advised its withdrawal, as it would most likely be rejected.<sup>87</sup> And as is customary in this type of situation, the U.S. Government rejected the request in June 2004, resorting to the

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<sup>86</sup>AMNESTY INTERNATIONAL, *Clouds of Injustice*, pp. 60-67.

<sup>87</sup>Opinion of the Attorney General of India: Extradition of Mr. Warren Anderson, 6 August 2001: "*The present opinion is regarding whether extradition proceedings against Mr. Warren Anderson are legally sustainable under Indo-American Extradition Treaty. In my earlier opinion dated 31.7.1998 on the same subject, I had taken the view that the offence of causing death by rash or negligent act (Section 304-A of the Indian Penal Code) would be comparable to the offence of manslaughter under the law of the United States and would prima facie be covered under Article 3 of the Extradition Treaty between India and the United States (the "Extradition Treaty")*", available at <http://storage.dow.com.edgesuite.net/dow.com/Bhopal/OpinionofAttorneyGeneralExtraditionofWarrenAnderson.pdf>.

unoriginal argument that it did not comply with the terms of the Extradition Treaty that both States had signed.<sup>88</sup> Despite this despicable political reaction by the U.S. Justice Department, which violated the signed agreement and enabled the company director to walk away scot free, the international arrest warrant against Anderson remained active until his death in September 2014.

Together with this judicial failure, the achievements of the criminal proceedings in India have been disappointing. Thus, when the American company and its president refused to appear in the Madhya Pradesh courts, Bhopal's chief magistrate declared their judicial and physical persons fugitives and proceeded to issue an embargo seizing the company's assets in India. This ruling was then amended by the Supreme Court, which allowed UCC, which owned the Indian subsidiary, to sell its shares. And the Indian judges only made the company deposit a modest sum in London based trust.<sup>89</sup> The foundation was called "Bhopal Hospital Trust" and it was not managed by UCC. The Trust's chairman, Sir Ian Percival was part of a law firm that was retained by UCC. All the money from the sale of UCC's shares in UCIL was deposited in the trust.

Meanwhile, the other proceedings against UCIL and the accused with Indian nationality continued separately, although the Supreme Court reduced the charges.<sup>90</sup> This conditioned the disappointing final verdict of 7 June 2010, which after more than two decades of litigation, sentenced UCIL to pay a fine of half a million rupees (ten thousand euros) and sentenced the plant's Indian managers to two years in prison for causing deaths by negligence.<sup>91</sup>

For all that, and despite the despicable judicial results of the criminal proceedings, these lawsuits and the Supreme Court's controversial judicial settlement in 1989, which gave rise to all these deficiencies, did not take into consideration in their rulings one of the most crucial aspects of the case: the continued effects of the pollution on people and the environment.

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<sup>88</sup>Fax from Ashley Deeks, United States Department, Office of the Legal Adviser, Washington D.C., 25 May, 2004, cited in Amnesty International, *Bhopal: Justice Delayed, Justice Denied Background briefing on the criminal prosecutions in India and the failure to bring the prosecutions to an end 25 years on*, ASA 20/024/2009, 27 November 2009, <https://www.amnesty.org/download/Documents/44000/asa200242009en.pdf>.

<sup>89</sup>Supreme Court of India, *Union Carbide Corporation Ltd. vs Union Of India (Uoi)* on 14 February, 1994, 1994 (4) SCALE 973, 1995 Supp (4) SCC 59, available at <https://indiankanoon.org/doc/212673/>

<sup>90</sup>In a ruling on 13 September 1996 the Supreme Court reduced the accusation from culpable homicide to manslaughter through negligence. Supreme Court of India, *Keshub Mahindra v. State Of M.P* on 13 September, 1996, Bench: Am. Ahmadi, Cji, S.B. Majmudar, CASE NO.: Appeal (crl.) 1672 of 1996, <https://indiankanoon.org/doc/1810324/>.

<sup>91</sup>Chief Judicial Magistrate's Court Bhopal, *MP: Cr Case n° 8460/1996*, 7 June 2010 available at <http://www.countercurrents.org/UCIL.pdf>.

#### **IV. THE SUBSEQUENT PROCEEDINGS OF THE CLAIMS FOR ENVIRONMENTAL DAMAGE UP AGAINST DOW CHEMICAL'S NEW CORPORATE WEB: *THE POLLUTER NEITHER PAYS NOR REPAIRS***

##### **1. The new lawsuits about polluting the environment and the evolution of environmental jurisprudence in India**

A decade after the Indian Supreme Court's "friendly solution", Union Carbide's abandoned factory in Bhopal was still displaying its dramatic effects. The tanks in which the former chemical plant's toxic and waste products were stored had not only not been emptied or cleaned, but their deterioration had caused massive leaks that were polluting the area's aquifers. Meanwhile, the local population had not been alerted to this situation, and continued to drink from the wells next to the plant, which had led to astronomical rates of cancer and reproductive illnesses in the women in this area of Bhopal. Indeed, a devastating report by Greenpeace attested empirically to "Bhopal's legacy" and the extreme toxicity of the soil and groundwater, samples of which they had analyzed in Exeter University's laboratories in the United Kingdom, where they had detected excessive amounts of heavy metals and organic pollutants.<sup>92</sup>

It was precisely the scientific evidence for continuing environmental damage, that led to a group of victims approaching the Southern District's New York court after the abovementioned report by Greenpeace. This time, the new lawsuit filed in November 1999 invoked the famous Alien Tort Claims Act (ACTA), whose encouraging results were beginning to be visible.<sup>93</sup> The Baño case accused UCC and its former executive director Anderson of continuing to cause harm to the environment and to all the victims' property. It also invoked the motivation behind closing the first case in the United States, which had considered the Indian courts a "suitable" forum if they obeyed their judicial resolutions. At this point, it is worth noting that during the proceedings it was alleged that neither the company nor its executive manager had appeared at the various required hearings of the criminal proceedings opened by the Bhopal district court, which had even issued an international arrest warrant against the person ultimately responsible of the tragedy, who stood accused of culpable homicide.

Once again, Judge Keenan and the Court of Appeals of the Second Circuit thwarted the entire legal initiative by reiterating well-worn grounds of law. Beyond noting the

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<sup>92</sup>LABUNSKA, I., STEPHENSON, A., BRIGDEN, K., STRINGER, R., SANTILLO, D. & JOHNSTON, P.A., *The Bhopal legacy. Toxic contaminants at the former Union Carbide factory site, Bhopal, India: 15 years after the Bhopal accident*. Greenpeace Research Laboratories, Department of Biological Sciences, University of Exeter, Exeter, November 1999, available at <http://www.greenpeace.org/india/Global/india/report/1999/10/the-bhopal-legacy.pdf>.

<sup>93</sup>ZAMORA CABOT, F. J., "Una Luz en el Corazón de las Tinieblas: El *Alien Tort Claims Act of 1789* (ATCA) de los Estados Unidos" in *Soberanía del Estado y Derecho Internacional, Homenaje al Prof. J.A. Carrillo Salcedo*, Universidades de Córdoba, Sevilla y Málaga, 2005, pp.1381-1394; PIGRAU SOLÉ, A., "La Responsabilidad Civil de las Empresas Transnacionales a Través de la *Alien Tort Claims Act* por su Participación en Violaciones de Derechos Humanos", *Revista Española de Desarrollo y Cooperación*, nº 25, 2009, pp. 113-130.

victims' lack of legal rights as a result of the 1985 Bhopal Act, and that the commitment to obey India's judicial decisions referred only to civil matters, the ruling cited John F. Keenan's decision by which India's Supreme Court had blocked all prosecution claims with the abovementioned verdict of 1989.<sup>94</sup> This decision was finally ratified by the Court of Appeals of the Second Circuit on 10 August 2006, which alleged the impossibility of an American court supervising the cleanliness of groundwater and aquifers in the soil of a foreign sovereign State, thereby ignoring the Indian consul's formal request for opening the door for the company to develop some type of environmental compensation.<sup>95</sup>

Despite these unfavourable rulings, a group of thirteen victims led by Janki Bai Sahu filed a further two lawsuits in desperation. In the Sahu I case, the prosecution focussed on water pollution, and the initiative was supported by various scientific reports that proved that the levels of carcinogenic chemicals in the wells near the UCIL plant were 1,705 times higher than those permitted by the World Health Organisation;<sup>96</sup> this pollution also affected 20,000 Bhopal citizens and was spreading. For over a decade the judge of the Southern District of New York and the Court of Appeals rejected all Sahu's aspirations. On one hand, they rejected the argument that UCC was directly to blame, despite the evidence attesting to the company's manifest participation as it had designed the factory and the storage tanks for the chemicals. On the other hand, Judge Keenan reiterated that the alleged inadequate technology used in the Bhopal plant was the direct responsibility of the Indian company UCIL, which was not controlled by the American parent company.<sup>97</sup>

In 2013 the Court of Appeals ratified these arguments and acknowledged that harm had been done to the plaintiffs in a disaster that could have been "prevented in its totality", but there was not sufficient evidence to prove that UCC was responsible.<sup>98</sup>

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<sup>94</sup>*Bano v. Union Carbide Corp.*, No. 99 Civ. 11329(JFK), 2000 WL 1225789, 2000 U.S. Dist. LEXIS 12326, (S.D.N.Y. Aug. 28, 2000). *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329(JFK), 2003 WL 1344884, 2003 U.S. Dist LEXIS 4097, (S.D.N.Y. Mar. 18, 2003).

<sup>95</sup>United States Court of Appeals for the Second Circuit, District Chief Judge, Edward R. Korman, 10 August 2006, summary order, *Bano v. Union Carbide Corp.*, 198 F. App'x 32 (2d Cir. 2006), Summary order: "2. *The Consul General of India submitted a letter stating that the Madhya Pradesh state government and the Union of India welcome any relief for remediation of the chemical plant site, but that letter does not obviate any of the sensitive and severe difficulties identified by the District Court and by this court regarding the administration of remediation of land owned by a foreign sovereign in its own country (...)* 3. (...) *As the district court observed, any clean-up of the aquifer or groundwater would affect the public generally and could not be undertaken without the permission and supervision of the Indian government*", available at [http://storage.dow.com.edgesuite.net/dow.com/Bhopal/Bano\\_Decision.pdf](http://storage.dow.com.edgesuite.net/dow.com/Bhopal/Bano_Decision.pdf)

<sup>96</sup>Class action complaint for equitable relief and damages, *Janki Bai Sahu and others v. UCC and Warren Anderson*, US Southern District Court of New York, Summary of action, 04CV-8825, 3 November 2004, paragraph 56, available at <https://www.earthrights.org/sites/default/files/documents/Sahu-I-Complaint.pdf>.

<sup>97</sup>*Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407 (S.D.N.Y. 2005) and *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825(JFK), 2006 WL 3377577 (S.D.N.Y. Nov. 20, 2006)

<sup>98</sup>United States Court Of Appeals for the Second Circuit, Summary Order, *Sahu, et al v. Union Carbide Corp., et al*, 27 June 2013, 12-2983-CV: "*Sahu and many others living near the Bhopal plant may well*

Despite this, the Sahu II case is still open, as the judges of the Second Appeals Circuit revoked the decision of the first instance court<sup>99</sup> to reject the deposition made by Couvaras, a UCC employee and manager of the project for the plant,<sup>100</sup> a highly important testimony that affirmed that the parent company in the United States had the ultimate responsibility for the system of storing the factory's waste products and water, whose leaks continued to pollute the aquifers.

Meanwhile, despite all the obstacles mentioned, the victims have persisted in seeking judicial compensation in the Indian courts for the environmental damage caused. In spite of India having taken part in the Stockholm World Summit in 1972, the principles of the Declaration of the United Nations Conference on the Environment remained a rhetorical exercise. And it was precisely the human and environmental disaster of Bhopal that was the real catalyst for the progressive advance of environmental law in India. The 1987 amendment of the Industrial Law, tightening up the procedure to control toxic and hazardous products, was complemented by the enactment of an Environmental Protection Law in 1986 (developed by the Hazardous Wastes Management and Handling Rules of 1989) and by the Public Liability Insurance Act of 1991. A whole series of regulations was established that regulated corporate responsibility regarding environmental pollution, with special reference to the management of dangerous substances, with accountability being extended to the people responsible for the business.<sup>101</sup> Similarly, the Environment Protection Act granted the central government extensive powers to enter and inspect any industry and take samples for analysis.<sup>102</sup>

This legislative development was accompanied by a revolution in environmental

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*have suffered terrible and lasting injuries from a wholly preventable disaster for which someone is responsible. After nine years of contentious litigation and discovery, however, all that the evidence in this case demonstrates is that UCC is not that entity",* available at <http://storage.dow.com.edgesuite.net/dow.com/Bhopal/Bhopal%20%202nd%20Court%20of%20Appeals%20June%202013%20Decision.pdf>.

<sup>99</sup>In a ruling on 30 July 2014 Judge Keenan expressed his wish to close the Sahu II case, concluding that UCC could not be prosecuted for the continuing pollution in Bhopal. Available at [https://www.earthrights.org/sites/default/files/documents/sahu\\_ii\\_dist\\_crt\\_dismissal\\_7.30.2014\\_0.pdf](https://www.earthrights.org/sites/default/files/documents/sahu_ii_dist_crt_dismissal_7.30.2014_0.pdf)

<sup>100</sup>United States Court Of Appeals for the Second Circuit, Reply brief for plaintiffs, *Sahu, et al. v. Union Carbide Corp., et al.*, Case 14-3807, 18 February 2015: "Conclusion: The judicial process is supposed to be a search for the truth. By asking this Court to shut its eyes to Plaintiffs' evidence, that is exactly what UCC seeks to avoid. A rational jury considering the record in this case could find UCC liable. This Court should reverse summary judgment and permit Plaintiffs to preserve Couvaras's testimony", available at [https://www.earthrights.org/sites/default/files/documents/2015-02-18\\_reply\\_for\\_plaintiffs-appellants.pdf](https://www.earthrights.org/sites/default/files/documents/2015-02-18_reply_for_plaintiffs-appellants.pdf).

<sup>101</sup>ABRAHAM, C. M. & ROSENCRANZ, A., "An Evaluation of Pollution Control Legislation in India", *Columbia Journal of Environmental Law* Vol. 11, 1986, pp. 101-118.

<sup>102</sup>*Environment Protection Act*, n° 29 de 1986, 23 May 1986, points 10 and 11 of Chapter 3 of the Law, the prologue of which refers to the Stockholm Conference in which India took part, declaring that this law developed those principles; available at <http://envfor.nic.in/legis/env/env1.html>.

jurisprudence in India,<sup>103</sup> driven by the Supreme Court in an attempt to coordinate national and international law. The most elementary principles of international environmental law were gradually integrated, starting in the 1990s.<sup>104</sup> Starting by following the then recent Río Declaration on the Environment and Development, the principle of "whoever pollutes, pays" was established in the cases *Indian Council for Environmental Legal Action v. Union of India* and *Vellore Citizens Welfare Forum v. Union of India* in 1996.<sup>105</sup> The following year the precautionary principle was consolidated in the verdict on *M.C. Mehta (Badkhal and Surajkund Lakes Matter) v. Union of India*, which was followed in 1998 by the verdict on *Bhavani River v. Shakti Sugars Ltd*, in which the polluter was obliged not only to compensate the victims, but also to restore the environment to its original state prior to the pollution. To this end, the National Environmental Engineering Research Institute (NEERI), a public body, was granted the right to inspect the area affected and to indicate the cost of repairing the pollution.<sup>106</sup>

It must also be noted that, with the aim of investigating more effectively the cases involving environmental damage, two laws have been passed that ordered special tribunals to be set up. These legislative initiatives have had limited success, as the 1995 National Environment Tribunal Act has not yet been implemented,<sup>107</sup> while the National Green Tribunal Act of 2010<sup>108</sup> has set up a "green court" with competence to investigate and prosecute violations of India's various environmental regulations in civil cases, though in the few years since its creation it has not shown the hoped-for results.<sup>109</sup>

Despite all this, the progressive development of legislation and jurisprudence

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<sup>103</sup>ABRAHAM, C.M. & ABRAHAM, S., "The Bhopal Case and the Development of Environmental Law in India", *International and Comparative Law Quarterly*, Vol. 40, 1991, pp 334-365.

<sup>104</sup>Al, *Injustice incorporated*, op. cit., p. 40, section "Some positive legal reforms".

<sup>105</sup>Supreme Court of India, *Vellore Citizens Welfare Forum v. Union Of India & Ors* on 28 August, 1996, available at <https://indiankanoon.org/doc/1934103/>: "2. The authority so constituted by the Central Government shall implement the "precautionary principle" and the "polluter pays" principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters, assess the loss to the ecology\environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise."

<sup>106</sup>Supreme Court of India, *Bhavani River v. Sakthi Sugars Ltd*, 30 July, 1998; Bench: A.S. Anand, B.N. Kirpal, V.N. Khare, point 3 of the dispositions of the ruling, available at <https://indiankanoon.org/doc/58735/>.

<sup>107</sup>DEVA, S., *Access to Justice: Human Rights Abuses Involving Corporations – India*, International Commission of Jurists (ICJ), 2011, p. 22, available at <http://www.icj.org/access-to-justice-human-rights-abuses-involving-corporations-india/>.

<sup>108</sup>National Green Tribunal Act 2010. Gazette of India (Extraordinary), Part II-Section 1, No.25, Act No.19 of 2010.

<sup>109</sup>VARGHESE, G.K. & ALAPPAT, B.J., "National Green Tribunal Act: A Harbinger for the development of Environmental Forensics in India?", *Environmental Forensics*, vol. 13 (3), 2012, pp. 209–215, available at <http://www.tandfonline.com/doi/abs/10.1080/15275922.2012.702330>.

regarding environmental law in India was finally consolidated in the Supreme Court ruling of 5 January 2005 on *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another*:

*"The legal position regarding applicability of the precautionary principle and polluter pays principle, which are part of the concept of sustainable development in our country, is now well settled (...) after referring to the principles evolved in various international conferences and to the concept of "sustainable development", inter alia, held that the precautionary principle and polluter pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes including the Environment Protection Act, 1986, these concepts are already implied. These principles have been held to have become part of our law (...) In this decision, it has also been observed that the principle of good governance is an accepted principle of international and domestic laws. It comprises the rule of law, effective State institutions, transparency and accountability and public affairs, respect for human rights and the meaningful participation of citizens in the political process of their countries and in the decisions affecting their lives".<sup>110</sup>*

It is precisely these advances that have contributed towards generating the catalyst for the Bhopal victims to go to the Indian courts again to denounce the pollution of the environment. Thus, in July 2004 a group of victims, protected by Article 32 of the Indian Constitution, which allows for legal action to be taken to protect public interest (*Public Interest Litigation*), denounced UCC and its successor companies Eveready (with Indian capital) and Dow Chemical to the Indian government in the State of Madhya Pradesh. This lawsuit, *Alok Pratap Singh*, calls for the accused to be prosecuted for continuing to cause environmental pollution that requires measures of remediation, such as periodic analysis and cleaning up of the polluted soil, and longterm medical assistance for the victims; measures that come to compensation of over three billion dollars.<sup>111</sup>

Similarly, the *Research Foundation for Science Technology and Natural Resources Policy* has continued to litigate against the State, accusing it of violating the right to life through its lenience and inaction regarding the proliferation of polluted industrial areas. This latter case provoked the Supreme Court to order a Supervisory Committee to analyze and propose recommendations for remedying the effects of areas with toxic waste. In May 2004 this committee published a report on matters in Bhopal, warning about the dangerous levels of toxic waste in the water in the area affected, which gave rise to a Supreme Court resolution ordering the government of the State of Madhya Pradesh to supply the communities next to

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<sup>110</sup>Supreme Court of India, *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another* WP 657/1995, Case No Writ Petition (C) No.657 of 1995 (With S.L.P.(C) No.16175 and C.A. No. 7660 of 1997), available at <https://www.elaw.org/es/content/india-research-foundation-science-technology-and-natural-resources-policy-v-union-india-and->.

<sup>111</sup>Madhya Pradesh High Court, *Alok Pratap Singh v. The Union Of India & Ors*, W.P.No.2802/2004.

the chemical plant with drinking water, and to close the polluted wells.<sup>112</sup> What is dramatic about this apparent judicial success is that not only did the list of places to be supplied with drinking water not include all the areas affected by the pollution, but that survivors organizations have recently denounced the presence of toxic chemicals in the water distributed by the public authorities.<sup>113</sup>

However, the *Alok Pratap Singh* case prospered in the Madhya Pradesh High Court, which in a ruling on 30 March 2005 demanded that tons of toxic waste be removed from Bhopal.<sup>114</sup> In addition to the operation's magnitude and cost, the measure was immediately rejected by the authorities in the States of Gujarat and Maharashtra, who opposed the removal and incineration of the waste products. India's central government also reacted, and sued UCC and Dow Chemical, demanding an advance payment of a billion rupees to begin the cleanup process. The matter was resolved years' later, on 9 August 2012, when the Supreme Court ruled that the government of Madhya Pradesh begin immediately to remove the polluted earth.<sup>115</sup> The controversial project has brought central and regional authorities into conflict, as well as generating protests from the citizens of Pithampur, the final destination for storing and incinerating the waste.<sup>116</sup>

In short, after an interminable judicial saga lasting decades, the polluting company has neither paid for nor remedied the damage. And the limited and deficient measures to supply drinking water and to begin to remove the polluted soil are being carried out by India's central governmental authorities with no possibility of the costs being met by the company. Thus, despite the evolution of jurisprudence regarding the principles of environmental law in India, these are only applied occasionally to legal persons of Indian nationality, and never to multinationals.<sup>117</sup>

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<sup>112</sup>Supreme Court, *Research Foundation for Science v. Union of India and Anr.* Writ Petition (Civil) No.657/1995, Order 7 May 2004. SHARMA, S., "The Bhopal Conflict Over Safe Water, Environment and Justice", in JOY, PARANJAPE & BHAGAT (ed.), *Documentation of Conflicts around Drinking Water & Sanitation in India*, Forum for Policy Dialogues on Water Conflicts in India, Delhi, 2014, available at [https://www.academia.edu/3170672/Sharma\\_S.\\_2014\\_.The\\_Bhopal\\_Conflict\\_Over\\_Safe\\_Water\\_Environment\\_and\\_Justice\\_In\\_The\\_Forum\\_Forum\\_for\\_Policy\\_Dialogues\\_on\\_Water\\_Conflicts\\_in\\_India\\_Documentation\\_of\\_Conflicts\\_around\\_Drinking\\_Water\\_and\\_Sanitation\\_in\\_India](https://www.academia.edu/3170672/Sharma_S._2014_.The_Bhopal_Conflict_Over_Safe_Water_Environment_and_Justice_In_The_Forum_Forum_for_Policy_Dialogues_on_Water_Conflicts_in_India_Documentation_of_Conflicts_around_Drinking_Water_and_Sanitation_in_India)

<sup>113</sup>AI, *Injustice incorporated, op. cit.*, p. 55, cited the report by the el Bhopal Medical Appeal, *Analysis of Chemical Contaminants in Groundwater and Assessment of the Qualitative and Quantitative Drinking Water Supply Situation in the Communities Surrounding Union Carbide India Ltd. (UCIL) Plant Site in Bhopal*, on behalf of the Sambhavna Trust Clinic, October 2009.

<sup>114</sup>Madhya Pradesh High Court, *Alok Pratap Singh v. The Union Of India & Ors*, 30 March 2005, W.P.No.2802/2004.

<sup>115</sup>Supreme Court, *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors v. Union of India & Ors*, order 9 August 2012, Writ Petition (C) N<sup>o</sup>. 50 of 1998, available at <https://indiankanoon.org/doc/121933292/>.

<sup>116</sup>"Carbide toxic waste incineration trail run begins at TSDF Pithampur", *Times of India*, 18 August 2015, available at <http://timesofindia.indiatimes.com/city/bhopal/Carbide-toxic-waste-incineration-trail-run-begins-at-TSDF-Pithampur/articleshow/48527269.cms>.

<sup>117</sup>MURALIDHAR, S., *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice*, International Environmental Law Research Centre, IELRC Working

## 2. UCC's fusion with Dow Chemical: diluting responsibilities and corporate veil "cover-ups"

Beyond all the judicial obstacles to obtaining adequate reparation for the victims, the legal manoeuvring of the well-paid U.S. and Indian lawyers gave rise to a new stratagem. Textbook tactics to evade any responsibility were used one after another, according to the jurist Muralidhar in his report to the International Commission of Jurists.<sup>118</sup> First, they claimed that the disaster was the result of sabotage. Then they declared before Judge Keenan that the U.S. Courts were not competent, and once they had obtained closure of the case in the New York courts by applying the *forum non conveniens* doctrine, they questioned the suitability of the Indian judges, until that country's Supreme Court bowed to their allegations and imposed a judicial settlement with compensation that would be covered by their insurance companies. And finally, in the renewed clashes in court regarding the lawsuits about the continued effects of the environmental damage, they did not hesitate to resort to the usual stratagem of provoking wrongful delays, thereby avoiding having to fork out any amount whatsoever to remedy the pollution's effects on Bhopal's population, soil and water. And as if that was not enough, Dow Chemical's acquisition of UCC was the definitive smokescreen in the U.S. And Indian courts for shirking any responsibility for criminal conduct in the past, present or future.

Indeed, the fusion of the two companies in February 2001 has produced the desired results in the judicial and extrajudicial headquarters, reiterating the argument by which, despite Dow acquiring UCC's shares, the latter has continued to exist as a separate company. As a result, any hypothetical responsibility that could be derived from the lawsuits still open could never be attributed to Dow Chemical. In this way, the latest rulings by the U.S. Courts have ended by rejecting any responsibility for UCC for the effects of the pollution,<sup>119</sup> without even considering a likely successor responsibility on the part of the buyer.

However, the controversy in India reached the Supreme Court. In 2010 the Indian government itself filed an extraordinary claim, the "curative petition", in which, exceptionally, it alleged fundamental violations of the founding principles of justice, and demanded that UCC cover the costs of all the acts of reparation that the central authorities and those of Madhya Pradesh had been paying for. This petition also

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Paper 2004/5, Geneva, 2004, available at <http://www.indiaenvironmentportal.org.in/files/w0405.pdf>: "The polluting corporation does not have to fear being saddled with clean up costs as long as it has an obliging state machinery that will help keep its dark secrets. In fact, by their inaction, the Government of India and the Government of Madhya Pradesh may have ensured that UCC is not saddled with any liability at all for the permanent environmental damage it has caused. The principles of environmental jurisprudence are good for Indian corporations but not for multinationals. Is anyone listening?"

<sup>118</sup>MURALIDHAR, S., *Unsettling Truths, Untold Tales*, op. cit., p. 67.

<sup>119</sup>United States Court Of Appeals for the Second Circuit, Summary Order, *Sahu, et al. v. Union Carbide Corp., et al.*, 27 June 2013.

named Dow Chemical directly as the accused, and in November 2011 this company reacted and submitted a document to the Supreme Court, in which it denied Indian jurisdiction over the company and reaffirmed its position that UCC and Dow Chemical were still two separate companies.<sup>120</sup> The Indian government has not countered these allegations despite the Supreme Court's repeated requests that it do so, and in view of this situation, the high court judges, after processing the "curative petition" for over six years, have not yet issued a ruling on the matter.<sup>121</sup>

Despite these unjustified delays, the Bhopal judges have been more diligent in this case. In the criminal proceedings against Anderson and the UCC, the chief magistrate of the Bhopal court ruled on 6 June 2005 that Dow Chemical appear in the case and explain what connection it had with the company it had acquired. After more than ten years and repeated orders to appear in the Bhopal district court, Dow Chemical has continued to disobey and not cooperate with the Indian judiciary, hiding behind the corporate veil that alleges there is complete severance with UCC.<sup>122</sup>

At this point it is inevitable to recognise that the very concept of a transnational corporation is difficult to determine, and although it should lead to the so-called "business unit", for legal (and sometimes extralegal) reasons the courts are usually reticent about recognizing them. The concept of a business unit therefore means that both the parent company and its subsidiaries constitute a single entity, and therefore responsibility extends jointly to the whole group.<sup>123</sup> That is how it should

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<sup>120</sup>Dow Chemical, "Dow's Response to the Curative Petition Filing by the Union of India", at [http://storage.dow.com.edgesuite.net/dow.com/sustainability/issues/Statement\\_CurativePetition.pdf](http://storage.dow.com.edgesuite.net/dow.com/sustainability/issues/Statement_CurativePetition.pdf).

<sup>121</sup>Indo-Asian News Service, "Help Bhopal gas tragedy victims get more compensation, government urged. The organizations also launched a postcard campaign, requesting the Supreme Court for an early hearing on the curative petition against Union Carbide and its owner Dow Chemical Company", 25 February 2016 available at <http://www.india.com/news/india/help-bhopal-gas-tragedy-victims-get-more-compensation-government-urged-981351/>

<sup>122</sup>Press Trust of India, "1984 Bhopal Gas Tragedy: Dow Chemical fails to appear in court for 3rd time", 20 December 2015, at <http://www.india.com/news/india/1984-bhopal-gas-tragedy-dow-chemical-fails-to-appear-in-court-for-3rd-time-800373/>: "Judicial Magistrate First Class (JMFC) Rajesh Nandeshwar yesterday posted the next hearing in the case on July 13, 2016, and also slapped a show-cause notice on Dow over a clutch of petitions filed by NGOs working for the gas tragedy survivors."

<sup>123</sup>The Spanish Supreme Court has established at the labour level that it is very difficult to determine the existence of a business unit within a group of companies that appear to be just one; basically because judgement is based on the principle of the legitimacy of a group of companies existing, linked in different ways, without this implying solidarity between them. The elusive concept of unitary management is stressed, as from the commercial perspective it is not enough for there simply to be a situation of control or identity of the members of the management, but rather it is necessary for that power or control to have crucial influence and impose a common business policy. In addition, Article 42.1 of Spain's Code of Commerce establishes the concept of a dominant company, stating: "1. Any dominant company within a group of companies is obliged to draw up its consolidated annual accounts and management report in the way established in this section.

*A group is said to exist when a company exercises or can exercise control, directly or indirectly, over one or more other companies. Specifically, control will be considered to exist when a company, which*

be, but the reality is that the multiple juridical forms that they use lead to this conclusion being dismissed.

When it delocalized its production (as a result of a policy to reduce costs or evade stricter environmental and labour laws), the parent company resorted to well-known formulae such as the creation of subsidiaries, fusions, demergers, takeovers, new companies with different ownership, subcontracts, segregations, and many other strategies that obstruct the path to the nucleus or decision centre. Thus, the most effective method of determining the concept of a business unit should be to find out where the decision centre is, who takes the decisions, who controls the societies' capital, and finally, who receives the profits. And the only path to this point is the one described in the famous doctrine of "lifting the corporate veil", which enables one to pinpoint the legal person hiding behind all the legal tangle.<sup>124</sup>

In the case of Bhopal, this veil of impunity would be susceptible to being drawn aside to examine the fact that Dow Chemical is in possession of all the UCC shares, and that in the sales contract signed by Dow Chemical and UCC the buyer "*accepted approximately US\$2 billion of outstanding Union Carbide Corporation debt*", and with it, a transfer of responsibility, according to the documents submitted to the U.S. Securities and Exchange Commission.<sup>125</sup> If a parallel was to be drawn between this

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*will be referred to as the dominant company, stands in relation to another company, which shall be referred to as the dependent company, in one of the following ways:*

*a) It has the majority of the rights to vote.*

*b) It has the power to name or remove the majority of the members of the management body.*

*c) It has at its disposal, by virtue of agreements with third parties, the majority of the rights to vote.*

*d) It has appointed with its votes the majority of the members of the management body, who hold their posts at the moment when the consolidated accounts have to be drawn up and during the two immediately preceding fiscal years. This circumstance will be assumed particularly when the majority of the members of the dominated company's board of management are members of the management body or top directors of the dominant company or another company dominated by it. This assumption will not give rise to the consolidation if the company whose administrators have been appointed, is linked to another company in any of the ways described in the first two letters of this section."*

Meanwhile, the Companies Capital Act states in its Article 18, Groups of companies, that: "*This law considers that a group of companies exists when any of the cases established in Article 42 of the Code of Commerce concur, and the dominant company is the one that exercises or can exercise control, directly or indirectly, over one or more of the others.*" Thus, most of the experts understand that when a company exercises effective control over another, there is a dominant company, and that this company can be said to be a business unit, with possible joint responsibility. However, in this case it is necessary for the parent company to exercise effective control over the rest of the subsidiaries, which can be established by applying the doctrine of piercing the corporate veil.

<sup>124</sup>The jurisprudence of the European Union's Court of Justice regarding Competition Law has been paradigmatic. For one of its latest and most important rulings, see that of 10 September 2009 in the *as. C-97/08, Akzo Nobel and other v. Commission*, which "confirmed that the fact that a company is completely owned by its parent company gives rise to an assumption of *ius tantum*, which makes it possible to attribute responsibility to that parent company for its subsidiary's violation of the regulations regarding competition.", GUERRA, A. & PEINADO, E., "The responsibility of parent companies for the infringements of rules governing competition committed by their subsidiaries", *Actualidad Jurídica Uría Menéndez* n<sup>o</sup> 31, 2012, pp. 61-65, at <http://www.uria.com/documentos/publicaciones/3361/documento/foro01.pdf?id=3876>.

<sup>125</sup>*Al, Injustice incorporated, op. cit.*, p. 243, note 309, which cites the archives of Dow Chemical

case and the criterion followed by the European Court of Justice (CJEU), though within the framework of Antitrust Law, the verdict would be clear, as “(...) in these circumstances, it is enough for the Commission to prove that the parent company of a subsidiary owns all the subsidiary's capital, to assume that it exercises decisive influence over that subsidiary's business policy. As a result, the Commission may consider that the parent company is jointly liable for the payment of the fine imposed on its subsidiary company, unless said parent company, to whom it falls to disprove said assumption, provides sufficient evidential proof to demonstrate that its subsidiary behaves autonomously in the market.”<sup>126</sup>

We are therefore up against not only an assumption of joint liability, but also an assumption of *iuris tantum*, which in these cases obliges the defendant to attest to the nonexistence of the business unit and joint liability. Thus, the *onus probandi* in this case would correspond to Dow Chemical. This is how the doctrine of piercing the corporate veil makes it possible, on the basis of facts (such as the company's registered address, the nationality of the board of directors, accounting information, business decisions, the destination of production and profits) to reveal the nucleus that is responsible for decision making, and in so doing, the business unit and the group's resulting joint responsibility.<sup>127</sup>

Curiously, the European Court of Justice has ruled against Dow Chemical, following the jurisprudence precedents of cases such as *Stora Kopparbergs Bergslags v. Commission* (ruling 16 November 2000, C-286/98 P) and *Akzo Nobel and other v. Commission* (ruling 10 September 2009 in C-97/08). In a ruling on 13 July 2011 the European Court of Justice set a precedent that could be brought before India's Supreme Court, which continues to refuse to recognise the business unity between Dow Chemical, Union Carbide and the Indian subsidiaries. Thus, by resorting to the concept of "cross pollination" between courts in different regions, the arguments

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Company, US Securities and Exchange Commission (SEC) Form 10K, 20 March 2002.

<sup>126</sup>CJEU, ruling by the Court of Justice (First Court) on 20 January 2011. *General Química SA and others v. European Commission*, C-90/09 at <http://curia.europa.eu/juris/liste.jsf?language=es&num=C-90/09>.

<sup>127</sup>It is important to explain that this business unit doctrine should not favour the perpetrator of the damage, who is responsible for it, which could occur if the plaintiff were obliged to litigate in the place where the principal company is based. It is therefore important to point out the reference of the Supreme Court's recent ruling of 4 April 2016, which states that: “making the plaintiff direct his lawsuit against the parent company would thwart in practice the objective of «guaranteeing complete and effective protection of the fundamental freedoms and rights of physical persons, and in particular, the right to privacy (...) The usefulness of the Community regulation would be weakened enormously if the victims had to find out, within the titular corporate group, through a search engine, what specific role each of its companies had, which is even on occasion a business secret, and anyway is not information available to the general public. The guideline's effectiveness would also be weakened if importance were given, like the appellant Google Spain tries to do, to the judicial personification that the person responsible for handling the data gives their establishments in the various member States, thereby forcing the victims to take legal action against companies based abroad”, ruling commented on by ALFARO, J., “La sentencia Google del Tribunal Supremo: Derecho de grupos y levantamiento del velo”, *Almacén de Derecho*, 14 April 2016, at <http://almacenederecho.org/la-sentencia-google-del-tribunal-supremo-derecho-de-grupos-y-levantamiento-del-velo/>.

used by both the Commission and the European Court of Justice to rule against Dow Chemical, Dow Deutschland, Dow Deutschland Anlagengesellschaft and Dow Europe should inspire the judges in Delhi. In this regard, the conclusions are particularly revealing in the case of Dow Chemical, according to the verdict by the Luxembourg judges:

*"(...) The Commission notes that Dow Deutschland Anlagengesellschaft, Dow Deutschland and Dow Europe are responsible for their direct participation in the violation. In this respect it specifies that whilst the violation lasted, said companies were 100% owned, either directly or indirectly, by Dow Chemical. Hence, to the Commission's understanding, it could be assumed that the parent company had exercised decisive influence on its subsidiaries' actions. It believed that said assumption was supported by various data. The Commission ended by declaring that, as a result, the contested decision should be sent to Dow Deutschland Anlagengesellschaft, Dow Deutschland, Dow Europe and Dow Chemical, who should be declared jointly responsible for the violation.*

*In this regard, it is important to remember that in the specific case of a parent company owning 100% of the capital of a subsidiary that has broken community law regarding competition, on one hand said parent company may exercise considerable influence over its subsidiary's actions, and on the other hand there is the assumption of iuris tantum, whereby said parent company effectively exercises decisive influence over its subsidiary's actions (...)*

*It follows from the above that Dow's allegations cannot raise doubts about the fact that Dow Chemical and its subsidiaries could be considered a single economic unit. In these circumstances, this Court considers that it is not necessary to agree to the measures of organization of procedure requested by Dow."<sup>128</sup>*

Thus, it was concluded that Dow Deutschland, Dow Deutschland Anlagengesellschaft and Dow Europe were completely controlled, directly or indirectly, by Dow Chemical, although the European Court of Justice noted that there were cases in which the parent company was exonerated of any responsibility if the subsidiary acted autonomously and attested to this independence. This last clarification was not the case, particularly when all the subsidiary's shares were owned by the parent company. Thus, it was necessary to clarify the presumed autonomy that was not liable to responsibility, because exoneration could only be applied when actions had been taken outside the subsidiary's productive structure. Thus, if the harmful act or action has taken place using the company's human and material resources or structure, the parent company's responsibility is to be assumed absolutely. Basically, because said parent company has the duty and obligation to ensure that its resources are not used unlawfully (as legally it controls them).

But even if it is possible to demand responsibility from the parent or dominating company, the problem of company succession still has to be resolved, i.e. the new company's subrogation in the responsibilities of the company it has acquired. Indeed, in cases like that of Bhopal, where the damage has been caused by the

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<sup>128</sup>Grounds of Law A.1.b of the General Court ruling (First Court) on 13 July 2011, *The Dow Chemical Company y otros v. European Commission*, case T-42/07, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=107313&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=359821>.

company that has been transferred without remedying said damage, the controversy arises regarding the inheritance of this responsibility, which in this case is rejected by the transnational Dow Chemical.

However, in this case of the sale of Union Carbide, succession has occurred, given that Dow Chemical acquired all of its patrimony, which implies not only its assets but also its liabilities. As a result, the subrogation of the obligation to remedy the human and environmental damage in Bhopal is demonstrated by this sales contract and by the fact that the successor company has maintained the group of resources that is organized to carry out an economic activity. A conclusion that is derived from the application and interpretation of the abovementioned concept, in line with internal and European labour,<sup>129</sup> commercial<sup>130</sup> and civil<sup>131</sup> laws that could be applied to the Bhopal case. Thus, all the principles derived from these rules can be advocated at the international level and applied by the Indian courts through the abovementioned doctrine of piercing the corporate veil.

Thus, the communiqué sent in 2008 by a group of Indian academics, lawyers and judges to their prime minister is completely lawful in pointing to Dow Chemical's successor responsibility and its acquired obligation to pay compensation to the victims and repair the environmental damage caused in Bhopal.<sup>132</sup> They also brought to light the unacceptable contradictions regarding this matter of successor liability that existed between India's Supreme Court and the Bhopal courts, and concluded that:

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<sup>129</sup>For example, within labour laws, the EU directive 2001/23 establishes this concept of successor company. Similarly, in Spanish internal law, Article 44 of the Workers' Statute contemplates the existence of business succession for the last reason given. With regard to this concept, it is clear that business mergers, acquisitions of all the share capital, and takeovers of either a complete company or an autonomous entity segregated from it, all imply the existence of succession, and would make it possible to demand responsibility from the new company for the company that was transferred. Thus, the CJEU and Spain's Supreme Court (see the ruling of 27 April 2015, Fourth Social Court) have applied this concept of company succession described in the abovementioned directive.

<sup>130</sup>At the commercial level, Law 3/2009 on structural modifications of mercantile societies declares in its Article 1 that its aims are: *"to regulate the structural modifications of mercantile societies, consisting in the transformation, fusion, demerger or global cession of assets and liabilities, including moving the business address abroad."* And in its Article 21 it consolidates the responsibility of the partners when transformations occur, unless the social creditors have expressly agreed to said transformation. On the other hand, these regulations stipulate that in the event of mergers (Articles 49, 52, 53), handing over assets and liabilities (Article 81), demerging the company (Article 69) and splitting, the matter of debts is automatic.

<sup>131</sup>As a general rule, Article 1205 of the Criminal Code could be applied analogously, as it establishes that: *"Novation, which consists in replacing a former debtor with a new one, can be done without the former's knowledge, but not without the consent of the creditor."*

<sup>132</sup>International Campaign for Justice in Bhopal, "Government of India-Dow deal on Bhopal illegal, legal professionals say", 23 April 2008 at <http://www.bhopal.net/government-of-india-dow-deal-on-bhopal-illegal-legal-professionals-say/>: *"As a 100% owner of Union Carbide after the merger, Dow is saddled with successor liability. Dow's attempts to use the corporate veil separating it and Union Carbide to evade liability is demonstrably fraudulent."*

*“Dow Chemical has continued to profit from the sales of its subsidiary’s products in India, effectively continuing the business of the selling entity, despite the latter’s status as an absconder. Indeed, it is arguable that this, and numerous other identifiable aspects of Dow’s business in the aftermath of the merger with Union Carbide, such as continuity of name, products, facilities, personnel, business operations and Union Carbide’s general enterprise, could be said to be effecting a fifth exception to absence of successor liability: the “substantial continuity test”, which originated in a series of U.S. Supreme Court labour relations and product liability cases.”<sup>133</sup>*

## V. CONCLUSIONS

The Bhopal case reveals the paradigm of court proceedings full of “ironies and contradictions”, in which the law has been “incapable of either preventing the disaster or repairing or alleviating the human anguish and agony”.<sup>134</sup> The judicial progression that the case has taken is a clear example of governments' permeability, if not submission, regarding the interests of large transnational companies. Once again, a long shadow is cast by the then U.S. Secretary of State, Henry Kissinger, who seems to have been a significant player from the start and involved in the tragic events, having authorized the state bank Exim to finance Union Carbide's multi-million investment in India. Moreover, the Wikileaks's cables have revealed that after the disaster, Kissinger acted as advisor to the company and intervened in 1988 in the progress of the trial, when he urged the then Indian Prime Minister, Rajiv Gandhi, to try to close the case in exchange for extrajudicial compensation for the victims.<sup>135</sup> Curiously, a few months later, India's Supreme Court dismissed all past, present and future civil and criminal lawsuits regarding Bhopal, and imposed a judicial settlement offering minuscule compensation in opposition to the victims' aspirations. More recently, during president Narendra Modi's first official visit to Washington, the multitudinous requests asking that at this meeting with Obama the matter of Bhopal be discussed (given that several international warrants of arrest against some of those responsible, and orders for compensation, were still pending), were met with silence.<sup>136</sup> Once again, the complacency of both governments regarding the transnational corporation eclipsed the public protests of the victims' associations that remembered Modi's past, when years' earlier, as Chief

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<sup>133</sup>Letter to Indian Prime Minister Mr Manmohan Singh, Minister of Law and Justice Mr. H Bharadwaj, Minister of Commerce & Industry, Mr. Kamal Nath and other government officials by a group of Indian legal practitioners, professionals, academics and former judges, 21 April 2008, cited in AI, *Injustice incorporated*, *op. cit.*, p. 244, note 311.

<sup>134</sup>CASSELS, *op. cit.*, pp. 49-50.

<sup>135</sup>EFE, “Las víctimas de Bhopal quieren que Obama pida perdón por los errores históricos”, *eldiario.es*, 3 December 2014, at [http://www.eldiario.es/sociedad/victimas-Bhopal-Obama-errores-historicos\\_0\\_331067438](http://www.eldiario.es/sociedad/victimas-Bhopal-Obama-errores-historicos_0_331067438).

<sup>136</sup>“Make Union Carbide pay for Bhopal tragedy: Amnesty writes to Modi, Obama”, *The Times of India*, 26 January 2015, at <http://timesofindia.indiatimes.com/india/Make-Union-Carbide-pay-for-Bhopal-tragedy-Amnesty-writes-to-Modi-Obama/articleshow/46016416.cms>

Minister of the Indian state of Gujarat, he had signed a controversial agreement with Dow Chemical.<sup>137</sup>

Yet the alarming thing is that in these cases the “corporatization” of governments involves the “politization of justice”, which calls into question the rule of law. In the case of Bhopal, this is evident when analyzing the grounds of law and verdicts of the reactionary rulings issued by the Southern District's New York court and the Indian Supreme Court over the past three decades. From the paradigm of “*real-politik*”, the arguments wielded repeatedly by Judge John F. Keenan in the Manhattan court and the Delhi Judge R.S. Pathak are easily explained as attempts to secure impunity for the transnational and reject the claims of the victims. Whilst the latter judge was rewarded, as mentioned above, and nominated a judge of the International Court of Justice in The Hague, the former judge and coordinator for criminal justice in the city of New York was appointed judge for life in the Federal District Court, based in Manhattan, by Ronald Reagan himself in 1983,<sup>138</sup> only months before the Bhopal disaster. Whatever the case, Dow Chemical, the company that inherited the disaster, continues even now to sell its products in India, despite the judicial prohibition and embargo on UCC's products. Meanwhile, the Wikileaks cables revealed the negotiations that took place between Dow's management and the Indian authorities, such as the Minister for Commerce, in an attempt to obtain measures of immunity in exchange for making large investments in the Asian country.<sup>139</sup>

Faced with this mountain of adversities, one can only wonder again, as at the beginning of this analysis, whether international law can prevent a tragedy like Bhopal or not. An affirmative answer would mean the naïve assumption that the world of values, one of the most important of which is justice,<sup>140</sup> prevails in the world order, having been perfectly internalized in national judicial systems. However, the repeated jurisprudence of Western states, where the rule of law supposedly prevails, attests to the fact that when justice should be administered, but the interests of the victims (especially in the most disadvantaged countries) and making good the environmental damage<sup>141</sup> clash with the wishes of large transnational companies, the scales of justice have a tendentious propensity for tipping in favour of the more powerful. Which, in short, means denying the right to

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<sup>137</sup> “Congress slams Modi for Dow link”, *The Indian Express*, 15 June 2010, at <http://archive.indianexpress.com/news/congress-slams-modi-for-dow-link/634042/>.

<sup>138</sup> LYNN, F., “Man in the news; Nominee for U.S. Judge: John Fontaine Keenan”, *The New York Times*, 21 July 1983, available at <http://www.nytimes.com/1983/07/21/nyregion/man-in-the-news-nominee-for-us-judge-john-fontaine-keenan.html>

<sup>139</sup> BARI, P., “Bhopal Gas Tragedy NGOs reveal Wikileaks' cables on Dow Chemicals; Allege Indian Govt. kowtowed to US pressure”, *TwoCircles.net*, 17 April 2013, at [http://twocircles.net/2013apr17/bhopal\\_gas\\_tragedy\\_ngos\\_reveal\\_wikileaks\\_cables\\_dow\\_chemicals\\_allege\\_indian\\_govt\\_kowtowed\\_#.VzBs39dEOuU](http://twocircles.net/2013apr17/bhopal_gas_tragedy_ngos_reveal_wikileaks_cables_dow_chemicals_allege_indian_govt_kowtowed_#.VzBs39dEOuU).

<sup>140</sup> ZAMORA CABOT, *op. cit.* p. 563.

<sup>141</sup> GARCÍA-ÁLVAREZ, L., “Las acciones colectivas en los litigios internacionales por daños ambientales”, *Revista Electrónica de Estudios Internacionales*, n<sup>o</sup> 30, December 2015, available at <http://www.reei.org/index.php/revista/num30/articulos/acciones-colectivas-litigios-internacionales-danos-ambientales>.

justice,<sup>142</sup> while binding international judicial frameworks are not approved.<sup>143</sup> On the contrary, if we are doomed to give a negative answer, we will be admitting that business is above the law, and in doing so, we will be resignedly validating the vice president of UCC's message to the U.S. authorities, demanding that the Government refuse India's request for Anderson's extradition. Sadly, the Washington administration paid heed repeatedly to the warnings made by the company's vice president, Joseph E. Goeghan,<sup>144</sup> endorsing the "betrayal of human rights" and consolidating the impunity of transnational companies, which has once again been made abundantly clear in the Kiobel case.<sup>145</sup> As professor Zamora Cabot disturbingly points out, the latest rulings by the U.S. Supreme Court evince increasing laziness, if not a downright disdainful lack of interest, in effectively granting the victims of human rights violations access to justice if the crimes were committed outside their borders, even if the victims are citizens of that country.<sup>146</sup>

This disturbing shift in jurisprudence, the unequal fight for rights that the ineffective soft law of the Global Compact and the Guiding Principles tries to overcome, and the close ties between large industrialists and governments all contribute towards glimpsing the answers to the questions posed at the beginning of this article. In other words, it is possible to humanize economic globalization and prevent other Bhopal, but only if the political will of governments is not subject to the dictates of the transnationals and the large corporate lobbies. Restrictions that sometimes seem insurmountable, and can even now call into question the values of the common European project.<sup>147</sup> This being so, we agree with the verdict of the

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<sup>142</sup>MARULLO, M.C., "Access to justice and forum necessitatis in transnational Human Rights litigation", *Papeles El tiempo de los derechos*, n<sup>o</sup> 5, 2015, available at <https://redtiempodelosderechos.files.wordpress.com/2016/01/wp-5.pdf>.

<sup>143</sup>GÓMEZ ISA, F., "Las empresas transnacionales y los Derechos Humanos: ¿hacia un marco jurídico internacional de carácter vinculante?", *Revista de responsabilidad social de la empresa*, n<sup>o</sup> 20, 2015, pp. 33-53.

<sup>144</sup>Fax to the US State Department, "Warren Anderson should not be extradited to India," dated July 24, 2003: "No issue has a greater potential to destroy U.S. business leaders' confidence in India than the handling of the Warren Anderson case.... Extradition in [a] case like this would place in jeopardy any officer of an American corporation with significant interests in foreign enterprises anywhere in the world in the event of some future disaster. The chilling effect on American investment abroad cannot be overstated", cited in "Criminal failure and 'the chilling effect': a short history of the Bhopal criminal prosecutions." *The Free Library*. 2015 Crime and Social Justice Associates, 7 May 2016 <http://www.thefreelibrary.com/Criminal+failure+and+%22the+chilling+effect%22%3a+a+short+history+of+the...-a0396526952>.

<sup>145</sup>GREAR, A. & WESTON, B.H., "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape" *Human Rights Law Review*, vol. 15, 2015, pp. 21-44.

<sup>146</sup>ZAMORA CABOT, F. J., "Acceso de las víctimas a la justicia y conductas en el extranjero: El Tribunal Supremo de los Estados Unidos da otra vuelta de tuerca en el caso OBB Personenverkehr v. Sachs, sobre inmunidad de jurisdicción", *REEI*, n<sup>o</sup> 31 June 2016, available at <http://www.reei.org/index.php/revista/num31/notas/acceso-victimas-justicia-conductas-extranjero-tribunal-supremo-estados-unidos-da-otra-vuelta-tuerca-caso-obb-personenverkehr-v-sachs-sobre-inmunidad-jurisdiccion>.

<sup>147</sup>ESTEVE MOLTÓ, J.E., "La 'gobernanza' y control de las corporaciones transnacionales sobre los valores, objetivos y principios de la Unión Europea y sus ciudadanos", in GARCÍA SÁEZ, J.A. & VAÑÓ

jurist Muralidhar who ended by stating that, “it is indeed a disturbing thought that if another Bhopal were to happen today, we may not respond differently despite the knowledge of earlier failures.”<sup>148</sup>

All told, it is imperative that we end on a positive and optimistic note. On one hand, it is important to continue insisting on working towards a legally binding consensual international treaty for multinational corporations, with which to constructively support Ecuador and South Africa's initiative of 26 June 2014 at the Human Rights Council, establishing the intergovernmental working group on this matter.<sup>149</sup> Meanwhile, however, and outside the debates of this U.N. body, civil society should persist in demanding accountability, and maintain its selfless efforts to consolidate a “jurisprudence of solidarity”, as understood by professor Upendra Baxi:

*“(...) the continuing movement of the Bhopal-violated beckons a new jurisprudence of human solidarity in a runaway globalizing world (...) The contemporary Bhopal movement reiterates India’s original pleading before Judge Keenan that no regime of multinational capital impunity ought to be allowed to go so far as altogether erasing this ‘unimaginable and unforgettable catastrophe’, of ‘pain, suffering, and emotional distress of immense proportion’ resulting in the ‘virtual destruction of [their] entire world’. (...) The message of Bhopal, in the main, thus constructs some new alternate futures beyond the new paradigm of trade-related, market friendly and environmentally hostile human rights.”<sup>150</sup>*

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VICEDO, R., *Educación la mirada: documentales para una enseñanza crítica de los Derechos Humanos*, Tirant Lo Blanch, Valencia, 2015, pp. 89-100.

<sup>148</sup>MURALIDHAR, S., *Unsettling Truths, Untold Tales*, *op. cit.*, p. 68.

<sup>149</sup>For the latest advances, see the Human Rights Council Session 31 on 11 March 2016, when the report presented by the Intergovernmental Working Group was debated, *cfr. Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*, A/HRC/31/50, available at [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50.E.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.50.E.docx)

<sup>150</sup>BAXI, U., "Writing about impunity and environment ...", *op. cit.*, p. 44.