

Writing about impunity and environment: the 'silver jubilee' of the Bhopal catastrophe

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Abstract

Addressing the 'silver jubilee' of the Bhopal catastrophe, this article interrogates a set of serial corporate and juridical failures to bring redress for the profound suffering and violation experienced by those ravaged by the Bhopal event. Presenting the catastrophe as a series of interlinked catastrophes, including the failure to deliver retributive justice for the Bhopal-violated, the author suggests the inadequacy of some existing narrative strategies concerning Bhopal to respond to the 'geographies of injustice' intimated by the lived actuality of human, social and environmental suffering produced by mass disasters. Identifying a politics of naming fully complicit in the discursive diminution of the incomprehensible levels of human and nonhuman sentient suffering caused by the failures of the Union Carbide Corporation (UCC), the author engages 'the practice of suffering thought', locating his discussion in critical notions of biopower and recent Marxian insights. Lamenting the radical failure of response to the fundamental violation enacted (and now globally symbolized) by Bhopal and the corporate impunity of the UCC, the author celebrates the rise of new social movement solidarity in the face of Bhopal – global subaltern movement affinities now inaugurating a 'new jurisprudence of human solidarity' and alternate possible futures lying beyond the contemporary global corporate colonization of human rights discourse.

Keywords: Bhopal, Bhopal-violated, impunity, environment, juridicalization, biopower/biopolitics, human rights, injustice and critical solidarities

1 Prefatory remarks

Writing about the Bhopal catastrophe – a massive lethal release of 47 tonnes of methyl isocyanate (MIC) on 3 December 1984, killing more than 10,000 people, imposing various degrees of suffering and disability on nearly a quarter of a million human beings and creating extensive environmental damage – is a necessary but difficult enterprise. If understanding the causes and consequences of the catastrophe remains critical for envisioning a better future for the integrity of the environment and of human rights, this may not proceed undialectically – merely accentuating some new histories of impunity for multinational corporate conduct without any serious regard for the active agency of the survivors, which also provides a complex register of the movement toward emancipatory politics. Further, *writing* about the Bhopal catastrophe, or any mass disaster, becomes *violence* when insensitive to the continuing suffering of affected peoples and sentient beings and entities in nature. Ways of avoiding epistemic violence are not readily available, on the one hand, in rational presentations of the catastrophe – which often register an overdrive of practical reason (according to which canon only the ‘rational’ constitutes the ‘real’) on the one hand nor, on the other hand, in the dramaturgy inherent to articulatory practices of sentimental reason. Indeed, the on-the-one-hand/on-the-other-hand binaries of thought all too often privilege practices of epistemic violence, as the theory, practice and movement in the spheres of human rights and environment so constantly reveal. *Writing Bhopal*, even on the eve of its silver jubilee, thus invites practices of suffering thought – a poignant narrative performance seeking to grasp the cascading orders of human rightlessness and social suffering –

continually imposed by the rational real as it exists and continues to proliferate – while according full dignity to the disarticulated voices of sentient environmental suffering. In the Bhopal saga, the latter features merely as a figuration of environmental pollution and toxic degradation; the death and suffering of nonhuman sentient beings continues to emerge in legal/juridical languages as claims over ‘damage’ to ‘agricultural livestock’. Such discursive habitus or dispositifs concerning mass disasters contain little or no conversation with the theory and movement for ‘animal’ rights or any deep ecology-type narratives of suffering in nature. In this particular respect, this present contribution in itself offers only a partial vignette of the Bhopal catastrophe. The state of art concerning mass disasters/catastrophes in general – and Bhopal in particular – does not foreground these concerns, and I fully acknowledge that my preferred way of speaking about the ‘Bhopal-violated’, avoiding the conventional language of ‘victims’, only partially redeems this not so benign neglect of wide-ranging environmental concerns. *Faute de mieux*, a brief outline of strategies of understanding must here suffice, and I may here offer only a somewhat random description.

First, increasingly, the birth of a multidisciplinary field named as disaster management now provides frameworks for understanding Bhopal. Grasping the prehistories (or the causal itineraries) of the catastrophe remains, of course, important for the tasks of disaster management and for future prevention – as far as is humanly possible – but the primary focus here remains on disaster preparedness, that is, on coordination of, and control over, the situation of a particular disaster event and directed towards the expeditious and effective management rehabilitation and relief of affected populations and the marginal amelioration of environmental harm. All disasters – whether ‘natural’,

‘man-made’ (a term fortunately impossible to feminize!) or ‘political’ – are accorded equal treatment in disaster management discourse. This discursive equality has the merit of situating an understanding of all disasters across human historical time.¹ However, historical and comparative disaster research fails to accord dignity of discourse to larger complex events of mass disaster such as the practices of colonization, the histories of the Cold War – or wars generally – and episodes/events of genocidal political formations – in short, to the narratives of political cruelty and mass atrocity and narratives of the destruction of natural resources and ecological heritage.² In its contemporary moment, especially in the post 9/11 United States, disaster research remains coequally directed towards efficient management of catastrophic terror attacks and natural catastrophes. In this genre, notable advances are made in the framing categories, especially those that distinguish ‘accidents’ from ‘disasters’ and the latter from ‘catastrophes’.³ The multifarious notion of ‘disaster-preparedness’ remains especially crucial, significantly networking federal and state government agencies,⁴ although conjointly with the labours of various social action groups, the mass media and practices of social philanthropy. Furthermore, these otherwise inclusive notions of disaster and management/governance regimes do not embrace structurally imposed deprivation and injustices such as impoverishment and violent practices of social exclusion which have the same, if not a more pervasive, blighting impact on human and environmental conditions than the discourse of disaster management may ever *fully* convey. Obviously, then, a certain *politics of naming* remains at work. I may not say more than to point out that even the various global policy enunciations directed towards the alleviation of the conditions of mass poverty (such as the UN Millennium Developmental Goals declarations and

programmes of action) and, the current wave of literature insisting that impoverishment constitutes the serial and cumulative violation of contemporary human rights norms, standards and values while offering different narrative pathways than those available in disaster-preparedness and management research still remain inadequate from the perspectives of the suffering peoples and the communities of resistance.

The *second* approach engages some global macrosociological narratives, especially exemplified by – and since – the emergence of what Ulrich Beck famously names as a ‘global risk society’⁵ – the activities, agencies and enterprises that produce, distribute and manage risks. In this formation, there occur not merely ecological contentions and conflicts assuming ‘the form of doctrinal struggles ... towards a proper road to modernity’⁶ as well as ‘definitional struggles over the scale, degree and urgency of risks’ but also, engagements with ways of ‘opening up of the political’ towards some kind of ‘democratization of technoeconomic development’.⁷ Notable as this perspective (variously problematizing conventional modes of risk-analysis and management) and prognosis (‘reflexive modernization’ somehow coping with the specifically political resolution of dilemmas posed by relatively autonomous technoscientific development and rights-oriented governance) remains, it also carries, at the same time, a tendency to renormalize risk production and distribution, conveyed by Beck’s famous aphorism: we all live in an ‘age of side effects’.⁸

Distribution is, as we learn – or ought to relearn – from ‘Uncle’ Marx, not an epiphenomenon but rather integral to (and decreed by) the mode of production. The imageries of the side-effects remain, though perhaps not entirely, the actual states/estates of human and social suffering produced by mass disasters – what I name as ‘geographies

of injustice'.⁹ These paradigmatically vary across global North and global South – and indeed, across peoples who constitute the South in the North and the North in the South. The saga of Bhopal would have thus been very different had the initial location of the plant (strongly favoured by the Union Carbide Corporation [UCC]) been in South Mumbai rather than its terminal location in the city of Bhopal, the capital of Madhya Pradesh (MP)! Or, to illustrate this in a different way (and as has been often noted in the Bhopal discourse), had the wind direction on that fateful day engulfed not the areas of the urban impoverished but the super-citizenry habitats of the urban affluent!

Further, even in terms of Michel Burawoy's evocative metaphor, while modern risk society entails forms of 'politics of production' as well as 'production of politics',¹⁰ both these forms of politics often consign to irrelevance the catastrophic sufferings of people and the devastation of the environment. Massive denials of the right to be human and to continue to remain human occupy but an obscure space in this narrative genre. What matters from the perspectives of global justice, now constitutively informed by concerns with the logics, paralogics and languages of contemporary human rights, is not so much the question of the inherent and inevitable production of risks and hazards in the name of social and economic development but rather the problem of the uneven distribution of risk exposure and embodied/lived experience. While it is true to say that the global risk society creates catastrophic events that respect *no* national frontiers, ideological divides or concerns for national sovereignty (after all, the Bhopal catastrophe occurred in the space-time of 18 months that also witnessed Chernobyl and the Sandoz chemical factory fire at Basle), all the available evidences suggest that impoverished populations everywhere bear a disproportionate burden of human harm and hurt and

remain most adversely affected by environmental damage and deterioration arising out of mass industrial disasters.¹¹ Both for Third-World humanity as a whole on a global level and for peoples within nations subjected to combined and uneven practices of ‘development’, the risk society emerges as a kind of political fate, best described by Kwame Nkrumah in the imagery of neocolonialism as ‘*power without responsibility and exploitation without redress*’.¹²

A *third* and related narrative strategy speaks, in the main, to what has been termed (in some heavy Foucauldian/post-Foucauldian languages) as *environmental/ecological governmentality*.¹³ In a sense, this refers to ‘technopolitics’, understood not just in the sense of the mediation of political power by technological development but more specifically as ‘rule by experts’.¹⁴ Further theoretical contexts are provided via some specific notions of biopower, especially in new constellations of the technoscientific prowess of global capital.¹⁵ In another narrative vein, the question here concerns the ‘production of nature’ now emerging from critical developments in Marxian approaches to human and social geography.¹⁶ This essay marks a small beginning towards situating Bhopal within these perspectives.

A *fourth* narrative strategy relegates the archetypal Bhopal catastrophe to some new ways of inventing new approaches to ‘business ethics’, in themselves often constituting a further set of aggravating and hazardous neologisms – at least from the perspectives of suffering humanity. Several generations of the languages of corporate social responsibility still remain premised on the view that human rights responsibilities do not directly or *even* indirectly attach to the *state-like* but still *non-state* multinational corporate actors.¹⁷ Space constraints forbid a detailed analysis of this narrative strategy,

save for saying that the Bhopal catastrophe marks a savage amniocentesis of any endeavour aimed at relating contemporary human rights discourse to multinational corporate governance conduct.¹⁸

A *fifth* narrative strategy directs close attention to pedagogies arising from mass disasters and catastrophes. In sum, as concerns the Bhopal catastrophe, this narrative move, far from scrupulously attending to the wider general histories of ‘toxic capitalism’,¹⁹ proceeds to ‘learning lessons’ from the specific instance of each and every mass disaster. The Bhopal catastrophe, in particular, spawns yet more specific narratives of causal itineraries of the histories of contemporary ultrahazardous chemical industries.

While a post-Bhopal world promises some superior understanding of the importance of industry-‘wise’ specific aetiologies of mass disasters and catastrophes and also counters this ‘trend’ in some future histories for the development of ‘best industry standards’ – thus thwarting the further potential of future Bhopals²⁰ – the probability of the risk management of future genetic/biotech Bhopals also remains hazardously uncertain. By this, I refer (and of course here, necessarily, without voluminous citations to relevant literature) to an entire array of the migration of biohazards under the auspices of Northern strategic biotech industries to some Third-World locations if only to fully avoid the regimes of any advanced regulation of such risks established in the United States or the European Union. Unlike the manifest and manifold hazards systemically produced by the global chemical industry, the globally strategic biotech industries, as is now well known, pose a wave of socially and scientifically invisible biohazards replete with further long-term risks to humans *in* – and even *as* environment – no matter how one

may privilege the languages of ‘sustainable development’ (even in this era of febrile talk of global warming).

Finally, and without being exhaustive, we encounter specific interfaces between technoscience and new social movements – including human rights and ‘surface’ and ‘deep’ ecology movements.²¹ I have pondered elsewhere²² the tensions between ‘new’ and ‘old’ social movements and between new social movements and human rights movements in terms both of politics of *knowing* and *being*. The Bhopal catastrophe marks the rise of new social movements in the light of the fact that the otherwise powerful trade union movements necessarily had to place industrial safety struggles over employment creation and sustenance. I may not here elaborate this complex remark concerning the relative decline of the historic roles of labour movements (in India and elsewhere) save for saying that Bhopal-violated humanity furnish some new ‘histories’ of militant subjectivity disanchored from trade union militancy and leading towards an extraordinary congregation of global subaltern movement affinities and social solidarities across borders, comprising social networks of biomedical, juridical, and ethical social action communities²³ fully deferential to the perspectives of the movements-on-the-ground. This movement fully places in view the Bhopal catastrophe, not as a single event but as a series of catastrophic events.

To this narrative strategy, I must of course add the dimension of the theory, practice and movement that legalizes, as well as juridicalizes, mass disasters or catastrophes. 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 injuries they suffer remain indeterminate.²⁴

‘Juridicalization’, in my lexicon, signifies ways in which the communities of suffering human beings and peoples in resistance reinvent responsive law and jurisprudence towards a more emancipatory and dialogical openness of adjudicatory and legislative power. The relationship between ‘legalization’ and ‘juridicalization’ remains complex as well as contradictory; the hard-won gains of the latter often stand cancelled by the former. Even so, this contribution highlights the ways in which the Bhopal-violated humanity (and their next of kin – the fluctuating consortia of human rights and environmental activists) have sought to achieve the juridicalization of catastrophe, even when profoundly haunted by some terminal forms of legalization.

2 Is Bhopal catastrophe a ‘political event’? – a necessary digression

Writing in the shadow of now intergenerational sufferings of the Bhopal-violated humanity, it remains necessary to attend to the fact that ‘it’ continues to articulate an uncanny production of the Will to Truth pitted against the Nietzschean Will to Power of the forces, agents and managers of global capital – including the Indian state managers. The Bhopal-violated have continually exposed the hollowness of the reiterated claims of the immunity and impunity of the UCC and its successor-in-interest Dow Chemicals.²⁵ They manifest an extraordinary series of performative/agentative acts, simply incredible in the face of their unnameable sufferings, via conflicted yet collective acts authoring (as I note fully later) the subsequent juridical itineraries of Bhopal litigation both in the United States and India seeking to ‘discipline and punish’ the UCC.

Yet, a conceptual limit, or threshold difficulty, must now be fully faced in terms of the political ‘eventness’ of the Bhopal catastrophe. Leaving aside the poignant fact that the discourse of the contemporary club of progressive A-to-Z (Agamben to Zizek)

thinkers continue to write as if the Bhopal catastrophe *never* happened, their theoretical constructions of what may count as a ‘political’ event almost compel the addressal of the Bhopal catastrophe as a political *nonevent*. Thus, writing Bhopal must ethically counter this erasure of the event from the contemporary discourse of human rights, justice and people’s movement – a task that may not render altogether inapt an extension to Bhopal-violated humanity of Alain Badiou’s remark – that theirs is the authentic resolve to become ‘something other than a victim, other than a being-for-death, and thus *something other than a mortal being*’.²⁶ The Bhopal-violated fully testify to Badiou’s observation that ‘if the “rights of man” exist surely they are not rights of life against death, or rights of survival against misery’ but rather ‘they are the rights of the Immortal, affirmed in their own right, or the rights of the Infinite exercised over the contingency of suffering and death’.²⁷ Further, this movement of suffering peoples and communities in resistance carries a larger narrative message, recrafting the discourse of environment and human rights, lifting us beyond the languages of victimage/victimhood and beckoning/reckoning towards a ‘political situation, one that calls for a political thought-practice, one that is peopled by its own authentic actors ...’.²⁸ Indeed, the ‘valiant victims’ of Bhopal²⁹ remain ‘faithful’ to the event of the catastrophe, treating it ‘*right to the limit of the possible*’.³⁰ Put another way, they ‘draw from this situation, to the greatest possible extent, the affirmative humanity it contains ... to try to be the immortal of the situation’.³¹

What constitutes a political event for Badiou remains a contested terrain,³² and the Bhopal catastrophe and attendant struggles for rights and justice may still not qualify as a ‘political event’, if only because these do not compel ‘the subject to invent a new way of

being or acting in the situation'.³³ Despite this, I prefer to read (with profound apologies to Badiou) the Bhopal 'eventness' as marking the birth of new subjectivities questioning modes of primitive accumulation in late capitalism, reading the event as

a kind of epistemic free radical that can migrate through many strata, the analysis of which reveals to us a sphere of the absolutely possible, of hitherto suppressed possibilities, previously undisclosed openings, and unimagined, unrealized unsuspected futures. While this is the sphere of hopes and dreams, it is no less the sphere of monsters and nightmares, since nothing guarantees that the unsuspected or undreamt of will not be unexpectedly terrible.³⁴

The reference to 'free radical' remains deeply pertinent; to be sure the runaway reaction of the MIC remained as such for their global corporate producers. These now chafe at the 'epistemic free radicals' in turn produced by the protest of the Bhopal-violated humanity. The globally-constituted corporate world regards the dreams of justice of the Bhopal-violated as the 'sphere of monsters and nightmares.' Yet, it is in this *not* entirely 'postmetaphysical' footloose and fancy-free narrative move that I now proceed to silhouette some histories of the juridicalization of the eventness of the Bhopal catastrophe. I proceed to do so from a deeply anguished activist and engaged perspective, yet not (hopefully and honestly) surrendering in any way the sense of narrative complexity and contradiction.

3 A brief history of the first Bhopal catastrophe

The first catastrophe occurred on 3 December 1984 and remains attributable to some key operational decisions of the UCC which controlled its Indian subsidiary, Union Carbide India Limited (UCIL). The pre-trial discovery documents established several incontrovertible truths. The first phase of Bhopal litigation before Judge Keenan fully confirmed the fact that UCC failed to follow the best industrial practice standards in the manufacture and storage of large quantities of MIC for the production of two brand insecticides/pesticides in a factory located in a densely populated area of the capital city of the state of MP. Second, it was also fully established that UCC also preferred systematically to ignore early warning signals of the potential of massive toxic release, specially demonstrated by the 1982 gas ‘leak’ that killed two workers, and the subsequent in-house safety audit report that stressed the urgency of the need for adequate safety systems at the Bhopal factory. UCC failed to take measures to prevent the subsequent lethal release by replicating the state of art digitalized safety systems installed at its own plant in West Virginia, which produced and stored minuscule amounts of MIC compared with the Bhopal plant. Third, considerations of ‘efficient’ corporate governance led to the closure of the refrigeration plant – essential to the prevention of a runaway chemical reaction. *Fourth*, in the first weeks of the event, the UCC and the UCIL media operations moved swiftly to minimize the risk-exposure, denying that what was released was MIC and insisting that it was merely harmless phosgene – and also providing misinformation concerning remedial measures, thus further aggravating the plight of the suffering.³⁵

For those who *still continue* to take the languages of corporate social responsibility seriously, it remains important to note that UCC has never fully explained why it needed to produce and store in such large quantities a known lethal chemical

substance at the Bhopal factory; nor has it placed in the public domain – despite insistent activist demand³⁶ – the epidemiological and toxicological information concerning MIC over which UCC possesses a global knowledge monopoly. It is perhaps no overstatement to say, at least from the standpoint of still *unnameable* and ongoing future human and environmental harms, that this toxic immunity/impunity of continuing nondisclosure constitutes a full indictment of the limitations of the elements currently constituting ‘crimes against humanity’.

The Bhopal saga provides a cruel testimony to the fact that as concerns the entirely disposable peoples and environments in the Third World, there is as yet simply *no* functional equivalent of the right to information, or governance transparency, worth mentioning – even in the otherwise proliferating contexts of so-called business ethics or global corporate ‘governance’. Thus, in respect of the world’s ‘largest peacetime industrial disaster’ as Judge Keenan was to describe it in the first phase of Bhopal litigation, neither the sufferings nor the human rights of the Bhopal-violated have been taken seriously.

Yet, a singular focus on these corporate governance misdeeds and mayhems must be placed within the larger context of the ideology of developmentalism, which led the Union of India (UOI) to invite UCC to establish such ultrahazardous manufacture at Bhopal in the first place. This furnishes a complex story with several subplots, a story not lending itself to the summary analysis which has, however, perforce to suffice here. An immediate motif stands furnished by India’s quest for self-sufficiency in food-grain production animated by import-substitution strategies. A larger motif is provided by the Indian leadership of ‘nonaligned nations’ complex mediation of Cold War global politics

via its own distinctive genre of planned economy, privileging self-reliant agrarian development entailing a lesser dependence on American overseas aid programmes. More at centre-stage is, of course, the literally fantastic reproduction of nature mirrored in early breakthroughs of R-DNA plant technologies which ushered in high-yielding, multicrop seed and plant varieties. This first ‘Green Revolution’ occurred worldwide, be it recalled, before the advent of global environmental/deep ecology movements, providing unrivalled governmental opportunities for what we today grasp as biopower and biopolitical governance.

The political ecology of the first Bhopal catastrophe still awaits the emergence of new Foucauldian labours deciphering Third-World biopolitical governance, perhaps best summated by a gifted phrase of Vandana Shiva: the first ‘Green Revolution’ did not merely foster plant monocultures but also further propagated the ‘monocultures of mind’.³⁷ However, recourse to a wider contextual understanding remains far from exculpatory of the immediate contexts of the secular sins of commission and omission by UCC and its normative cohorts. The tragedy of the first Bhopal catastrophe lies precisely – at least from the perspectives of the Bhopal-violated – at the not-too-distant doorstep of the UCC, although the violated also variously regard the UOI and MP governments as completely complicit in their still unending agony.

Importantly, from the first anniversary of the Bhopal catastrophe until today, demands for retributive justice are combined with those of distributive justice. The mammoth outcry – ‘*Union Carbide Ko Phansi Do*’ – ‘*Hang the UCC*’ – still resonates and conveys a crucial message: restorative justice in situations of the catastrophic imposition of human and social suffering remains ethically inadequate outside retributive

justice. For the entire span of about 25 years now, the multifarious ‘victim’ groups, each with their own distinctive agendum for relief and rehabilitation, still speak with one voice about the extradition of the ex-CEO of UCC (Warren Anderson), previously declared by the Bhopal court as an absconder or fugitive from justice. Though momentarily arrested and detained, Anderson still continues to be a ‘fugitive felon’, thanks to lackadaisical pursuit of extradition proceedings by the UOI, in part abetted by the disinclination of the US State and Justice Departments. The issue, of course, is not about a particular named individual but rather concerns modes of extradition of the ways of reckless corporate governance; the Bhopal-violated engaged in this hot pursuit represent a more finely tuned sense, compared with the nascent theorists, of global reparative justice. If, as happened in the course of the Nuremburg Tribunal, a few German corporations were held guilty of connivance with genocide, there is little reason or justification (outside the *realpolitik* of the United States) for continued impunity for multinational enterprises that now enact crimes against humanity – already made analogously punishable by the Rome Treaty establishing the International Criminal Court.³⁸

4 Juridical innovations: promises, perplexities and perils

4.1 The quest for justice

The quest for justice for the violated peoples was not an easy one by any means, and divergent Bhopal-based social action groups³⁹ offered different approaches concerning what should be done. Justice assumed wider meaning than justice according to the law – contained in the unanimous demand for retributive justice and the varying alternative legal strategies for the pursuit of effective compensation and rehabilitation. Healthcare justice and economic justice remained the central preoccupation of all the Bhopal activist

groups. Indeed, legal strategies were always viewed by ‘victim’ groups from the wider perspectives of healthcare and economic justice. The languages of justice, rather than of human rights, were thus always privileged. In all my association with the Bhopal-violated activists until now, it was never in doubt that rights-languages were not, for them, important in themselves but only important as a means to the ends of justice. And ‘justice’ for the Bhopal activists was a matter of struggle, of people’s impassioned politics and of direct action fully and constantly geared towards naming and shaming the producers of social indifference, including state managers and agents and their normative cohorts – comprising the commentariat – ‘learned’ professions, public intellectuals and the 24/7 mass media pundits. The Bhopal-violated humanity’s movement for justice furnishes a rare instance of a quest for human and ecological justice (at least in India since her independence) of the formation of militant justice-consistencies, or those now named – in some postmodern political phrase-regimes – as ‘counterpublics’.

One way, surely, to narrate this agonizing movement for justice remains best provided (to evoke a profound notion from the philosopher Maurice Merleau-Ponty) by the vivid discourse of justice in/of the flesh – the experience of lived individual bodies, and not of any abstract or species bodies.⁴⁰ And in many senses (which I may not elaborate here), the human right to health ‘talk’, while important, does not quite measure up to the imperatives of justice in/of the flesh.

The imperatives, of course, are rather easily stated, in practical terms of pressing problems in the domain of healthcare justice (where they still sadly continue to lie). Not only were the available healthcare facilities in government hospitals, in terms of expert diagnosis and treatment, woefully limited, but the lack of important information

concerning the toxicological impact of MIC prevented effective care management, even by dedicated and radical health activist groups in Bhopal, Delhi and elsewhere. The Indian Supreme Court's judicial arithmetic classification of compensable injuries into various categories (as late as 4 May 1989) relegated as many as 150,000 out of more than 200,000 'victims' to only bearing 'minor injuries' and restricted the category of severe injury to a cruelly ludicrous figure of 2000 people!⁴¹ This outrageous pronouncement bears no relation to the manifest existential suffering of the survivors or to the record in the archives of as many as 15,000 additional deaths between 1985 and 2003.⁴² Apart from the immediate adverse health impacts such as pulmonary malfunctioning and deterioration, corneal opacity and posttraumatic stress syndrome – all of which had direct disruptive effects on the livelihood opportunities of the affected peoples – there exist very few studies of the median and long-term effects of the catastrophe (such as immune system damage, neurological and neurovascular harm, cardiovascular damage, gynaecological impairment, carcinogenic impacts and psychic ill-effects⁴³). The International Medical Commission Bhopal (IMCB) identified these further effects in a 1994 study.⁴⁴ I mention all this briefly here to expose the fact that the pioneering juridical innovations (analysed later) were never fully adequate to the dimension of healthcare justice, partially crystallized by the human right to health.

It remains all the more important to note that the issues of soil and water pollution have been effectively raised recently before American courts (further reinforced thanks again to a Bhopal-violated initiative that now energizes some active members of the US Congress). Indeed, the latter now concede that these issues were not finally settled by any judicial proceeding in India, and further, that the UCC, and even its successor-in-interest

the Dow Chemicals Corporation, may still be fully legally liable and ethically accountable.⁴⁵

The leading voices at Bhopal that initially opposed judicial recourse as an impediment to struggle for healthcare justice have, unfortunately, been fully proved right and at a colossal cost of human and social suffering. Much the same may be said concerning the human rights to life and means of livelihood; as despite our sincere efforts, no significant micro-regional employment opportunities/strategies consistent with decimated bodies were ever fully planned by the state and national governments.⁴⁶

4.2 Perplexities surrounding the choice of legal action

Among those who favoured some kinds of legal/judicial strategies – strategies that I was especially privileged to coordinate in the wake of the catastrophe – the manifest concerns led to no clear agreement on what should be done. Some activist groups preferred militant legal action against the UCC; some others were in favour of holding the Indian state fully legally liable and morally responsible; some others preferred a sustained social militant action programme of direct action against a state held hostage by global capital. In the event, a menu of strategies evolved: support for pursuing and prosecuting UCC by whatever legal means possible; devising strategies of stringent legal action holding the national and state governments fully legally liable and the pursuit of militant direct action strategies in aid of both these courses of action. Yet, as I know as a self-elected servant of these diverse groups, some incommensurable ideological differences also persisted. I might add that these remain distant from the forbidding prose of the high priests of the critical legal studies movement! I have involuntarily learnt a great deal, and more vividly – in particular about the truths of popular distrust of state law in general and the

ambivalences of counter-hegemonic movements of suffering peoples. Further, there was a good deal of reflection (though obviously not thus expressed) concerning ways in which the imperial techniques of emergent green governmentality may, after all, construct a future regime of law reform and environmental governance in a parasitical relation to the actual sufferings of the Bhopal-violated. The catastrophe did indeed act as a 'risk regulation catalyst' resulting in a wide range of legal and administrative reform measures.⁴⁷ However, this regulatory boom did little to ameliorate the plight of the Bhopal-violated.

Moreover, there was precious concern for the autonomy of Bhopal activism. Indeed, initially this concern went so far as to enable the more radical elements to indict some others wishing to pursue legal strategies as collaborators with the Indian state and even a 'stooges' of UCC! This tension was painfully evident on the very first anniversary of Bhopal and required difficult negotiation throughout the process of devising a common framework for legal action. This story must await another day, save for saying here that the creative jurisprudence of suffering peoples and communities in resistance emerges via a constant and often agonizing reflexive vigilance.

In the event, there was broad understanding that pursuing UCC entailed the creative cooptation of the contingent Indian forms of governmentality. This understanding, endlessly ridden with perplexities, provided limited activist endorsement of two specific strategies, each one of which, in turn, constituted a moment of promise as well as peril. Briefly put, all this contained a 'temporary suspension of disbelief' (to evoke poet William Coleridge's expression) in the possibility of a benign state.

The first constitutive element of the promise of justice for Bhopal-violated was the creative adaptation of the doctrine of *parens patriae* by the sovereign Indian democratic state. The Bhopal Act 1985 (supported, and mainly authored, by some Bhopal-violated peoples and some activists, including myself) by which the Indian Parliament authorized the UOI to pursue mass disaster litigation as a victim surrogate before US judicial fora, marks the first step in the proverbial journey of a thousand miles towards a daring articulation of Indian environmental governmentality.

In a sense, perhaps, this remained entirely reducible to a technical rather than any profoundly ethical state/law innovation. Technical, because it aimed first at establishing jurisdiction over the UCC in US judicial fora, since the UCC otherwise remained entirely outside Indian jurisdictional borders and boundaries; second, it was aimed at the short-changing of the Bhopal-violated peoples by the ‘Kings of Torts’ – the swarm of US contingency fee lawyers, who had initiated as many as 144 legal proceedings in the US courts for varying amounts of damages⁴⁸ – and thereby to secure complete justice for them. Even so, and in howsoever exigent and normatively messy and untidy modes, India thus emerged, inaugurally, as a postcolonial sovereign plaintiff in hot pursuit of a mighty multinational corporation. Incidentally, the first two objectives were largely fulfilled in the proceedings before Judge Keenan; even when the United States was not held to be a convenient forum for the trial of the suit,⁴⁹ Judge Keenan obligated UCC to submit to Indian jurisdiction and to accord full discovery of all relevant documentation.

More crucial, though, was the foundational principle inaugurally enunciated as the principle of absolute multinational enterprise liability. The Indian complaint before Judge Keenan maintained as follows:

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

Defendant multinational Union Carbide breached this *primary, absolute, and non-delegable duty* through its undertaking of an ultrahazardous and inherently dangerous activity posing *unacceptable risks* at its plant in Bhopal, and the resultant escape of lethal MIC from that plant. Defendant Union Carbide *further failed to provide that its Bhopal plant met the highest standards of safety and failed to inform the Union of India and its peoples of the dangers therein*. Defendant Union Carbide is primarily and absolutely liable for any and all damages caused or contributed to by the escape of lethal MIC from its Bhopal plant.⁵⁰

It needs stressing that these manifold enunciative performatives go above and beyond the extant global law and jurisprudence. Conventional approaches suggest that tort law remedies are private, not public, law remedies;⁵¹ the Bhopal juristic innovations transcend these limits, relating tort law to human rights and environmental violations. Furthermore, in accentuating a *network* conception of the integrity of multinational

corporate governance, the innovation adds value to a sustained critique in the name of global justice, fully confronting the awesome consolidation of the global risk society and its ‘principled’ regimes of immunity and impunity for predatory formations of multinational enterprises and their related business entities.

Further, this daring enunciation of the principle of absolute multinational enterprise liability was soon extended by the Supreme Court to hazardous industry, manufacture or process carried out by Indian corporations and business entities and, even during the Bhopal case interim proceedings, further held as binding on Indian courts in a judgment of MP High Court awarding interim 250 million US dollars compensation for Bhopal-violated.⁵² The Bhopal case stands ‘settled’ in an appeal from this very latter affirmation; UCC, having already stalled various Indian judicial proceedings, now needs to act, not only on its behalf but also in a fiduciary capacity/role as a vessel and vehicle of global multinational capital.

UCC accomplishes this role rather remarkably in comparison to the performatives of the Indian State’s *parens patriae* obligations. First, UCC denies the very existence of any networked conception of a monolithic global corporation as any real (or actually existing) or any imaginable entity. Second, UCC redraws the corporate veil, resisting its prizing open in the name both of good corporate governance and human rights. Third, UCC contests the Indian enunciation of the principle of absolute multinational enterprise liability in various ways, though never fully explicitly, as its forensic strategies are directed in the main towards the avoidance of any determination concerning its liability.

Granting all these awesome forensic strategies, reading through several submissions made before the US and Indian courts makes it abundantly clear that UCC

contested the principle on the ground that it violates the basic and time-tested principles of civil liability for injurious acts – the doctrines of negligence or fault liability which crystallize justice and fair play in the realm of tort liability – even to the extent of problematizing articulations of legislative standards of strict/no-fault liability. Manifestly then it remained easy for UCC to claim that any assertion of absolute liability that allows *no* scope for defence is simply unjust.⁵³ Further, UCC severally claimed that the Indian enunciation of absolute multinational enterprise liability conflates the identity and responsibility of both the ‘parent’ and the ‘subsidiary’ company.⁵⁴ UCC maintained vigorously throughout that if any entity was responsible for the relevant acts or omissions, it was the UCIL, its Indian subsidiary. By contrast, the UOI interrogated the justice quality of the conventional tenets of tort and corporation law on a higher platform – that of the standards of protection and promotion of human rights and environmental integrity applicable for owners and operators of ultrahazardous manufacture, processes or applications. The quantification of overall actual damages for human and environmental harm, pegged at 3 billion US dollars including claims for punitive damages, remained critical as well as triggering the future of environmentally sensitive and human-rights friendly corporate governance.

5 The second Bhopal catastrophe

The betrayal of the promise of the new principle constitutes the second Bhopal catastrophe, in which the Indian state, in complete amnesia concerning its claimed *parens patriae* role, proceeded to persuade the Indian Supreme Court in chamber (nonpublic) proceedings towards the settlement of the dispute for a meagre amount of 470 million US dollars. The brief judicial settlement order, animated by a rhetorical concern for the

urgent need to respond to the sufferings of the Bhopal victims, constitutes a judicial scandal for a variety of reasons. First, the settlement orders were passed in gross violation of the Court's finely-honed jurisprudence of natural justice because the Bhopal-violated petitioners were not given any opportunity of hearing in the proceedings. In a subsequent review petition, the Court itself acknowledged this foundational error, only to treat that proceeding as an instance of postdecisional hearing which in the end sustained the settlement amount! Further, the original settlement orders went so far as to impose obligations upon the UOI to defend the UCC in India and worldwide in any civil action arising from the first catastrophe and to confer a blanket immunity on all criminal actions against the UCC in India, subsequently and meagrely lifted in the review petition. I ponder, speculatively though, in the concluding section, the practice of some sentimental reason that guided the Court in proceeding towards the settlement (out of an ostensible regard for 'justice' to the victims) which in turn governed a somewhat unfeeling juridical aftermath.

Aggravating all this, the Supreme Court decision in the review petition proceeded to quantify damage awards for deaths, estimated at a conservative figure of 2000 fatalities, and arbitrarily to classify the toxic and epidemiological injuries into 'minor' and 'severe' impairments, further fixing the floor as well as the ceiling for compensation and rehabilitation.⁵⁵ The Bhopal-violated were thus judicially and juridically short-changed, offering an instance not noted by the A-to-Z thinkers, of the constitution of *adjudicatory biopower/biopolitics*.

The Supreme Court of India proceeded to justify the settlement via the rhetoric of the dire need to provide some relief to 'victims' but in the process also proceeded to

recompose their surviving bodies in terms of classification of compensable injuries into categories of death, permanent total disability, temporary total or partial disability, injuries of utmost severity, minor injuries and loss of livestock, and by the establishment of ‘specialized medical centres’ for treatment and therapy.⁵⁶ Adjudicatory biopower/biopolitics thus creates and circulates ‘politicized bodies’ of collective subjects of mass industrial disasters.⁵⁷ I suggest that once we regard relatively autonomous adjudicative deliberation as a site for production of the *political* (that is, production of conflicted conceptions of the truths of human rights and justice), juridical biopower emerges as an integral aspect of diverse activist constructions of, and for, the narratives of biopolitics/biosovereignty.

6 The third Bhopal catastrophe

Because of space constraints, and because also there is nothing further that may be said about India’s callous governance response to the Bhopal-violated, I here provide a summary statement of what must be described as the still continuing third Bhopal catastrophe, in which the inaugural promise of the daring juristic innovations emerges as a full order of perils for the Bhopal-violated. The Supreme Court of India’s chaotic ‘nomos’ justifying the unjustifiable settlement orders⁵⁸ constitutes a story in which the ‘victims’ stand ‘revictimized’ all over again (in the words of victims) and forever.

That ‘justification’ of the settlement amount was based, as the Court said, on certain ‘*assumptions of truth*’.⁵⁹ What remained decisive was the judicial view of uncommitted/impartial justice pitted against ‘different opinions of the interpretation of laws or on questions of policy or even on what may be considered wise or unwise’,

because (as the Court said) when ‘one speaks of justice and truth, these words mean the same thing to all men whose judgement is uncommitted’.⁶⁰

It did not judicially matter, after all, that the Supreme Court’s settlement orders were preceded by shoddy and inadequate record-keeping of deaths and serious injuries⁶¹ and followed by the multifarious, even nefarious ‘bureaucratization of justice’.⁶² Nor did it matter, furthermore, that the tribunals established for the disbursement of compensation made impossible demands for evidence of ‘genuine’ claims, as opposed to ‘fake’ ones; for a while, this even required full evidence of death due to the MIC exposure – paperwork entailing evidence of death certificates and of participants at the funerals! Subsequently, the tribunals sought strict proof of the nature and extent of the injury from the survivors! This resulted in frequent activist demands for Supreme Court invigilation of the administration of disbursement relief, but even this window of opportunity was finally and cruelly shut down by a Bhopal-weary Court in 2007⁶³ in an untoward fidelity to a judicial conception of justice that finally rings down the curtain on any just and humane treatment and regard for the Bhopal-violated.

7 Concluding the inconcludable?

In a sense, while the stories of juridicalization of the Bhopal catastrophe have for the most part ended, the saga of suffering still remains, unfolding toxic continuities across now the second generation of the Bhopal-violated. Yet, the spirit of resistance and struggle that accompanies their suffering even in a vastly changed world constituted by the globalizing postmodern condition lives on, despite the second and third Bhopal catastrophes, which signify what I have named as the *structural adjustment* of Indian judicial activism – an integral aspect of now rampant judicial and juridical globalization.

In the main, and in terms of resistance to the juridicalization of their sufferings, the Bhopal movement still continues to struggle to unpack the settlement orders judicially granting extraordinary impunity to UCC. These, incidentally, still remain altogether inexplicable outside my working hypothesis that the judicial abdication occurred out of a 'fine' regard for the self-image of the institutional integrity of the Indian Supreme Court. By this, I refer to a possible state of anxiety generated by the otherwise gifted leaders of the Indian Bar, suborned by UCC, who may have fully exploited (in chamber hearings) the apprehension that any final decision of the Court might be impugned and set aside by an inferior US Court on the ground that the final Indian judgment failed to accord UCC the dignity of due process of law. Judge Keenan had previously laid the foundations for this apprehension concerning the subjection to a US 'due process' requirement any Indian final judgment by heaping lavish praise on the Indian judiciary, saying: 'The Union of India is a world power in 1986, and its courts have a proven capacity to mete out fair and equal justice' and that, accordingly, to decide the Bhopal case in a US Court would be to deprive the 'Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people ...'; to do so, would be further to 'revive a history of subservience and subjugation from which India has emerged'.⁶⁴ On this scenario, any refusal to recognize and enforce an Indian damages award by a small causes court in New York may have amounted not so much to an act of legal imperialism but to a performance of adjudicatory pathology of a Third World summit Court unable to decipher the entailments/ requirements of the rule of law doctrine, otherwise the same thing as rule by global capital. The Indian Supreme Court may thus stand tall in the world but only with

high heels of ‘due process’ fashioned by the designer goods produced by the American judicial and juridical markets!

Given the fact that the Bhopal-violated petitioners had successfully stymied all suggestions of unconscionable extrajudicial settlement (ranging from 100 million US dollars to, finally, 250 million US dollars, UCC insured damage), some non-‘victim’ articulators of public opinion, in India and elsewhere, hailed the settlement as eminently ‘just’. By contrast, the Bhopal-violated, overcoming the moment of desolate despair, soon enough recovered resilience with the demand that since the UOI was a party to the judicial settlement orders, it must now make ‘good’ the deficit between the settlement award of 470 million US dollars and India’s original claim for 3 billion US dollars in their favour – a demand that still echoes in various civil suits against the UOI and the MP Government. All this, while reinforcing the suspicions of the Bhopal-violated concerning recourse to the state/law combines, also suggests acts of popular resistance against their reduction to states of nonbeing via the settlement orders and their aftermaths.

In the process marking an anguished recovery of the collective self of the Bhopal-violated, the only way of escaping legal liability and moral responsibility known to the Northern corporate world – the way of merger and amalgamation and of divestiture of assets to successors-in-interest – stands further severely challenged.⁶⁵ Creatively adapting Mahatma Gandhi’s famous ‘Quit India’ movement that, after all, germinated an inaugural movement asserting the human right to self-determination of colonized peoples everywhere, the contemporary Bhopal-violated movement now marshals the symbolic powers of a ‘Dow, Quit India’ movement,⁶⁶ further innovating the politics of direct action

and mass civil disobedience. This furnishes, indeed, a movement for deglobalization set against the rampant injustices and violations of a globalizing world.

Notable on this register remains a ‘walk for justice’ (*Padayatra*) from Bhopal to Delhi led by 39 survivors of the first catastrophe, amongst many hundred others. This walk articulated six demands for justice,⁶⁷ the pertinence of which is not one bit diminished by the progressive hearing-impaired ears of India’s single-minded globalizing state managers. These demands rearticulate a *complete code of justice*, transcending the juridicalization of the first Bhopal catastrophe and seeking a complete reversal of the impacts of the second and third catastrophes.

The rate and direction of policy response to the demands will, understandably, be based on the perceptions of threats posed to the new comity of concerns established, since the Bhopal settlement, between globalizing Indian state managers and the consortia of global capital. There is, in the ‘nature of things’, as it were, no assurance that the intransigence of the organic intellectuals of the Bhopal-violated movement (not an entirely a vanishing breed yet an already endangered species) and the wider networks of international activist solidarity may yield any determinate results for the Bhopal -violated humanity in the immediate future.

Even so, the very name ‘Bhopal’ continues to haunt the votaries of globalization in India, at least, as a profound moral nuisance. By frequent recourse to direct action strategies inviting incredible state repression, the Bhopal-violated constantly tease – and test – the tactics, tricks, and treacheries of green governmentality and further ensure that the injustices suffered by them will remain more than ‘remembrance of things past’. In

this, they seek to ensure that such orders of anti-human rights and eco-unfriendly trade-offs may never occur again.⁶⁸

To listen, and even to yield to, the new movement of the Bhopal-violated is thus to flout the imperatives of India's emergence – if no longer as the ethical voice of the postcolony of the nonaligned nations – at least as an equal 'Davos-type' emergent 'Asian giant' as important as the People's Republic of China. This new form of 'gigantochomachy' is precisely at stake in the Bhopal-violated movement, not thus far fully ingested by some de-globalizing 'new' social and human rights movements.

The conclusionary space of this tormented narrative offers little room for any detailed analysis of the new politics now reconstructing new forms of sovereign biopolitics, save for briefly noting a few trends. First, the democratization of people's knowledge now stands fully combated by continuing practices of the nationalization of truth and the politics of denial, a not uncommon occurrence in the worldwide histories of recent mass disasters, and yet still countered by Bhopal-violated practices of resistance.⁶⁹ Second, justifications for a new ideology of developmentalism under which contemporary neocolonialism goes – as it were – global, now need to be continually refurbished in the languages recreating new modes of primitive accumulation within the very heart of what is otherwise described as 'postmodern' capitalism.⁷⁰ Third, the state/law combine must in the face of the Bhopal-violated movement still continue to 'impersonate' the standards of that human rights civility⁷¹ which has marked policy and adjudication responses as somehow still concern-full acts of 'justice' for the Bhopal-violated!⁷²

The Bhopal-violated re-emerge Phoenix-like, to mix metaphors, compellingly from their own MIC ashes. They interrogate (to adapt a phrase from Nietzsche) the ‘superficiality’ of the ‘profundity’⁷³ ‘of so many critical modes of legal/judicial and even human rights nihilism. Adapting a further Nietzschean phrase – and to entirely invert the contexts of the author’s intent – the movement of the Bhopal-violated manifests the ‘courage of all strong spirits to *know* their own immortality’.⁷⁴

Thus, reaching towards the improbability of a conclusion may be all that matters. At the conclusion of his great novel *Tess of the d’Urbervilles*, Thomas Hardy poignantly writes that “Justice” was done, and the President of the Immortals, in the Aeschylean phrase, had ended his sport with Tess’. While it may be true to say that that the binational (the common community of the Indian and United States justices) presidents of the judicial immortals may have thus rendered ‘justice’ by decreeing a judicial fate for the Bhopal-violated, their continuing struggles constitute at least a reminder of a different genre of ‘immortality’ spoken of by Alain Badiou (quoted earlier) – as ‘the rights of the Immortal, affirmed in their own right, or the rights of the Infinite exercised over the contingency of suffering and death’.

Put differently, the continuing movement of the Bhopal-violated beckons a new jurisprudence of human solidarity in a runaway globalizing world. Their movement more fully revitalizes India’s original intent in devising the principle of absolute multinational enterprise liability for ultrahazardous industry, process and application when seeking compensation for the ‘enormity of the Bhopal disaster’⁷⁵ (even when lost in translation), via this jurisprudence of solidarity. 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’.⁷⁶

In this, the Bhopal-violated movement constantly interrogates the assassins of collective memory and further enacts a jurisprudence of critical human and social solidarity, paralleled perhaps only in the contemporary world by the commemorative moments of Hiroshima–Nagasaki survivors and next of kin.

Perhaps, then, I may ‘conclude’ here by adapting the phrase-regime of Richard Rorty that such jurisprudence is not ‘discovered by reflection but created ... *by increasing our sensitivity to particular details of pain and humiliation and other unfamiliar sorts of people*’.⁷⁷ 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.⁷⁸

Footnotes

1 For example, AM Gunn, *The Encyclopedia of Disasters: Environmental Catastrophes and Human Tragedies* (Westport, Connecticut 2008) in a two-volume narrative of 184 disasters begins with the supervolcano, Toba, Indonesia, 74000 BC and ends with Greensburg, Kansas, tornado, 2007, assigning Bhopal catastrophe 155th place.

2 Ibid. Gunn no doubt includes Srebrenica and Rwanda in his narrative, but the histories of colonialism/imperialism do not find a mention. See, in contrast, E Galeano, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (Monthly Review Press, New York 1997); W Rodney, *How Europe Underdeveloped Africa* (Bogle-L’Overture Publications, Loudon 1983); D Naroji, *Poverty and Un-British Rule In India* (1901; republished by Ministry of Information and Broadcasting, Government of

India, 1988); P Dove, *The Catastrophe of Modernity: Tragedy and the Nation in Latin American Literature* (Bucknell University Press, Lewisburg 2004) and, of course, the notable corpus of Noam Chomsky.

3 See, eg, H Rodriguez, E Quarantelli and R Dynes (eds), *Handbook of Disaster Research* (Springer, London 2006); R Perry and EL Quarantelli (eds), *What Is a Disaster? New Answers to Old Questions* (Xlibris Books, Philadelphia 2005).

4 In the wake of Katrina disaster, much concern was expressed at the Stafford Act (the Federal Disaster Relief and Emergency Assistance Act, PL 100-707, signed into law 23 November 1988), which classified the eligibility of federal funding into two categories: ‘emergencies’ and ‘major disasters’, the latter capping federal assistance at US \$5 million. The Act has been further supplemented by Public Law 109-205, 4 October 2006 concerned with homeland security management. Some regard disasters as ‘regulation catalysts’: see ME Kahn, ‘Environmental Disasters as Risk Regulation Catalysts?: the Role of Bhopal, Chernobyl, Exxon Valdez, Love Canal, and Three Mile Island in Shaping U.S. Environmental Law’ (2007)

35 J Risk Uncertain 37.

5 U Beck, *Global Risk Society: Towards a New Modernity* (Sage, London 2002).

6 Ibid 40.

7 Ibid 237–50.

8 U Beck, A Giddens and S Lash (eds), *Reflexive Modernization* (Stanford University Press, Stanford 1994) 175; see also the contribution by Anthony Giddens, ‘Living in Post-traditional Society’ in the same volume, at 84.

9 U Baxi, ‘Geographies of Injustice: Human Rights at the Altar of Convenience’ in R Craig (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford 2001) 197–212.

10 M Burawoy, *The Politics of Production: Factory Regimes Under Capitalism and Socialism* (Verso, London 1985).

11 It is this awareness that marks ongoing attempts at articulating sustainable development as an integral part of the human right to development and the further quest to develop the right to development itself. See U Baxi, *Human Rights in a Posthuman World: Critical Essays* (OUP, New Delhi 2007) Chs 3 and 4.

12 K Nkrumah, *Neo-Colonialism: the Last Stage of Imperialism* (Thomas Nelson and Sons Ltd, London 1965, emphasis added). See, as to the practices of environmental racism, L Westra and BE Lawson (eds), *Faces of Environmental Racism: Confronting Issues of Global Justice* (2nd edn Rowman and Littlefield Publishers, Lanham 2001).

13 See P Rutherford, 'The Entry of Life into History' in E Darier (ed), *Discourses of the Environment* (Blackwell, Oxford 1999) 1–34; P Rutherford, 'Ecological Modernization and Environmental Risk' in the same volume at 95–118; TW Luke, 'Environmentality as Green Governmentality' in the same volume at 121–51.

14 See, especially, T Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press, Berkeley 2002); B Latour, *Reassembling the Social: an Introduction to Actor-Network-Theory* (OUP, Oxford 2007); J Ferguson, *The Anti-politics Machine: Development, Depoliticization and Bureaucratic Power in Lesotho* (University of Minnesota Press, Minnesota 1994).

15 The recently available work of Roberto Esposito remains precious for deciphering emergent forms of biopower and biopolitics, especially in the insistence on affirmative biopolitics. See, especially, R Esposito, (T Campbell (trans)) *Biopolitics and Philosophy* (University of Minnesota Press, Minneapolis 2007). See also T Campbell, 'Bios, Immunity, Life: the Thought of Roberto Esposito' (2006) *Diacritics* 2.

16 See, especially, D Harvey, *Justice, Nature and the Geography of Difference* (Blackwell, Oxford 1996); N Smith, *Uneven Development: Nature, Capital, and Production of Space* (3rd edn Georgia University Press, Athens 2008); A Schmidt, *The Concept of Nature in Marx* (New Left Books, London 1971); N Thrift, 'From Born to Made: Technology, Biology and Space' (2006) 30 (4) *Trans Inst Br Geogr* 463. In this sense (and with Neil Smith), we may speak of the evolution of the second nature: the universes of politics and regulation over those that already produce 'nature' as a human creation.

17 See U Baxi, *The Future of Human Rights* (3rd edn OUP, New Delhi 2008) Ch 9. See further L Bormann-Larsen and O Wiggen, *Responsibility in World Business: Managing Side-Effects of Corporate Activity* (United Nations University, Tokyo 2004) and specifically U. Baxi 'The "Just War" for Profit and Power: the Bhopal Catastrophe and the Principle of Double Effect' in the same volume, 175–201; R McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden J Int'l Law*, 477–504.

18 The recent determined reversal by Jonathan Ruggie, the UN Special Representative on Business and Human Rights, marks a significant diminution of the valiant accomplishments that marked the inaugural advent of the UN Norms of Human Rights responsibilities of Multinational Corporations and Related Business Entities, analysed fully in Baxi, *ibid*.

19 See F Pearce and S Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth, Aldershot 1998).

20 See I Eckerman, 'The Bhopal Gas Leak: Analyses of Causes and Consequences by Three Different Models' (2005) 18 J Loss Prev Process Indust 213; *The Bhopal Saga: Causes and Consequences of the World's Largest Industrial Disaster* (Universities Press (India) Private Limited/New Delhi, Orient Longmans, Hyderabad). See also, D Lapierre and J Moro, *It Was Five Minutes Past Midnight in Bhopal* (Full Circle, Delhi 2001); D Kurzman, *A Killing Wind: Inside Union Carbide* (McGraw Hill, New York 1987); D Weir, *The Bhopal Syndrome: Pesticides, Environment, and Health* (Sierra Club Books, San Francisco 1984); P Shrivastava, *Bhopal: Anatomy of a Crisis* (Ballinger, Cambridge 1987); S Hazarika, *Bhopal Lessons of a Tragedy* (Penguin, New York 1987).

21 See, especially, K Eder, *New Politics of Class: Social Movements and Cultural Dynamics in Advanced Societies* (Sage, London 1993).

22 Baxi, *Future*, 2008 (n 17) Ch 7.

23 Reflected variously in the exertions of the International Campaign for Bhopal Victims and the four hearings/listenings conducted under the auspices of the Permanent People's Tribunal that establish ways of communication of linkages between industrial hazards and human rights violations.

24 See U Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law, Recueil des cours* 276 (Martinus Nijhoff, The Hague 1999, 2000) 305–427, and the literature cited therein.

25 See the as yet unreported decision of Justice K Chandru, Madras High Court, 2009, which repudiated all claims of economic loss and damage for defamation filed by Dow Chemicals concerning demonstrations by Bhopal activists outside its corporate office premises valiantly upholding their constitutional right to protest against the residual toxic pollution which, according to them, rightly imposed duties of toxic cleanup on the successor company.

26 A Badiou, *Ethics: an Essay on the Understanding of Evil* (Verso, London 2001) 12.

27 Ibid 12.

28 Ibid 13.

29 U Baxi and A Dhanda (eds), *Valiant Victims and Lethal Litigation: the Bhopal Case* (NM Tripathi, Bombay; The Indian Law Institute, New Delhi 1990), U Baxi, 'Introduction'.

30 Badiou (n 26) 15.

31 Ibid 30.

32 See I Mackenzie, 'What is a Political Event?' (2008) 11 (3) *Theory & Event* (available at <http://muse.jhu.edu/journals/theory_and_event/v011/11.3.mackenzie.html> (last accessed 12 November 2009). See also A Johnston, 'The Quick and the Dead: Alain Badiou and the Split Speeds of Transformation' (2007) 1 (2) *IJZS* 56; R Saleci 'The Nature of Event in Late Capitalism' (2008) 29 (5) *Cardozo L Rev* 2333.

33 Badiou (n 26) 42.

34 See J De Caputo, 'Bodies Still Unrisen, Events Still Unsaid' (2007) 12 (1) *Angelaki* 73, 73.

35 See U Baxi and T Paul (eds), *Mass Disasters and Multinational Liability: the Bhopal Case*, (NM Tripathi, Bombay; Indian Law Institute, New Delhi 1985); U Baxi (ed), *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case* (NM Tripathi, Bombay; Indian Law Institute, Delhi 1986); U Baxi and A Dhanda (n 29). See further J Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press, Toronto 1993); U Baxi (n 24); D Dembo, W Morehouse and L Wykle, *Abuse of Power: Social Performance of Multinational Corporations: the Case of Union Carbide* (New Horizons Press, New York 1990); Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (Amnesty International Publications, London 2004).

Additionally, see also for a poignant literary and existential narrative, Lapierre and Moro, *Five Minutes Past Midnight* (n 20); for early accounts, see Kurzman, *A Killing Wind* (n 20); Weir, *The Bhopal Syndrome* (n 20); Shrivastava, *Bhopal: Anatomy of a Crisis* (n 20); Hazarika, *Bhopal Lessons of a Tragedy* (n 20). A most useful periodic contemporary analysis by Will Lepowski appears in several issues of *Chemical and Engineering News* and periodic publications of the International Council of Public Affairs and International Centre for Law and Development, New York.

36 I raised this in my address at the Annual General Meeting of UCC, as a proxy shareholder for the American Union of Baptist Churches, on the eve of the 15th anniversary of the catastrophe, insisting that no justification remained at hand for nondisclosure given the settlement orders which fully exculpated UCC from any legal liability and also given the UCC public relations gesture accepting – in part – ‘moral responsibility’ for the event. Not only did the CEO representative chairing the event not respond, but when the meeting ended, as Ward Morehouse, Clarence Das and myself (all representing Bhopal-violated) began to leave, the shareholders made way for us with gesticulations, one of them saying loudly, ‘*Beware of the fumes of Bhopal*’!

37 V Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (Zed Books, London 1993).

38 See A Ramsastry, ‘Corporate Complicity: from Nuremburg to Rangoon’ (2002) 20 Berkeley J Intl L 91.

39 These major groups are Bhopal Gas Peedit Mahila Udyog Sangathan (‘BGPMUS’); Bhopal Gas Peedit Mahila Stationery Karmachari Sangh (‘BGPMKS’); Bhopal Gas Peedit Sangharsh Sahayog Samiti; (‘BGPSSS’) Bhopal Group for Information and Action (‘BGIA’); The International Campaign for Justice in Bhopal (ICJIB); the Medico Friends Circle, Forum; the Jan Swasthya Kendra and Sambhavana Trust Clinic. Fortunately, this listing remains far from exhaustive.

40 See a recent interesting account by SP Thomas, ‘Through the Lens of Merleau-Ponty: Advancing the Phenomenological Approach to Nursing Research’ (2005) 6 Nurs Philos 63–76. See also B Flynn, ‘Textuality and the Flesh: Derrida and Merleau-Ponty’ (1984) 15 J Brit Soc Phenom 164–179; T Carman, ‘The Body in Husserl and Merleau-Ponty’ (1999) 27 Philosophical Topics 206–226.

41 U Baxi and A Dhanda (n 29) lv.

42 Amnesty International (n 35) 12.

43 Ibid 14–8.

44 See S Acquilla and others, ‘Aftermath of the World’s Worst Chemical Disaster, Bhopal, December 1984’ (2005) 18 J Loss Prev Process Ind 268. The Indian Council for Medical Research (ICMR) began a systematic study of the health impacts beginning in 1985 but abandoned it, suddenly and inexplicably in 1993. See also C Sathyamala, N Vohra and K Satish, *Against All Odds: Continuing Effects of the Toxic*

Gases on the Health Status of the Surviving Population in Bhopal (The Centre for Community Health and Social Medicine: Bhopal and Delhi, 1989).

45 See, as to the US proceedings, the decision of the US Court of Appeals, 2nd Circuit, in *Sajjida Bano and Others v UCC and Warren Anderson* 17 March 2004, which still leaves open some possibilities of appropriate judicial action. See further the call made by several United States Congressmen in a letter dated 16 June 2009 urging the Chairperson and the Board of Directors of Dow Chemicals at least to assume, in the context of environmental degradation, the same order of responsibility as it did for the predecessor UCC setting aside \$2.2 billion in 2002 to put towards Union Carbide's pending asbestos liabilities in the United States as for the Bhopal-violated, rather than disowning and evading any further 'liabilities it inherited from Bhopal'. See further T Edwards, 'Contamination of Community Water Sources in Bhopal, India', 20 October 2005 (on file with the author), and Amnesty International (n 35) Ch 3.

46 Amnesty International (n 35) Ch 2. See also C Sathyamala, N Vohra and K Satish, (n 44).

47 Too numerous to survey here – even when especially worthy of summary mention – remain the terms of the recasting of the colonial Factories Act and the innovatory measures of the Public Liability Insurance Act (providing for interim compensation of the those violated by hazardous industries and the tightening of air and water pollution legal regimes).

48 The first suit was filed within 4 days of the catastrophe: see, *Dawani et al v Union Carbide Corporation, SDW Va.* (7 December 1984).

49 See U Baxi, *Inconvenient Forum* (n 35) 34–69 for the text of Judge Keenan's decision dated 12 May 1986; my critique in the Introduction to that work 1-34 and (n 24) Ch 2. For a more favourable approach to Keenan, see J Cassels (n 35) Ch 6.

50 (Emphasis added). See the Indian complaint before the United States District Court, filed 8 April 1985 Southern District of New York, reproduced in U Baxi and T Paul, *Mass Disasters* (n 35) 4–5. Further, India maintained that:

Multinational corporations by virtue of their global purpose, structure, organization, technology, finances and resources have it within their power to make decisions and take actions that can result

in industrial disasters of catastrophic proportion and magnitude. This is particularly true with respect to those activities of the multinationals which are ultrahazardous or inherently dangerous.

Key management personnel of multinationals exercise a closely-held power which is neither restricted by national boundaries nor effectively controlled by international law. The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult or even impossible to pinpoint responsibility for the damage caused by the enterprise to discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. In this manner, the multinational carries out its global purpose through thousands of daily actions, by a multitude of employees and agents. Persons harmed by the acts of a multinational corporation are not in a position to isolate which unit of the enterprise causing the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The multinational must necessarily assume this responsibility, for it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards. This inherent duty of the multinational is the only effective way to promote safety and assure that information is shared with all sectors of its organization and with the nations in which it operates.

See further the Amended Consolidated Complaint and the Jury Demand filed by plaintiffs on 8 July 1985; U Baxi and T Paul, *Mass Disasters* (n 35) 148–60.

51 But see PM Shuck (ed), *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (WH Norton, New York 1991) and the literature referred to in U Baxi (n 24).

52 See *M.C. Mehta and others v Shriram Food and Fertilizer Industries and Union of India* (Oleum Gas Leak Case) AIR 1987 SC 1026 and the 4 April 1998 decision of the MP High Court reproduced in U Baxi and A Dhanda (n 29) 338–83.

53 This may appear as axiomatic, until we realize that the principle of absolute multinational liability is not obviously designed to extend to situations of *force majeure* or Acts of God. No one would rationally and

reasonably seek to extend the principle to situations of natural disasters such as floods, cyclones, earthquakes and tsunamis, or even to an act of war, were these actually to cause the runaway MIC reaction. The UCC trivialized its potential critique of the principle via vague assertions that a militant Sikh group named 'Black June' had claimed responsibility for the Bhopal catastrophe! This strained even the credibility of an otherwise sympathetic Judge Keenan!

54 Baxi, *Valiant Victims* (n 35) 32–5.

55 The space constraints of this contribution require me to forsake voluminous case law citations and to refer you instead to my critique of these extraordinary adjudicative exertions of power, in my 'Introduction' (n 29) and the textual materials fully archived in that volume. I must here at least add that the review petitions, as drafted by me and questioning the unreason of the settlement orders, were signed individually by eminent citizens from the worlds of the humanities, education, science, technology, and active public citizens. The ethical weight carried by these names at least induced the Supreme Court of India to 'unpack' the settlement and to acknowledge the error of its ways.

56 See the Table in *Valiant Victims* (n 35), iv.

57 See in this context an extraordinary anthropological analysis by V Adams, 'Suffering the Winds of Lhasa: Politicized Bodies, Human Rights, Cultural Difference, and Humanism in Tibet' (1998) 12 (1) *Medical Anthropology Quarterly* 74. I find poignant the reference to 'winds' in this discourse as relating to the killing wind direction of the Bhopal catastrophe. Although not so naming it, the work of Anna Grear on embodiment/disembodiment via the discourse of corporate legal personhood remains here also compelling for any discourse of the juridical biopolitical constitution of human rights and social suffering. See, especially, the insightful discussion in A Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights and Law Review* 511–43. See also A Grear, 'Human Rights, Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory' (2006) 17 *Law and Critique* 171–99 and A Grear, *Re-Directing Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave MacMillan, Basingstoke 2010 forthcoming).

58 *Union Carbide Corporation v Union of India and Ors* [1989] 1 SCR 730.

59 *Ibid* para 30.

60 Ibid.

61 J Cassels (n 35) 155–62; see also the Amnesty International (n 35) Ch 4.

62 J Cassels (n 35) Ch 8.

63 *Bhopal Gas Peedith Mahila Udyog Sanghathan and Anr. v Union of India (UOI) and Ors* (2007) 9 SCC 707.

64 U Baxi, *Inconvenient Forum* (n 35) 69; see my Introduction critiquing these observations.

65 Leaving aside, here, the narratives of alternative of recourse to bankruptcy proceedings, a favourite device of US multinational enterprises routinely adopted to escape large damage awards.

66 See the archive on <http://www.studentsforbhopal.org/?q=node/4> (last accessed 12 November 2009).

67 These included the demand for the setting up of a national commission on Bhopal with the funds and authority to administer health care, research, economic rehabilitation and social support for the survivors; provision of safe drinking water to those affected by the contaminated ground water of the Union Carbide factory; establishment of a special prosecution cell to prosecute the case against Union Carbide Corporation and its former chairman, Warren Anderson; ensuring scientific assessment of the toxic contamination of the factory and surrounding areas and forcing Union Carbide's owner, The Dow Chemical Company, to clean up and compensate for the damage; the blacklisting of Dow and Union Carbide's products and technologies in India and the halting of the expansion of Dow's business; the declaration of December 3rd as a national day of mourning for victims of industrial disasters and pollution and the undertaking that the Bhopal disaster be included in school and college curricula.

Incidentally, and without the slightest trace of any pride of authorship, it warms my aging though activist human heart that my plea for a high-powered commission for relief and rehabilitation for the Bhopal-violated (U Baxi, *Inconvenient Forum* (n 35) 34) now stands thus creatively adapted on the eve of the silver jubilee of Bhopal.

68 Which here include constitutionally enshrined human rights further developed by an otherwise activist Supreme Court of India and the internationally obligatory human rights norms and standards accepted by India and at times also crafted by UN mediation.

69 Thus, for example, the entirely ungrudging reception of the UCC successor-in-interest Dow Chemicals, without even as much regard for restoration of human rights and claims of justice as urged by the Bhopal

movement as shown even by the letter dated 16 June 2009 from leading US legislators to Dow Chemicals (n 45), which now leads UOI to defend the presence and actions of the successor company.

70 India's Eleventh Plan enunciation now replaces the imagery of *equitable development* (based on human rights and social justice) with inclusive *growth* (based on consideration of global trade and economic competitiveness) in which a flexible labour market is considered a new imperative for anticonstitutional Indian development; see Planning Commission, Government of India, *Eleventh Five Year Plan, 2007-12, Volume 1*, at paras 1:15, 4:70 (OUP, New Delhi 2008).

71 I adapt this phrase the gifted work of D Fischlin and M Nandorfy, *Eduardo Galeano: Through A Looking Glass* (Black Rose, Montreal 2002) 31–42.

72 And, in a different mode, the Indian state managers insist on heavily coopting the languages of ILO talk of 'fair globalization', further affirming the potential of affirmative practices of biopower/biopolitics. ILO. *Decent Work* (Geneva, 1999).

73 F Nietzsche, *The Genealogy of Morality, Preface* at 4, as quoted in B Leiter, *Nietzsche on Morality*, 42 (Routledge, London 2002).

74 Quoted in Leiter (n 73) 48.

75 U Baxi and T Paul, *Mass Disasters* (n 35) 9.

76 Ibid, 8.

77 R Rorty, *Contingency, Irony and Solidarity* (Cambridge University Press, Cambridge 1989) 16.

78 Baxi, *Future* (n 17) Ch 8.