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Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity

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MULTINATIONAL CORPORATIONS IN THE AFTERMATH OF BHOPAL: THE NEED FOR A NEW COMPREHENSIVE GLOBAL REGIME FOR TRANSNATIONAL CORPORATE ACTIVITY

SUDHIR K. CHOPRA*

I. Introduction	236
II. Factual Setting of the Bhopal and Other Disasters	241
A. Union Carbide—Bhopal, India	241
B. Givaudan—Seveso & Meda, Italy	243
C. Nuclear Plant—Chernobyl, Ukraine (USSR)	244
D. Sandoz—Basel, Switzerland	245
III. The Adequacy and Responsiveness of the Law, Policy, and Institutions in Industrial Disasters	246
A. Bhopal	247
B. Seveso, Chernobyl, and Basel	252
C. Lessons from the Bhopal & Seveso Accidents	255
IV. International Guidelines—Development and Environment	258
A. Stockholm Declaration	259
B. Code of Conduct for Transnational Corporations and the ILO Declaration	261
C. The Earth Summit, 1992	264
V. An Appraisal	267
A. The Psychology of the Diplomatic Elite	269
B. Assigning the Blame	272
C. Development, Economic Cooperation, and the History of International Law	274
VI. Recommendations for the Globalization of Environmental Responsibility in Transnational Business Activity	278

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The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made.¹

Oliver Wendell Holmes

I. INTRODUCTION

The tragedy of Bhopal² is long gone from the minds of the western public. The commercial charisma that the news carried for some time is all but dead. However, the victims of this accident continue to suffer and will endure further suffering for decades to come. The urgency to find answers to avoid such accidents in the future is also a bygone fact. Yet, the sheer magnanimity of the loss of human life and sufferings dictate that further examination of the issues related to this accident be carried on, at least until the ways and means of thinking through the Bhopal quandary have been exhausted. This accident presents to us many socio-legal issues that are much different than those encountered in other industrial or environmental disasters. The accident is exceptional, not because of the high number of human casualties³ or the long-term ill effects on the health of the residents of that area,⁴ but because this accident raised questions that were only feared and dealt with marginally in

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 479 (1897).

2. A toxic gas called Methyl Isocyanate (MIC) escaped from an underground storage tank of a fertilizer plant on the night of December 2, 1984, in the city of Bhopal, India. This plant was owned and operated by Union Carbide India, Ltd., a subsidiary of Union Carbide Corporation of the United States. The gas quickly spread over an area of 25 square miles, resulting in 1800 deaths and affecting over 200,000 more people. The latest death total has been calculated at 4200 people. Sanjeev Majupuria, *A New Theory on Bhopal Leak*, INDIA ABROAD, Mar. 5, 1993, at 30. See generally *Bhopal—What Really Happened*, BUS. INDIA, Feb. 25-Mar. 10, 1985, at 102; *Bhopal: City of Death*, INDIA TODAY, Dec. 31, 1984, at 6; Sanjoy Hazarika, *Gas Leak in India Kills at Least 410 in City of Bhopal*, N.Y. TIMES, Dec. 4, 1984, at A1; Stuart Diamond, *The Bhopal Disaster: How It Happened*, N.Y. TIMES, Jan. 28, 1985, at A1; *Implications of the Industrial Disaster in Bhopal, India: Hearing before the Subcomm. on Asia and Pacific Affairs of the House Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 3, 6, 28 (1984) (statements of Robert A. Peck, Deputy Assistant Secretary for Near Eastern and South Asian Affairs, Department of State, and Ronald Wishart, Vice President for Government Relations, Union Carbide Corporation); Ved P. Nanda & Bruce C. Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 154, 165-70 (1988).

3. Majupuria, *supra* note 2, at 30; Robert Stone, *A U.S. Firm's Awful Legacy in India*, SACRAMENTO BEE, Feb. 5, 1989, at 3; *Bhopal's Over—At Least for Union Carbide*, NEWSWEEK, Feb. 27, 1989, at 54. An original estimate of 1800 dead was updated to 3300 dead in 1989; the most recent figure indicates 4200 deaths as a consequence of the after-effects of the Bhopal disaster.

4. Anthony Spaeth, *Court Settlement Stuns Bhopal Survivors*, WALL ST. J., Feb. 22, 1989, at A12.

international resolutions⁵ and the Code of Conduct for Transnational Corporations.⁶ This disaster has no equal in the annals of industrialized society. It raises many distinct legal issues never before encountered in any other accident. This fact alone necessitates a discourse that delves into the uniqueness of this legal nightmare. Hence, the inquiry must examine the consequences on the transnational corporations (TNCs), the exporters and importers of hazardous substances and technology, and the general population to determine the cause of such disasters. The desired result is to find safer and more secure ways of conducting ultra hazardous activity, especially in third world countries. The fragmented nature of the current legal regime that regulates transnational corporate activity has failed thoroughly. No attempt has been made to question, comprehend, or analyze the enormity of the scope of the TNCs' activity from a world order perspective. A sense of global, human, social, economic, environmental, and corporate justice is absent from the scholarly writings that have emerged in the aftermath of Bhopal. The answer must be sought in a

5. The origin of the Code of Conduct for Transnational Corporations can be found in the U.N. Declarations on *New International Economic Order*. The three Resolutions passed by the United Nations General Assembly are: *Declaration on the Establishment of a New International Economic Order*, May 9, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp. (No.1), at 3, U.N. Doc. A/9559 (1974); *A Programme of Action on the Establishment of a New International Economic Order*, May 16, 1975, G.A. Res. 3202, 29 U.N. GAOR Supp. (No.1), at 5, U.N. Doc. 1/9559 (1974); and *The Charter of Economic Rights and Duties of States*, Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), at 50, U.N. Doc. A/9631 (1975). For a detailed discussion of the Code of Conduct, see William C. Burns, *The Report of the Secretary General on Transnational Corporations and Industrial Process Safety: A Critical Appraisal*, 3 GEO. INT'L ENVTL. L. REV. 55 (1990). The main objective of these resolutions was to integrate developing countries in a global economy. See Gamani Corea, *UNCTAD and North-South Dialog*, in *NEW DIRECTIONS IN INTERNATIONAL LAW* 78 (Rafael Guitierrez Girardot et al. eds., 1982); see also Norbert Horn, *Normative Problems of New International Economic Order*, 16 J. WORLD TRADE L. 338 (1982).

6. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY, May 6, 1980, *reprinted in* 19 INT'L LEGAL MATERIALS 773 (1980). The principle objective of the Code is to improve the standard of living in developing countries by improving the flow of technology and technological information to third world nations. For a detailed discussion of the Code of Conduct, see generally S.K. Agrawala, *Transfer of Technology to LDC's: Implications of the Proposed Code*, 23 INDIAN J. INT'L L. 246, 247 (1983); Pieter Sanders, *Implementing International Codes of Conduct for Multinational Enterprises*, 30 AM. J. COMP. L. 241 (1982); Detlav Vagts, *The Global Corporation and International Law*, 6 J. INT'L L. & ECON. 247 (1972); Vicki R. Patton-Hulce, Comment, *Multinational Corporations and Lesser Developed Countries—Foreign Investment, Transfer of Technology, and the Paris Convention: Caveat Investor*, 5 U. DAYTON L. REV. 105 (1980). In addition to the Code referred to here, the International Labor Organization—through "A Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy," ILO Labor Office, CH-1211 Geneva 22 (1977)—recommended that: "(1) the TNCs shall give priority to local personnel in employment, (2) the TNCs shall use technologies which generate employment, (3) the TNCs shall provide workers with information about the firm to allow meaningful negotiations," and (4) the governments "should promote good labor and employment practices." See Robert Grosse, *Codes of Conduct for Multinational Enterprises*, 16 J. WORLD TRADE L. 414 (1982).

manner that addresses this problem from a long-term, global perspective.

At first, this Article shall attempt to establish the differences between Bhopal and other industrial disasters. Then it shall explore the causes of the deficiencies in the existing politico-legal framework that is designed to regulate and direct international business activities of the transnational corporations. This is followed by an analysis of the deep-rooted mistrust between developed and developing countries, as evidenced by the psychology and perceptions about "harm," "risk," and "development." Perhaps then the necessity can be established for yet another international legal regime that can regulate transnational corporate activity effectively. A developing nation needs to be assured not only of the transfer of technology that has become redundant on the cost-benefit scale of business profitability in environmentally conscious developed countries, but also of the transfer of such technology that is absolutely safe to conduct ultra-hazardous activity in any part of the world.⁷ Such measures are necessary to remedy the problems encountered during lengthy litigation, which seems to have failed to mitigate the pain and suffering inflicted upon the victims of the Bhopal tragedy.

The best course is to develop stricter measures that will eliminate the possibility of "cost-benefit" related disasters. Interestingly, the culprits of the cost-benefit approach are both the importers of hazardous technology and substances and the TNCs. While the latter are usually willing to export cheaper, redundant technology to their foreign subsidiaries because of the exclusion of environmental cost, the former is satisfied because the imported technology is cheaper and is also responsible for creating new jobs.⁸ Both parties in such a scenario are concerned with the immediate cost factor. The total cost that will be required to remedy the long-term ill effects on the human population, which can easily be averted by early investment in environmentally conscious and safe technology, is completely ignored.

Many scholars of international environmental law have discussed and written on the Bhopal tragedy from an international law perspective.⁹ However,

7. See generally Judith L. Ugelow, *A Survey of Recent Studies on Costs of Pollution Control and the Effects on Trade*, in ENVIRONMENT AND TRADE 167 (Seymour Rubin & Thomas R. Graham eds., 1982).

8. See generally Ingo Walter, *International Economic Repercussions of Environmental Policy: An Economist's Perspective*, in ENVIRONMENT AND TRADE, *supra* note 7, at 22; Charles Pearson, *Environment and International Economic Policy*, in ENVIRONMENT AND TRADE, *supra* note 7, at 46.

9. Remarks by Robert Lutz, Ved Nanda, David Wirth, Danial Magraw, and Gunther Handl, in Shelly P. Batham, *International Transfer of Hazardous Technology and Substances: Caveat Emptor or State Responsibility?*, 79 AM. SOC'Y INT'L L. PROC. 303, 303-22 (1985) [hereinafter *International Transfer*]. The discussion at this panel raised some very fundamental questions about the applicability of the international law of state responsibility to situations such as Bhopal. Some

the reality is that not one aspect of public international law was applied in the Bhopal case to help resolve the dilemma faced by the victims.¹⁰ Some international lawyers examine the problem from the perspective of state responsibility, some take the human rights angle, and still others emphasize the point of the responsibility of the parent company to consider the Code of Conduct for Transnational Corporations.¹¹ In reality, every aspect of this case has been considered under the municipal laws of either the United States or India, with both countries following the common law system but exhibiting different applications and interpretations.¹² An urgent need exists to narrow this gap between the international law process and the municipal law approach. The primary difference between a Bhopal-type tragedy and other industrial disasters is that while the latter could be resolved effectively under international law, the former must find recourse in the domestic laws of the countries involved. One of the major problems is the lack of an appropriate and effective international legal system to provide a speedy resolution of the issues involved.¹³ A system is needed that is designed to provide not only a code of conduct, but also an enforceable legal framework based on sound principles of global justice under which the activities of TNCs can be regulated in much the same way as if they were in their home countries. A binding dispute settlement mechanism is also needed either in the form of a "court of arbitration" or a more innovative "international corporate dispute settlement court." Another option would be to change the current structure and jurisdiction of the

of the questions raised were about the role of the Code of Conduct of International Labor Organisation on transnational activity, the United Nations Economic and Social Council, the U.N. Conference on Trade and Development, and the EEC. Other issues raised were whether there can be liability without a violation of international law and whether international law imposes a responsibility on states to provide quick relief to the victims of these disasters.

10. UPENDRA BAXI & THOMAS PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (1986) [hereinafter *MASS DISASTERS*]; UPENDRA BAXI, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* (1986) [hereinafter *INCONVENIENT FORUM*]; UPENDRA BAXI & AMITA DHANDA, *VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE* (1990) [hereinafter *VALLANT VICTIMS*]. Complete material on Bhopal litigation starting with the government of India's complaint in the Southern District Court in New York up to the final settlement of the case by the Supreme Court of India is presented in these three books. Also, the introduction to each book, all written by Professor Upendra Baxi, provide a very able and rational criticism of the various rulings, both Indian and American. For legal developments after Bhopal to strengthen environmental laws in India, see generally C.M. Abraham & Sushila Abraham, *The Bhopal Case and the Development of Environmental Law in India*, 40 *INT'L & COMP. L.Q.* 334 (1991).

11. See *International Transfer*, *supra* note 9, at 310, 315, 318 (remarks by David Wirth, Danial Magraw, and Gunther Handl).

12. See generally *VALIANT VICTIMS*, *supra* note 10, at 310.

13. David Wirth writes that "[t]here is relatively little that can be characterized as comprising a traditional body of law establishing international standards for export of substances prohibited or regulated in the country of origin. There are few, if any, multilateral agreements or decisions of international tribunals addressing this matter." *International Transfer*, *supra* note 9, at 310.

International Court of Justice so that it could rule on the cases involving transnational business activity.

It is time for both the transferor and the transferee of hazardous materials or any sophisticated technology to stop depending upon cleverly drafted but meaningless resolutions and codes of conduct reflecting the accommodations reached by negotiators taking opposite positions as a result of their bureaucratic mentality. Unfortunately, these crafty instruments of international legal literature are self-defeating. In most cases, the language of such resolutions projects one and only one view; that is, all interest groups have agreed to disagree, and, therefore, the negotiators have failed to evolve intellectually. Of what good is the jungle of documents created by these fancy international organizations if they cannot deliver an iota of satisfaction to the poor masses of our so-called civilized universe? When we encounter a situation like this, we are forced to reassess our profound claims to wisdom. Immediately, a feeling about the inadequacy of traditional methods of negotiation comes to mind. If we are to evolve beyond the current stalemate to prove that we are not a static society, then an innovative experiment is necessary. To demonstrate an understanding of the dynamic process of scientific advancement and to justify our claims to mankind's overall social progress, we need to show that industrial progress is taken into consideration in the international law-making process. We ought to recognize that the parity between social and industrial development is a prerequisite to true progress.

We are now approaching the end of the third century of the industrial revolution.¹⁴ At a time when the West claims that its civilization has matured, we find ourselves facing the reality that the fruits of the Industrial Revolution have failed to spread beyond the borders of western countries. Poverty and famine in the Third World continue to be a sad reality.¹⁵ The East and the South continue to suffer from the lack of basic necessities. The challenge now is how to embrace humanity in its entirety so that some very basic aspirations of mankind can be satisfied. If the Berlin wall can come down and if the Russian economy can experiment with free enterprise while the rest of the Eastern Block rushes to embrace the market economy, then the laws regulating international trade and business activity can be restructured.

In an era of environmental crisis and changing perceptions of the global

14. ERIC ROLL, A HISTORY OF ECONOMIC THOUGHT 79 (5th ed. 1992).

15. See generally AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1991). Professor Sen writes that "not everything about poverty is quite so simple. Even the identification of the poor and the diagnosis of poverty may be far from obvious when we move away from extreme and raw poverty. . . . [M]ost importantly—the causation of poverty raises questions that are not easily answered." *Id.* at vii.

economy, it is now not only obvious but necessary that the old institutions be replaced with new thinking. In this invigorated era of globalism—whether termed environmentalism or an interdependent global economy—a Grotian approach is needed. New and bold ideas must be injected to replace old, ineffective ones. Vattalism, a belief in simply grooming the existing laws and institutions, is unlikely to work. Admittedly, Vattalism goes well with the current bureaucratization of international law. The Grotian innovationism is bound to receive resistance from the guards of established order. Yet, an experiment with a stream of new ideas will most certainly help replace the post-colonial structure of international trade. Even though the ideas which take into account global interdependence for survival and the need for TNCs to be financially viable are important, it is equally, if not more, important that developing countries receive the benefits of the technological revolution in a way that reduces the gap between the “haves” and “have nots.”¹⁶

II. FACTUAL SETTING OF BHOPAL AND OTHER DISASTERS

A. *Union Carbide—Bhopal, India*

The Bhopal disaster occurred at a plant owned and operated by Union Carbide India, Ltd. (UCIL),¹⁷ a subsidiary of the Union Carbide Corporation (UCC) incorporated in New York. The parent company owned 50.9% of the total stock of the subsidiary, whereas Indian-government-owned corporations¹⁸ with a significant representation on the board of directors of UCIL owned 22%

16. Amartya Sen, *Equality of What?*, in *LIBERTY, EQUALITY, AND LAW* 137 (Sterling M. McMurrin ed., 1987); see also AMARTYA SEN, *INEQUALITY REEXAMINED* 12-30 (1992) (questioning the veracity of utilitarian philosophy that is founded in Bentham's theory and based on a refinement of Adam Smith's political economy). Professor Sen's analysis is thorough and proves that the foundations of our current political economy are faulty and unlikely to deliver economic equality to the poor. See generally PATRICIA H. WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* (1991) (suggesting that a careful reading of Adam Smith's major works reveals that justice, not self-interest or benevolence, is the most basic virtue to Smith, and that a system of natural jurisprudence is necessary for a viable and ideal political economy).

17. Note that Indian and American courts refer to Union Carbide, Ltd., as UCIL, whereas the American papers frequently refer to UCIL as UCI.

18. Charan Lal Sahu v. Union Carbide, Judgment of the Supreme Court of India, Writ petition No. 258 (1989), at 2; [1989] 1 S.C.C. 674; [1989] 2 S.C.C. 540; [1989] 3 S.C.C. 38, *reprinted* in *VALIANT VICTIMS*, *supra* note 10, at 551-635. Unit Trust of India and Life Insurance Corporation of India is indicated to own 22% of Union Carbide India stock. *VALIANT VICTIMS*, *supra* note 10, at 551. However, according to the written statement filed by Union Carbide U.S., of the 23,504 shares, 23,000 shares were owned by Indians. Statements also indicated that in December 1984, 24.85% of the stock was controlled by government-owned organizations. In addition to the corporations mentioned above, the following corporations were also stockholders: Industrial Credit and Investment Corporation, Industrial Development Bank of India, Industrial Finance Corporation of India, and General Insurance Corporation of India. See *VALIANT VICTIMS*, *supra* note 10, at 36.

of the stock. At the time of the accident, only one American citizen was serving on the Board of Directors of UCIL while living in Hong Kong. UCIL was a foreign company incorporated in India and subject to Indian laws, regulatory provisions, and policies. The day-to-day business of the company was controlled by the Indian directors who formed the majority on the Board of Directors of UCIL. Although a general design was sold to the subsidiary by the parent company,¹⁹ it was developed and subsequently modified by UCIL locally and approved by the various regulatory agencies of the Indian government.²⁰ This is a classic case of the transfer of hazardous substances and technology to a third world country by a TNC. The technology in question was provided by the parent company on a very specific demand by the recipient country.²¹ This is a perfect example of a developing country seeking hazardous technology for

19. Stuart Diamond, *Carbide Gives Details on Its Sabotage Claim*, N.Y. TIMES, Nov. 18, 1986, at 29. As reported, UCC sold "general design drawings to its Indian subsidiary, which then hired companies to do detailed design and construction." *Id.* "The parent company trained some of the plant managers, but was unable to dictate the plant's daily operations . . ." *Id.* However, the Indian government blamed Union Carbide for errors in the design, management, and an oversight of the Bhopal plant. *Id.* Specifically, the government stated that "unreasonable and highly dangerous defective plant conditions" were responsible for the accident. *Id.* See also Matt Miller, *Two Years After Bhopal Gas Leak Disaster, Lingering Effects Still Plague Its People*, WALL ST. J., Dec. 5, 1986, at A34; *India Sues Union Carbide in Bhopal: Case Differs Little from One Filed in U.S.*, 9 INT'L ENVTL. REP. (BNA), 343 (1986).

20. According to the 1973 agreement for the sale of the design, which was approved by the Indian government, the parent company was not to be "in any way liable for any loss, damage, personal injury, or death" resulting from the design specifications sold. Diamond, *supra* note 19, at 29. "[The] Indian government had approved and inspected the plant, [it] knew about the dangers of MIC, and [it] refused to allow American employees from [Union] Carbide to remain in India to provide technical assistance requested by its subsidiary to the Indians running the plant." *Id.* The Indian government, by a letter dated March 13, 1972, authorized UCIL to set up an MIC plant to manufacture 5000 tons of MIC-based pesticides at Bhopal. See VALIANT VICTIMS, *supra* note 10, at 39.

21. One commentator has stated:

The Bhopal plant was constructed by UCIL pursuant to Indian government policies, laws and regulations which required the complete back integration of production facilities. UCIL, in compliance with the stated government policies and regulations, was forced to back-integrate and build the Bhopal plant, even though it would have been much more desirable financially both for [d]efendant and for UCIL to continue to import MIC from the [d]efendant. UCIL had no desire to incur the huge capital expenditure of building a pesticide plant; however, the Central Government's laws and policies required such construction.

VALIANT VICTIMS, *supra* note 10, at 202. See also Charan Lal Sahu v. Union Carbide, Judgment of the Supreme Court of India, Writ petition No. 258 (1989), at 2; *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 855-59 (S.D.N.Y. 1986). See generally Günther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny—Common Responsibility*, 20 N.Y.U. J. INT'L L. & POL. 603 (1988); Craig D. Galli, Note, *Hazardous Exports to Third World: The Need to Abolish the Double Standards*, 12 COLUM. J. ENVTL. L. 71 (1987); Maureen Bent, Note, *Exporting Hazardous Industries: Should American Standards Apply?*, 20 N.Y.U. J. INT'L L. & POL. 777 (1988).

much-needed development and then redesigning and modifying the technology according to the local needs and expertise.²²

In the case of the Bhopal disaster, the following facts can be identified: 1) a subsidiary of a TNC operated in a third world foreign country; 2) the subsidiary was subject to local laws, regulation, and control and not the laws controlling and regulating the parent company; 3) the parent company was not free to manage and operate its subsidiary's plant by way of providing technical and personnel assistance; 4) no effects of the accident were experienced outside the borders of India except for the economic effects on the parent company; 5) in addition to ecological damage in the region, the primary damage was the loss of human life and human suffering; 6) a case was filed in the United States in order to circumvent Indian laws and acquire jurisdiction over the parent company; 7) no international law was referred to in the course of litigation, either in the United States or in India.²³

B. Givaudan—Seveso & Meda, Italy

From a legal perspective, the accident most similar to Bhopal occurred on July 10, 1976, in Meda, Italy at a plant owned by the Givaudan corporation, a subsidiary of the Swiss corporation Hoffman LaRoche.²⁴ The accident was caused by malfunctioning safety equipment that led to the release of an extremely toxic gas, dioxin.²⁵ The neighboring town of Seveso was most affected by the incident; thus this accident is commonly called the Seveso incident. Without doubt, this accident caused heavy ecological damage and widespread contamination to several cities.²⁶ Similarities aside, there are marked differences between the Bhopal and Seveso situations.

In contrast to the facts of the Bhopal tragedy, the Seveso incident is characterized by the following facts: 1) both the parent company and the

22. This case is a typical example of the problems faced in the third world countries. Technology-importing countries modify plant designs to accommodate their growing developmental needs. These modifications are not always environmentally safe nor even economically sound. In India, the tendency is to adopt labor intensive methods and to create as many jobs as possible. Generally, third world countries prefer to import labor intensive technology and then modify it to suit their needs, which often compromises safety features. Governmental interference to assure that foreign multinationals generate maximum local employment is very common.

23. Diamond, *supra* note 19, at 29.

24. Melton S. Davis, *Under the Poison Cloud*, N.Y. TIMES MAG., Oct. 10, 1976, at 20.

25. *Poison Cloud's Effects Still Baffle Italy's Officials*, N.Y. TIMES, Aug. 13, 1978, at 3. For a detailed discussion of the Seveso accident, see generally Nanda & Bailey, *supra* note 2, at 163-67.

26. *Commission Reports on Causes of Seveso: Makes General Suggestions for New Rules*, 1 INT'L ENVTL. REP. (BNA) 246 (Aug. 10, 1978) [hereinafter *Commission Reports*]. See also Nanda & Bailey, *supra* note 2, at 164.

subsidiary were located in developed countries, with no involvement from a third world country; 2) the subsidiary was subject to local laws, which if properly observed and effectively enforced would have reduced the possibility of such an accident;²⁷ 3) the parent company was closely involved in running its subsidiary;²⁸ 4) the cases were filed and adjudicated both in Italy and Switzerland but without the intent to circumvent the Italian law,²⁹ and major settlements were reached outside the courts; 5) the case was settled basically between the subsidiary, the Italian government, and the city of Seveso,³⁰ and a settlement was reached between the subsidiary and the victims even though the parent company was willing to accept responsibility;³¹ 6) the main damage was ecological, combined with some human suffering but with no deaths; and 7) the effect beyond the borders of Italy was again economic and marginal.³²

C. Nuclear Plant—Chernobyl, Ukraine (USSR)

While the cases of Bhopal and Seveso have a few similarities, the case of Chernobyl is very different. The Chernobyl accident of April 26, 1986, was caused by a chemical explosion resulting in the meltdown of one of the four

27. "[C]harges against the mayor of Meda [Italy] and local health officials were initially filed and then later dropped. The charges were based upon the officials' failure to apply existing legislation which could have avoided the disaster." Nanda & Bailey, *supra* note 2, at 165.

28. *Commission Reports*, *supra* note 26, at 246; Nanda & Bailey, *supra* note 2, at 164. The parent company and subsidiary were both accused of failing to inform the Italian authorities about the nature of the operations and of failing to install automatic control and warning devices. *Commission Reports*, *supra* note 26, at 246; Nanda & Bailey, *supra* note 2, at 164-65.

29. In the case of Bhopal, from the beginning, both the victims and the Indian government tried to reach the parent company by filing cases in a United States federal court. Under the Indian laws then in effect, the parent company could not be sued for the wrongs of its subsidiary. The tort law doctrine of absolute liability for ultrahazardous activity, with all of its exceptions, was in force. See *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. All regulated industries were excluded from absolute liability. *Id.* Other exceptions such as contributory negligence, consent, and statutory activities are discussed in other cases. See, e.g., *Marlor v. Ball*, [1900] 16 TLR 239; *Narayanan v. Government of Travancore-Codin*, 1956 A.I.R. 225 (S.C.); *Madras Ry. Co. v. Zamindar of Carvatenagarum* (1874) 1 I. App. 364. Indian corporate law, like English corporate law, has preserved the corporate identity. See A. RAMAIIYA, *GUIDE TO THE COMPANIES ACT* §34, at 112-15 (J.C. Shah et al. eds, 10th ed. 1984); AVTAR SINGH, *INDIAN COMPANY LAW* 11-23 (6th ed. 1979) (stating that Indian law does not permit piercing of the corporate veil to reach the parent company except in the case of fraud or tax evasion, and traditionally, courts have protected the sanctity of an incorporated body).

30. *Figures for Seveso Compensation at Odds with Italian Announcement*, 3 INT'L ENVTL. REP. (BNA) 242 (June 11, 1980); *Seveso Files Suit in Geneva Court Seeking Damages for Dioxin Disaster*, 2 INT'L ENVTL. REP. (BNA) 574 (Mar. 10, 1979); Nanda & Bailey, *supra* note 2, at 164.

31. *Commission Reports*, *supra* note 26, at 246; Nanda & Bailey, *supra* note 2, at 164.

32. See Nanda & Bailey, *supra* note 2, at 164. In the case of Bhopal, the parent company was asked to pay most of the settlement, \$425 million, while the subsidiary was asked to contribute \$45 million. VALIANT VICTIMS, *supra* note 10, at 527-32. In the case of Seveso, the subsidiary paid \$80 million to the Italian government and an additional \$72 million to the city of Seveso. Nanda & Bailey, *supra* note 2, at 164.

reactors at the Chernobyl nuclear power plant.³³ Without doubt, this was the worst nuclear power plant accident in history, killing thirty-one workers and causing acute radiation problems for several hundred more.³⁴

Differences between the two accidents discussed earlier and the Chernobyl explosion are numerous: 1) Chernobyl involved a government-owned operation with no TNC or foreign ownership in question; 2) the plant was subject to the local laws of the former Soviet Union; 3) the former Soviet government ran the operation with no foreign corporate involvement; 4) the accident perfectly demonstrated the concept of the public international law of state responsibility³⁵ because the former Soviet Union as a state was responsible for both the ecological and financial damage incurred by injured countries; 5) interestingly, the question of damage compensation was raised by the European Parliament and not by individual countries in any court of law;³⁶ 6) the transboundary effect of the accident was felt all over Europe;³⁷ and 7) the main damages from the accident came in the form of long-term radiation pollution, ecological damage, dislocation of economic activity, and long-term health problems.

D. Sandoz—Basel, Switzerland

The Sandoz accident involved a major toxic chemical spill in the Rhine that occurred at Basel, Switzerland, on November 1, 1986. The spill caused approximately 1246 tons of toxic chemical to be released into the Rhine River, adversely affecting France, Germany, the Netherlands, and Switzerland.³⁸ The

33. For a detailed discussion of the accident, see Nanda & Bailey, *supra* note 2, at 170-76. See also *Some Facts on Chernobyl Revealed*, 9 INT'L ENVTL. REP. (BNA) 139-40 (May 14, 1986).

34. See Nanda & Bailey, *supra* note 2, at 173.

35. See generally Günther Handl, *Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda*, 15 ECOLOGY L.Q. 203 (1988); INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (R. Lillich ed., 1983).

36. OECD, *The Accident at Chernobyl—Economic Damage and Its Compensation in Western Europe*, 39 NUCLEAR L. BULL. 58 (1987). See Nanda & Bailey, *supra* note 2, at 176.

37. Increased radiation levels were found in Scandinavia, Poland, France, United Kingdom, Finland, Italy, Ireland, and West Germany. See *Some Facts on Chernobyl Revealed*, *supra* note 33, at 140; *Government Withholds Information/Then Says Radiation Levels Not Serious*, 9 INT'L ENVTL. REP. (BNA) 188 (June 11, 1986); *EEC Lifts Ban on East European Food Imports, Substitutes U.S. Limits on Radiation Levels*, 9 INT'L ENVTL. REP. (BNA) 189 (June 11, 1986); *Radiation Levels from Chernobyl Prompt Limits on Livestock Slaughter*, 10 INT'L ENVTL. REP. (BNA) 442 (Sept. 9, 1987); *Effects of Chernobyl in Finland*, 9 INT'L ENVTL. REP. (BNA) 420 (Nov. 12, 1986); *Excess Radioactivity Found in Birds that Fly Through Chernobyl Contamination*, 9 INT'L ENVTL. REP. (BNA) 272-73 (Aug. 13, 1986); *No U.S. Effects Seen*, 9 INT'L ENV. REP. (BNA) 140 (May 14, 1986).

38. Paul Lewis, *Huge Chemical Spill in the Rhine Creates Havoc in Four Countries*, N.Y. TIMES, Nov. 11, 1986, at 1; *French, Germans Complain About Notice of Fire at Sandoz Chemical Plant in Basel*, 9 INT'L ENVTL. REP. (BNA) 389-90 (Nov. 12, 1986) [hereinafter *French, Germans Complain*]. See also EGLI Promises "Radical Measures" to Prevent Future Incidents like Sandoz,

factual setting of the Sandoz accident is very different than those of Bhopal and Seveso because: 1) the Sandoz case involves a large TNC operating in its country of incorporation; 2) no involvement of a subsidiary or any operations in another country was in question; 3) the parent company was subject to the laws and standards of its country of incorporation; 4) the parent company was free to operate, regulate, and effectuate its own standards and activities; 5) no cases were filed in any domestic courts; 6) settlement of damages was taken up between the French and Swiss governments at the same time, thus invoking the international law of state responsibility;³⁹ 7) the main damage caused by this spill was ecological, especially the loss of marine life in the Rhine River; and 8) the effects of this accident went beyond the borders of Switzerland, causing significant economic damage to the fishing industries in the injured states.⁴⁰

III. THE ADEQUACY AND RESPONSIVENESS OF THE LAW, POLICY, AND INSTITUTIONS IN INDUSTRIAL DISASTERS

Each of the four cases discussed in Section II has been dealt with in a different way and under a different set of laws. While Chernobyl and Sandoz are the textbook examples of state responsibility cases, Bhopal and Seveso are not. In the latter cases, new laws were created judicially or legislatively to address the problems.⁴¹ However, these laws are very limited in scope. They neither address the causes of such accidents nor satisfy the aspirations and

9 INT'L ENVTL. REP. (BNA) 429-41 (Dec. 10, 1986) [hereinafter *Radical Measures*]; *Government Bills Switzerland*, 10 INT'L ENVTL. REP. (BNA) 3-7 (Jan. 14, 1987); Nanda & Bailey, *supra* note 2, at 176-78.

39. *Government Bills Switzerland*, *supra* note, 38 at 3; *Sandoz and French Government Settle for Pollution Claim for 46 Million Francs*, 10 INT'L ENVTL. REP. (BNA) 492 (Oct. 14, 1987); Nanda & Bailey, *supra* note 2, at 177.

40. *See generally French, Germans Complain*, *supra* note 38, at 389-90; Nanda & Bailey, *supra* note 2, at 177-78.

41. *Radical Measures*, *supra* note 38, at 429-30; *EEC Calls for Immediate Closure*, 9 INT'L ENVTL. REP. (BNA) 180 (June 11, 1986). The U.S. Court of Appeals for the Second Circuit stated that Union Carbide USA shall:

- (1) consent to the jurisdiction of the courts of India and continue to waive defenses based on the statute of limitations, (2) agree to satisfy any judgment rendered by Indian Court against it and upheld on appeal . . . ; (3) be subject to discovery under the Federal Rules of Civil Procedure of the United States.

VALIANT VICTIMS, *supra* note 10, at 655. These three conditions have set an unprecedented example whereby a foreign multinational can now be reached without piercing the corporate veil of the subsidiary, and much more liberal discovery laws are available to foreign states to reach the records of a multinational. *See id.* Also, it is important to note that the Bhopal Gas Leak Disaster Act of 1985 passed by the Government of India, which came into force on March 29, 1985, created a new example whereby the Government of India assumed the responsibility as *parens patriae* to represent Indian victims while at the same time being a codefendant along with UCIL before the Indian courts. This is a unique example wherein a defendant is also a plaintiff. *See MASS DISASTERS*, *supra* note 10, at 11-16.

desires of the victims. This inquiry will begin with the Bhopal case because the thesis of this Article is that Bhopal is unique because, unlike all other accidents, it involved a developing country; yet, it is typical of the events leading up to and following a North-South⁴² commercial disaster.

A. Bhopal

In the case of Bhopal, it was often said that the old rustic laws of India were inadequate to respond to the situation. The central government's policy to keep itself out of the reach of victims was also discussed. Both factors were indeed a major hurdle for the victims in this search for justice and constituted the prime reasons why the victims filed cases in the U.S. courts. Another commonly ignored aspect of the Bhopal case is that if UCIL was the only target of Bhopal litigation, then the investment of Indian Government-owned insurance companies would have been affected. These investments accounted for about 22% of the ownership of UCIL.⁴³ The mystery as to the insurer of UCIL in India can only be unfolded by realizing that, at the time of accident, there were no private insurance companies in India. The two largest corporate insurance companies were stockholders of UCIL. This scenario leaves the question of whether the Indian government's objective in filing the case in the U.S. courts was to seek compensation for the victims, to avoid the responsibility of the insurers of the Indian subsidiary, or to save the capital invested by government-owned investment companies in UCIL.⁴⁴ In fact, the final settlement ordered by the Indian Supreme Court divides the liability between the parent and the subsidiary. By allocating \$45 million to be paid by the subsidiary, which affected the holdings of the Indian-government-owned corporations, the Supreme Court of India acknowledged that the Indian subsidiary could not be absolved of its responsibility.⁴⁵

However, this was not the only reason for filing the case in the U.S. The problem also involved the substantive laws of India. First, under the Companies Act, neither the victims nor the Indian government could have secured jurisdiction over the parent company without proving that the activities of the subsidiary were fraudulent or were for the purpose of tax evasion.⁴⁶ Obviously this was not the case, and piercing the corporate veil was thus not a viable

42. "North-South" is a standard term in United Nations documents and is used to refer to developed countries (North) versus developing countries (South). It also represents the sharp division of the United Nations into two interest blocks.

43. See Charan Lal Sahu v. Union of India, Judgment of the Supreme Court of India, Writ petition No. 268 (1989), at 2, cited in VALIANT VICTIMS, *supra* note 10, at 550.

44. VALIANT VICTIMS, *supra* note 10, at 550.

45. See Union Carbide Corporation v. Union of India, Civil Appeal Numbers 3187-88 of 1988, order dated Feb. 14, 1989, at 2, cited in VALIANT VICTIMS, *supra* note 10, at 527-28.

46. See RAMAIIYA, *supra* note 29, at 112-15; SINGH, *supra* note 29, at 11.

approach. Furthermore, the concept of strict liability was not in force in India at the time of the accident. The old doctrine of absolute liability as set out in the case of *Rylands v. Fletcher*⁴⁷ was thoroughly weakened into a law of exceptions,⁴⁸ rendering the application of this concept impossible. For instance, in 1965, the Indian Supreme Court, while elaborating on the phrase of "extra-ordinary use," held that in a country such as India where agriculture is a major industry and where infrastructure and support systems are necessary for agricultural and industrial development, it would be wrong to apply the rule of strict liability for an accident unless negligence is proven.⁴⁹ There was a long history in India where courts repeatedly refused to apply the strict liability rule and instead preferred to impose liability under a negligence theory.⁵⁰ However, this practice was overruled in 1987 by the Supreme Court, in *M.C. Mehta v. Union of India*,⁵¹ which held:

[A]n enterprise which is engaged in hazardous or inherently dangerous industry . . . owes an absolute and non-delegable duty to the community to insure that no harm results to anyone . . . [A]nd if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm . . .⁵²

Although this change may appear as a step forward, it did not come as a result of the court becoming more concerned or humane, but as a result of global scrutiny of Indian laws. Until this case, Indian courts were willing participants in the bureaucratic mentality that traditionally denied the rights of victims⁵³ based on the pretext that hazardous activity is necessary to sustain the development of the country. This pretext is decidedly a violation of human

47. (1868) L.R. 3 H.L. 330.

48. Exceptions such as contributory negligence, consent, and statutory activities are discussed in the following cases respectively: *Marlor v. Ball*, [1900] 16 TLR 239; *Narayanan v. Travancore-Codin*, 1956 A.I.R. 639 (S.C.); *Madras Ry. Co. v. Zemindar of Carvatenagarum*, 1 I. App. 364 (1874).

49. *Punjab v. Modern Cultivators*, 1965 A.I.R. 17 (S.C.). In this case, Chief Justice Sinha criticized the old English concept of "king can do no wrong" and said that there was no reason for maintaining this feudal concept in India when it has been abolished by statutes in England. *Id.*

50. *Ram Lal v. Lil Dhary*, 3 Indian L.R. 776 (Cal. 1877); *Shayad Ali v. Shyam Pratap*, 41 Indian Cas. 382 (Pat. 1917); *Mahindra Nath v. Mathura Das*, 1946 A.I.R. 175 (Cal. 1946).

51. (1987) 1 S.C.C. 395-420, *cited in* *Charan Lal Sahu v. Union of India*, Judgment of the Supreme Court of India, Writ petition No. 268 (1989) (Singh, J., dissenting, at 5); VALIANT VICTIMS, *supra* note 10, at 617.

52. VALIANT VICTIMS, *supra* note 10, at 618.

53. No effort was ever made to improve safety features of dangerous technology. The bureaucrats insist that they know what is best for the country in terms of importing new or efficient technology. This attitude is decidedly the reason behind the government's inaction. In the case of Bhopal, UCIL was instructed by the government to use domestic consultants for detailed designing of the plant in question. VALIANT VICTIMS, *supra* note 10, at 39, 202.

rights and reflects sheer contempt for the poor. This case is only a beginning, for there is still much more to accomplish. This is an example of a defective democratic process where the executive branch overwhelmingly dominates every policymaking aspect of governance. Politicians' inexperience makes them too heavily dependent on traditional governmental agencies. Quite frequently, lawmakers are overpowered by bureaucracy and decide the fate of the masses without ever realizing that, as public servants, it is their duty to protect the public's interest. This disturbing attitude finds its way into the national policy and laws in a very subtle manner.

Another Draconian law that continues to be a part of Indian case law, primarily due to bureaucratic and political ineptitude, is the law that protects the government and its employees from all tortious liability.⁵⁴ In 1962, this law was modified by the India Supreme Court in the *Vidhyawati* case, which held that the "state was liable for damages occasioned by the negligence of its servants . . . if the negligence was such as would render an ordinary employer liable."⁵⁵ However, this progressive development did not last long. In 1965, the Supreme Court reversed itself, holding that the "state was not liable for the tortious acts of its servants if the acts were referable to the exercise of the sovereign powers."⁵⁶

After this description of substantive laws, it is easier to understand why the Bhopal case was filed in the U.S. In addition to the Indian courts' tradition of protecting the government, its policies, and its bureaucratic mentality at the expense of the victims, those responsible for deciding where to file the cases were weary of the resurgence of judicial activism on the pretext of Bhopal.⁵⁷ The cases were replete with information showing that the laws were either not enforced or completely ignored. Proper execution and enforcement of these laws could have averted such a catastrophe.⁵⁸

54. RATANLAL RANCHHODDAS & DHIRAJLAL THAKORE, *THE LAW OF TORTS* 25 (1973); *Union of India v. F. Gian Chand Kasturi Lal*, 56 INDIAN L.R. 68 (1954).

55. 2 H.M. SEERVAI, *CONSTITUTION OF INDIA*, 1794-95 (3d ed. 1984); *Rajasthan v. Mst. Vidhyawati*, 1962 S.C.R. (Supp. 2).

56. SEERVAI, *supra* note 55, at 1975; *Kasturilal v. Uttar Pradesh*, 1965 A.S.C. 1039 (S.C.).

57. While bureaucratic hierarchy and governmental institutions are protected from civil liability, they are not protected from criminal liability in India. See *Ratlam Municipality v. Vardhichand*, 1980 CRI. L.J. 1075-77; *VALIANT VICTIMS*, *supra* note 10, at 639.

58. Robert Reinhold, *Disaster in Bhopal: Where Does the Blame Lie?*, N.Y. TIMES, Jan. 31, 1985, at 8. The Bhopal development plan, which had the force of law, was issued on Aug. 25, 1975. The plan required that the obvious industries, including the Carbide plant, be relocated to a new industrial zone 15 miles away to save the population from the harmful effects of such industries. Evidently the plan was not followed despite a 1975 order of the commissioner and director of town and country planning. It is important to note that the license to manufacture the pesticides was issued two months after the plan was announced. The latest disclosures indicate that only two months before the accident, slum dwellers were given permanent property rights all around

This is a typical scenario of the common law principles of India.⁵⁹ Almost all former colonies of Britain inherited this body of substantive law along with the bureaucratic machinery traditionally designed to rule the subjects, not the free citizens, with high-handed bureaucratic control.⁶⁰ The fact that all the former colonies have emerged as free nations in the last five decades does not necessarily indicate that they have matured to practice democracy by developing and balancing public participation and competence.⁶¹ How far these newly born democracies follow *salus populi*⁶² is questionable. The degree to which any country follows the values attached to *salus populi*⁶³ varies depending on the combination of the maturity of its political institutions, the degree of literacy, the economic conditions, and its developmental level.

Under these conditions, Bhopal victims sought redress in a U.S. court along with the Indian government, which passed special legislation to empower itself to represent the victims.⁶⁴ The final settlement could not have been reached without the help of U.S. law and U.S. courts. The Indian government overcame the weaknesses of its own law, primarily the difficulty in reaching the parent company and the absence of strict liability, by using American substantive and procedural law. The very fact that Judge Kennon helped the government and victims secure jurisdiction over the parent company was a victory. The American procedural law of discovery was also helpful.⁶⁵ Thus, the final outcome of the case was the product of two countries' laws and legal systems.

the plant. *Id.* Such permission, if given, was in violation of many state and federal laws. See Majupuria, *supra* note 2, at 30.

59. In addition to the improper location of the plant, the majority of the victims resided on the property, in violation of several local laws, which legally amounted to contributory negligence on the part of the victims as well as the state government. See generally SURESH JAIN & VIMLA JAIN, ENVIRONMENTAL LAWS IN INDIA (1985) (listing the following statutes: M.P. Regulation of Land Act, 1948, at 166; M.P. Municipal Corporations Act 1956, §§ 246, 248A; M.P. Local Acts 1919-1970, 2d. ed., vol. L11, 399).

60. See generally Sudhir Chopra, *A Review of the Indian Legal and Administrative System in the Context of Bhopal Disaster: What Is Wrong and What to Do?*, 10 ALIGARH L.J. 83 (1990) [hereinafter Chopra, *A Review*]; Sudhir Chopra, *La Catastrofe De Bhopal El Sistema Juridico-Administrativo de la India: Que Esta Mal y Hay Que Hacer?*, 5 AMBIENTE Y RECURSOS NATURALES 49 (1989).

61. For a detailed discussion of the principles of participation and competence, see generally DENNIS THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT (1976); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (3d ed. 1865).

62. The welfare of the people.

63. The concept of *salus populi* has been derived from Cicero's (DeFinibus, ii-105) *salus populi suprema est lex*, the good of the people is chief law. OXFORD DICTIONARY OF QUOTATIONS 151 (3d ed. 1979).

64. In 1985, the Bhopal Gas Leak Disaster (Processing of claims) Act was passed. MASS DISASTERS, *supra* note 10, at 11-16.

65. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd.*, 809 F.2d 195 (2d Cir. 1987).

At last, the victims were comforted by the answer. Of course, the speed with which this process will attain its objective now fully rests on the politicians of the Central and State Governments.⁶⁶

The purpose of the Indian law-bashing in this Article is not to undermine the significant role that the Indian Supreme Court and the legal system have played in delivering justice to the victims. The Supreme Court, in particular, has shown vision and innovation in handling complex and, at times, politically controversial matters. Yet, the problem lies with the system inherited from the British. After all, the system was not structured to run a free society but was instead designed to govern a colony. An occasional problem in the delivery of social justice is, that while courts can be bold, innovative, and visionary, they can also fail to divorce themselves from the fundamental principles of law that govern their own thought processes. This situation is clearly demonstrated by the response of Indian substantive law on strict liability of the parent company or of the government. The judicial process, which has at times demonstrated signs of judicial activism and innovation,⁶⁷ failed, until recently, to notice and incorporate the rapid changes of industrial development and hazardous activity associated with sophisticated technology. The Bhopal incident was a shock that resulted in a fairly speedy response from both the legislative and judicial institutions. It is a step forward; yet, much work remains to be done to undo the damage caused by the typical bureaucratic mentality in the Third World.⁶⁸

In a divided world, there will be divided law. What divides the world divides the law as well—socio-economic conditions, maturity of the political and legal institutions, and the general development level.⁶⁹ Yet, the world community is responsible for attempting to reduce this gap. Furthermore, wherever possible, super-expensive litigation, such as in the Bhopal case, must be avoided by establishing more creative methods of dispute settlement for similar situations, even if that requires building new international institutions to bring harmony to an otherwise fragmented world order. International law is sought to resolve conflicts between sovereign states, to bring order to a disorderly state of affairs. Despite political and ideological constraints, international legal thinking is often demonstrated through progressive ideas of new, bold institutions capable of delivering the goods they are asked to deliver. The question then is: Why not seek a bold and imaginative response to avoid

66. Upendra Baxi, *Introduction to VALIANT VICTIMS*, *supra* note 10, at i-iii.

67. *See generally* Ratlam Municipality v. Vardhichand, CRI. L.J. 1079-77 (1980).

68. Chopra, *A Review*, *supra* note 60, at 92-95.

69. RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 6 (1964). *See generally* Oliver J. Lissitzyn, *International Law in a Divided World*, 542 INT'L CONCILIATION (Mar. 1963); Stanley Hoffman, *International Systems and International Law*, 14 WORLD POL. 205 (1961).

future Bhopals and Sevesos?

B. Seveso, Chernobyl, and Basel

The incident in Seveso had many similarities to the one in Bhopal. However, unlike Bhopal, Seveso involved two developed countries. The involvement of two developed countries supports the proposition that the problem is virtually universal. That is to say, a TNC operating in another country, whether developed or undeveloped, should have the same responsibility as if it were operating in its home country. Today, scores of corporations, particularly governmental corporations from China and India, are engaging in private and public undertakings in dozens of African and other Asian countries to help less-developed countries with modern technology. This transfer of technology enhances development and generates employment. Nevertheless, such a transfer of technology from one developing country to another is not necessarily safe, clean, and responsive to contemporary ecological concerns.

The Seveso incident was resolved through settlements reached between the subsidiary company and the Italian government without resorting to extensive and expensive litigation. There was no elaborate discussion of what law should be applied because the subsidiary was the responsible party and could be reached for the satisfaction of any or all claims. The subsidiary of a developed country received support from the laws of a developed country and was able to collaborate with the parent company to satisfy adjudicated or negotiated claims. Perhaps the Seveso incident did not raise the issue of these accidents to the level of attracting global attention because the claims were settled easily. This situation was very different from Bhopal.

The modern TNCs have been operating for nearly two centuries. They began to expand their business in newly colonized countries with the advent of European powers. The intensity with which they operate today and the extent to which the world economy has become dependent on them for their global network of business activities are relatively new phenomena of the twentieth century. But for the TNCs, there is no hope for progress in under-developed countries. An acute sense of interdependence exists here: the developing countries need TNCs to help alleviate the miseries of poverty, while the corporations need new markets for the sustained growth of their business activity. In the post-war years, international energies were primarily spent addressing the political aftermath of the war; thus, the issue of global interdependence hardly received adequate attention. Also, political and ideological differences were strong impediments to building bold global institutions capable of transcending the Code of Conduct for Transnational Corporations. In a politically sensitive world, "sovereignty" is the last expression of freedom from all kinds of dominance, whether political or

economic, or by giant TNCs.⁷⁰ Must there be adherence to what was relevant in the past, or is it possible to evolve into a global society that is more responsive to contemporary problems and the needs of the future? This question requires the immediate attention of politicians and legal scholars alike. Now is the time to move beyond the traditional First World and Third World approach to a global society where issues of a transnational nature are addressed by the global community through accommodation and trust.

The corporate liability in the Basel-Sandoz case was best handled through the law of state responsibility. As discussed earlier, the Sandoz corporation did agree to satisfy the French claim, as well as other claims by ecological institutions. It is noteworthy to mention here that cases between the corporations of developed countries are generally more easily and amicably settled, though some degree of distrust towards TNCs can be noticed even by the public in developed countries. The law of state responsibility, as applied in the Basel case, was sufficient to provide an adequate remedy.⁷¹ No involvement of TNCs existed in the Basel situation. The issue was the settlement between the bordering or affected states due to transboundary pollution. The most germane rule of international law applicable in such a case was developed in the Trail Smelter Arbitration, which stated "that it is unlawful for a state to cause transfrontier pollution which entails serious damage in another state."⁷² This rule is applicable in cases where two states are involved. The Chernobyl accident also illustrates an application of this rule of liability for transfrontier damages. However, in the cases of Bhopal and Seveso, this rule could not be invoked because there was no transboundary damage or pollution. In cases involving transboundary pollution, both states are subject to the custom of international law that imposes a duty to cooperate, including a duty to provide information and to consult.⁷³ This rule can be relied upon successfully in most cases similar to Basel or Chernobyl.

In the case of Chernobyl, however, the former Soviet Union refused to compensate for damages to crops in neighboring countries. There is no clear

70. GEORG SCHWARZENBERGER, *POWER POLITICS* 121-29 (3d ed. 1964); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 98-121, 299-312 (4th ed. 1967).

71. Nanda & Bailey, *supra* note 2, at 182.

72. Trail Smelter (U.S. v Canada), 3 R.I.A.A. 1911 (1941). See also Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. REP. 4.

73. Michael Bothe, *International Problems of Industrial Siting: In Border Areas and National Environmental Policies*, in *TRANSFRONTIER POLLUTION AND THE ROLE OF THE STATES* 79-97 (1981). See also G.E. Donascimento & E. Silva, *Pending Problems on International Law of the Environment*, in *THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT* 217 (René-Jean Dupuy ed., 1985); Günther Handl, *National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered*, 26 NAT. RESOURCES J. 405, 412-13 (1986).

alternative when a responsible state refuses to satisfy its obligations.⁷⁴ The history of the state responsibility rules is indicative of the problems faced during four and a half decades of negotiations. Professor Allott's description of the work of the International Law Commission (ILC) on state responsibility provides a vivid picture as to why it does not seem to work:

Garcia Amador's first report was . . . an extraordinary document Individuals would be [the] subject of law entitled to pursue claims in their own right, breach of which would give rise to the international responsibility.

It is not difficult to imagine the dismay with which many members of the Commission greeted the report . . . [M]ember governments set about bringing the reporter back into line In subsequent reports of the Commission life was gradually drained out of the topic.⁷⁵

Indeed, there are many aspects of state responsibility that are settled, including when and under what circumstances a set of rules should be invoked. Professor Allott's assessment states that the reason behind the failure at the ILC lies in the bureaucratization of the international society that projects, in addition to the influence of a certain social group, a dominance of a certain mentality. Professor Allot further says:

[It is the] bureaucratic spirit which seeks to get the job done with the minimum of spiritual commitment and the maximum of personnel security. It is the spirit of the quiet life rather than the good life, seeking to gain an accumulation of minor tactical success in relation to one's professional equals rather than to make original and energetic contributions to the general interest of society.⁷⁶

74. Linda A. Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENVTL. L. 203, 207 n.43 (1987).

75. Phillip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 4-5 (1988). For a detailed discussion of the topic, see generally WILLIAM BISHOP, JR., *INTERNATIONAL LAW* 626-737 (1962); G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 381-425 (1979); C.W. Jenks, *Liability for Ultra Hazardous Activities in International Law*, 117 RECUEIL DES COURS 99, 105-200 (1966); Daniel S. Magraw, *The International Law Commission's Study of International Liability for Nonprohibited Acts as It Relates to Developing States*, 61 WASH. L. REV. 1041 (1986); Günther Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525 (1980).

76. Allott, *supra* note 75, at 9-10.

C. Lessons from the Bhopal & Seveso Accidents

From the brief discussion of the factual settings of the four accidents discussed earlier, it is clear that the Chernobyl and Sandoz accidents, though ecologically damaging, are in a different category. In these two cases, international law of state responsibility could be, and was, effectively invoked. However, Bhopal and Seveso raised entirely different issues about how to effectively regulate, control, and mitigate the effects of an industrial disaster. In the case of Seveso, the subsidiary of a foreign parent company was willing to settle the case by paying damages. In the case of Bhopal, the attack initially focused on the foreign parent corporation to find fault with, and lay claim on, a TNC. This situation highlights the problems faced by developing countries that frequently import hazardous substances and technology for much needed developmental projects.

The Bhopal and Seveso incidents raised a number of issues that need further investigation: how to regulate and subject TNCs operating in foreign countries to a definite regulatory regime; how to establish and enforce international standards on the corporations involved in the export and import of hazardous substances and technology to prevent such accidents in developing countries; and what kind of dispute settlement mechanisms should be developed to find just compensation to redress the damage caused to human victims, state economies, and global ecology. Also, why not inject the sense of a fair social system⁷⁷ and environmental justice⁷⁸ into an international setting? Generally, these

77. Allot writes,

More than any other kind of lawyer, international lawyers have a universalizing function. The rule which they perceive in one situation must be capable of conforming with a hypothetical rule for all situations. Customary international law has been a system of universalizing in Rawlsian mode—universalized self interest. Such a concept of justice is an inversion of another concept of justice—particular justice as the particularization of universal justice—but at least it is universalizing in tendency.

Allot, *supra* note 75, at 24. See generally John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *A THEORY OF JUSTICE*].

78. See generally PETER S. WENZ, *ENVIRONMENTAL JUSTICE* 310-24 (1988). I do not agree with Wenz's conception of environmental justice, because it is structured around a very narrow perception of the environmental quandary. In discussing distributive justice, he completely misses international tangents of the ecological riddle. Of all of the problems that we face today, environmental problems are such that they defy national boundaries—spill over into another's sovereign air, land, water, or into international commons of air and oceans. I wonder how we can construe a pluralistic theory for international society that is interdependent—in terms of economic, technological, and environmental issues? It is important to understand and appreciate that nature is one whole—interdependent—no matter where we go in the world. The main problem is man's relationship with nature. The only answer lies in a holistic approach where man agrees to live as part of nature and not as a species present to conquer and abuse nature. For a different example of the pluralistic approach, see generally CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987).

concepts are referred to in a setting of the sovereign state, yet the relevance of these fundamental principles of justice in the context of a just international legal order is equally important. Perhaps what is required is an attempt to build an international regulatory regime that takes into account the political and economical realities of the contemporary world, including the interdependence of the global economy, the global implications of environmental hazards, the global reach of the activities of TNCs, and the existence of third world countries who need assisted development without the additional cost of environmental damage. The latter half of the twentieth century has seen the disregard of national boundaries with regard to technology and economics. Recent rapid integration of the European and South Asian economies strongly indicates that uniform values, standards, and mechanisms for the control and regulation of TNCs are needed in an increasingly borderless society to develop and sustain a relatively risk-free global community that addresses the needs of both developing and developed countries.

Economic development and the environment have traditionally been at odds with each other, particularly in third world countries. Robert McNamara, former President of the World Bank, very aptly observed:

The question is not whether there should be continued growth. There must be. Nor is the question whether the impact on the environment must be respected. It has to be. Nor—least of all—is it a question of whether these considerations are interlocked. They are. The solution of the dilemma revolves clearly not about whether, but about how.⁷⁹

The developing countries have different conceptions of the risk associated with any hazardous activity. It is a right of every state to decide what constitutes a safe and risk-free activity, what the standard of the health of its citizens will be, and what level of pollution that it will accept as legal within its boundaries.⁸⁰ Yet, it is an entirely different situation when such standards of health, risk, safety, and pollution begin to interact with the well-being of those beyond its sovereign jurisdiction.⁸¹ The adverse effect of such lenient

79. Robert McNamara, Address to the United Nations Conference on the Human Environment, Stockholm, Sweden (1972), quoted in Edith Brown-Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 538 (1984).

80. See Günther Handl & Robert Lutz, *An International Policy Perspective on the Trade of Hazardous Materials and Technologies*, 30 *HARV. INT'L L.J.* 351, 355 (1989).

81. See generally Symposium, *Multinational Corporations and Their New Responsibilities to Disclose and Communicate Risk Information*, 6 *B.U. INT'L L.J.* 1 (1988). It is now admitted that in the last 20 years or so, the duty to inform importers of hazardous technology has evolved from a mere code of conduct to a customary international law. Daniel Partan, *The "Duty to Inform" in International Environmental Law*, 6 *B.U. INT'L L.J.* 43, 43 (1988). See also Harris Gleckman, *Proposed Requirements for Transnational Corporations to Disclose Information on Product and*

standards is long-term and can affect the resource base for future generations.⁸²

TNCs operating in developing countries involved in hazardous activity pose exactly the kind of problem that cannot and should not be left to the whims and understanding of one country alone, whether it be the importing or exporting nation. More often than not, developing countries importing hazardous technology or substances, acting in narrow self-interest, attempt to avoid stricter standards under the pretext of economic development. Is such behavior justified when it overlooks the effects of pollution and the health and safety of its own citizens only to achieve economic development? Certainly not. In an activity that is clearly global or has long-term effects on a nation's population, such an exercise of sovereign rights must be moderated.⁸³

Some critics even question whether this is truly an exercise of the sovereign rights of a developing or developed country or, in fact, a bureaucratization of society at large. Strong resistance by developing countries to accept higher standards of health, safety, and environmental protection is a vivid illustration of the bureaucratization of the issues of global concern that, in the long run, are likely to affect the international community and even future generations. Professor Allott describes this bureaucratization as one involving "not only the dominance of a certain social group but also the dominance of a certain mentality."⁸⁴ Today, we are at the end of a century that has witnessed the greatest growth of democracy in the history of civilization. This is the time to transcend conservative nationalistic positions⁸⁵ and embrace a just global order where all activities crossing the border of a nation state are subject to one uniform standard. With such an approach in mind, this Article shall examine the existing international law in general, and then, more specifically, the international law applicable to TNCs and international environmental law. Having established that the existing body of law is inadequate, obsolete, and ineffective, it is possible to develop and analyze what kind of global order and

Process Hazards, 6 B.U. INT'L L.J. 89 (1988).

82. See generally Handl & Lutz, *supra* note 80, at 354; Brown-Weiss, *supra* note 79, at 495; see also *Stockholm Declaration*, U.N. Conference on the Human Environment, U.N. Doc. A/CONF/4814/REV.1 (1972), reprinted in 11 INT'L LEGAL MATERIALS 1416 (1972).

83. For a different view, see generally Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980); PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW* (1993).

84. Allot, *supra* note 75, at 9.

85. SCHWARZENBERGER, *supra* note 70, at 209-12. Schwarzenberger, under the heading "Limitations and Peculiarities of International Law," discusses the problems associated with enforcement of international legal norms. *Id.* at 209. Separately, in three different chapters titled "International Aristocracy," "International Oligarchy," and "Minor Members of International Cast," he addresses the issues that shape the scope and content of the accepted norms of international law. *Id.* at 99-139.

sense of justice is needed to form a base for a global regulatory regime to prevent and mitigate such disasters.

IV. INTERNATIONAL GUIDELINES—DEVELOPMENT AND ENVIRONMENT

International legal literature is full of guidelines originating both from the United Nation agencies and regional organizations. In reality, these guidelines serve no purpose other than to edify their authors. The fact that these are only guidelines demonstrates that anything more would be unacceptable to one interest group or the other. Each group is trying to protect either its right to liberty⁸⁶ (that is, refusing to subject itself to foreign control or any control) or its right to equality⁸⁷ (that is, seeking economic and technical parity). These factors are the causes of the nation states' desire to indulge in a power struggle among the community of nation states.⁸⁸ The main guidelines for purposes of this Article can be found in the Stockholm Declaration,⁸⁹ the Code of Conduct for Transnational Corporations,⁹⁰ the ILO Declaration,⁹¹ and the Rio Summit

86. Douglas M. Johnston, *The Foundations of Justice in International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 125-29 (Ronald St. John Macdonald et al. eds., 1978); ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 46 (1958); ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 164-65 (1969).

87. The principle of equality in international law implies equality of state. According to Professor Dickinson, there is a lot of confusion between two principles: equality before the law and an equal capacity for rights and obligations. He writes that the latter is "an ideal toward which the law should seek to develop." EDWIN D. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 3-4 (1920). J.L. Brierly writes:

If the theory of equality, therefore, is interpreted to mean that all states have equal rights in law, it is contradicted by the facts. It is a true theory only if it means that the rights of one state, whatever they may be, are as much entitled to the protection of law as the rights of any other, that is to say, if it merely denies that the weakness of a state is any excuse in law for disregarding its legal rights.

J.L. BRIERLY, *THE LAW OF NATIONS* 66 (1928).

88. MORGENTHAU, *supra* note 70, at 36-82. Morgenthau writes that all political phenomenon can be reduced to three basic types: to keep power, to increase power, or to demonstrate power.

A nation whose foreign policy tends towards keeping power and not towards changing the distribution of power in its favor pursues a policy of the status quo. A nation whose foreign policy aims at acquiring more power than it has, through a reversal of existing power relations—whose foreign policy, in other words, seeks a favorable change in power status—pursues a policy of imperialism. A nation whose foreign policy seeks to demonstrate the power it has, either for the purpose of maintaining or increasing it, pursues a policy of prestige.

Id. at 36-37. This is a classical approach to international relations. Now, in an era of global environmentalism—especially in the aftermath of the East-West rivalry—the rules for international relations are rapidly changing.

89. *See infra* note 93 and accompanying text.

90. *See infra* note 97 and accompanying text; *supra* note 5 and accompanying text (Programme of Action).

91. *See infra* note 100 and accompanying text; *supra* note 6 and accompanying text.

and its declarations.⁹² A careful examination of these recommendations and principles will show that they contradict each other and that there has been little progress, if any, between Stockholm and Rio. The tension between the North and South continues. The only progress is the recognition of new problem areas, and, once again, the nation states have agreed to disagree on the methods and means of resolving the new quagmire.

A. *Stockholm Declaration*

To begin with, Recommendation 103 of the Stockholm Declaration recommends that governments take the necessary steps to ensure:

(a) That all countries . . . agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets and recognize further that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries. As a general rule, no country should solve or disregard its environmental problems at the expense of other countries,

(e) That all countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial process or products except in the cases where environmental disruption may constitute a concern to other countries.

Recommendation 106 states:

That Governments of the developing countries consider fully the new opportunities that may be offered to them to establish industries and/or expand existing industries in which they may have comparative advantages because of environmental considerations, and that special care be taken to apply the appropriate international standards on environment in order to avoid the creation of pollution problems in developing countries

Recommendation 108 states:

It being recognised that it is in the interest of mankind that the technologies for protecting and improving the environment be

92. See *infra* notes 105, 108 and accompanying text.

employed universally⁹³

A glance at the language of these recommendations suggests that the essence of the problem is a fight between the North and the South. Each party is seeking to maintain its freedom from foreign interference while agreeing to protect the environment in principle. Recommendation 103 addresses the North-South conflict and satisfies both by failing to invoke environmental concerns as a pretext for discriminatory trade policies and by failing to develop policies that might lead to restrictive practices in the transfer of technology to developing countries. At the same time, those seeking equality further emphasize that the same environmental concerns should not be permitted to deny or reduce access to developed countries since equality is necessary for the developing economies to sell their products in developed countries. The recommendation further emphasizes that the burden of environmental policies, such as expansive pollution control mechanisms and stricter process-safety standards, should not be transferred along with technology.⁹⁴ This means that ecologically damaging industries should not be relocated to developing countries.⁹⁵ This last scenario appears to be self-contradictory because the objective of equality with developed economies requires that developing countries strive to achieve the same standards as are observed in developed countries.

How can the objective of equality be realized when, while seeking the most advanced of technologies, the very features of advancement are denied as part of a technology transfer package? This illogical approach has its roots in a bureaucratic mentality that thrives on minor technical successes rather than seeking practical solutions. The irony is that a guideline that seems to have emerged from an expensive diplomatic exercise on an issue of global significance, in the end, provides everything except a solution. The question of seeking access to markets amounts to asking for the acceptance of inferior goods. The very idea of such a position suggests that the inferior should be accepted as an equal. Inferior and superior can never be equal; the only way to seek and achieve equality is to compete and ask for fair competition. Equality does not follow from charity. If third world countries seek equality, then they must seek partnership on equal footing rather than technical victories at the negotiating table.

93. *Stockholm Declaration*, U.N. Doc. A/CONF/48/14/REV. 1 (1972), reprinted in 11 INT'L L. MATERIALS 1416 (1972); see also JAMES BARROS & DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* 303-06 (1974).

94. Seymour J. Rubin, *A Predominantly Commercial Policy Perspective*, in ENVIRONMENT AND TRADE, *supra* note 7, at 3.

95. See generally Ingo Walter, *Environmentally Induced Industrial Relocation to Developing Countries*, in ENVIRONMENT AND TRADE, *supra* note 7, at 67.

This is not to suggest that I support the policies of TNCs. There is enough evidence in the historical literature that multinationals thrive on the idea of maximization of wealth at minimal cost. The exploitative tactics of multinationals are indeed well documented. Multinationals often adopt strategies and means devoid of human values because human input is measured in economic terms rather than by moral and ethical standards.⁹⁶

In addition, nation states agree that uniform standards should not be universally applied, especially with regard to industrial process and product safety. Is not this principle a glaring example of the Bhopal scenario? What was sought as a technology transfer for the Bhopal plant was supposed to be inferior, in principle. Even though the facts are still in dispute, these types of guidelines actually misguide the countries that export technology. Perhaps the tactical victory gained by the bureaucrats of the developing nations was, after all, a tactical defect, for it failed to protect the public interest. Can there be accountability for such absurdity? Certainly not. This recommendation is nothing but a denial of the equality that the Third World is seeking.

Recommendation 106 completely negates the guidelines developed in Recommendation 103 because it recognizes that opportunities may exist when developing countries will be offered more sophisticated technology equipped with environmentally safer features, but that special care shall be taken to refuse such superior technology. Even though the desire to acquire safer technology is present, economics prevail when it comes to the actual transfer of technology. Good intentions are not enough to reach parity. Recommendation 108 firmly establishes the guideline that recognizes the interest of mankind in supporting the globalization of ecologically safe technology. Once again, the guideline has desirable objectives; yet, it is not a binding principle. Furthermore, the earlier recommendations have already negated its effects.

B. Code of Conduct for Transnational Corporations and the ILO Declaration

The Code of Conduct for Transnational Corporations emerged from the

96. S.K. Verma, *International Code of Conduct for Transnational Corporations*, 20 *INDIAN J. INT'L L.* 20 (1980); WERNER J. FELD, *MULTINATIONAL CORPORATIONS AND U.N. POLITICS* 32 (1980). On the issue of the valuation of human-labor in economic terms, see generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 7-25 (Edwin Cannan ed., 1976) (1776); JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 29-53 (William Ashley ed., 1987) (1848); REV. THOMAS R. MALTHUS, *PRINCIPLES OF POLITICAL ECONOMY* 85-107 (1820). For a discussion of David Ricardo's theory, see generally ERIC ROLL, *A HISTORY OF ECONOMIC THOUGHT* 160-63 (5th ed. 1992).

1974 movement to establish a New International Economic Order.⁹⁷ One main concern of this discussion is the Resolution on the Programme of Action on the Establishment of a New International Economic Order.⁹⁸ The proposed Code of Conduct for Transnational Corporations as proposed by the U.N. General Assembly states the following objectives: 1) the prevention of TNCs' interference in the internal affairs of the host countries and collaboration with racist regimes; 2) the prohibition of restrictive business practices by TNCs; 3) the transfer of technology and management skills by TNCs to developing countries on equitable and favorable terms; 4) the regulation of repatriation of profits by the TNCs; and 5) the adoption of provisions to promote reinvestment of TNCs' profits in developing countries.⁹⁹

The International Labor Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy recommends that TNCs should give priority to local personnel in employment and training, use technologies which generate employment, provide workers with information about the firm to allow meaningful negotiations, and work with governments to promote good labor and employment practices.¹⁰⁰

This Article will now examine the recommendations of the Code of Conduct for Transnational Corporations and the ILO Principles to assess their goals and achievements in the context of overall progress of the developing countries. Of course, the biggest problem is that opinions differ regarding how to accelerate the process of much-needed development to improve conditions in the developing world. The fundamental position of one side is to maintain liberty, while the other side seeks equality.

The first principle referred to in the Code of Conduct for Transnational Corporations reflects the historical concerns of those seeking to benefit from the transfer of technology through the TNCs. Interference in internal affairs of host countries was a common concern. The idea of wanting to discourage the practice warrants some merit. This guideline favors the approach where giant

97. This movement is articulated in three U.N. Resolutions passed by the General Assembly in 1974: *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 29 U.N. GAOR, Supp. No. 31, at 3, U.N. Doc. A/9556 (1974); *Programme of Action on the Establishment of a New International Economic Order*, G.A. Res. 3202, 29 U.N. GAOR Supp. No. 31, at 5, U.N. Doc. 1/9556 (1974) [hereinafter *Programme of Action*]; and the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, 30 U.N. GAOR Supp. No. 31, at 50, U.N. Doc. A/9631 (1975).

98. *Programme of Action*, *supra* note 97, at 5.

99. *Programme of Action*, *supra* note 97, at 728.

100. International Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO Labor Office CH-1211 Geneva 22 (1977); Burns, *supra* note 5, at 55; Grosse, *supra* note 6, at 414, 420.

TNCs, instead of providing the means for attaining equality, begin influencing the unstable political cultures and, consequently, the political process. By exercising influence on the body politic, TNCs place themselves in the position to dictate terms most beneficial to them, thus depriving the developing host of any possibility of achieving equality. Such situations have often interfered with the political liberty of host countries.

The second principle in the Code of Conduct for Transnational Corporations requires the prohibition of restrictive business practices. This is to avoid a monopoly of TNCs, which eventually controls the governmental decisionmaking process and the consumers' choices in the developing world.

The third principle is the most sound and should have a positive effect on the overall development process. However, the combined reading of this provision with Recommendation 106 of the Stockholm Declaration¹⁰¹ and with the ILO Declaration seeking the use of technologies that generate employment, demonstrates that the actual transfer of technology which is sought on equitable and favorable terms turns into a technology that has been altered and stripped of its most efficient, protective, and safety-related aspects. Thus, the problem of achieving equality remains. The more one tactical victory is negotiated, the more is lost because this method fails to reduce the developmental gap. This gap widens with every scientific breakthrough in the West; instead of moving in the direction of achieving developmental parity, we move toward disparity.

The fourth principle referred to in the Code of Conduct for Transnational Corporations, recommending regulations for repatriation of profits, has a strong appeal because it results in more capital and technological transfers. Yet compelling provisions, which severely restrict the repatriation of profit, do not necessarily mean that new technology will indeed follow. The intended objective can best be achieved by providing a more flexible and functional approach which will eliminate the feeling of insecurity and leave the option of market development open to investors. Regulation of the repatriation of profits, with a limited objective to study and analyze the patterns and results of profit movements, is more likely to encourage risk-free investment that will ultimately lead to accelerated development.

The ILO principle seeking more employment opportunities for local population has good intentions but reflects a regional attitude. The developing countries will have to leave the decisions of training and competent employment to the multinationals if they want to achieve real progress. Much-needed exposure and attainment of superior skills is thus denied by insisting on local

101. See *supra* note 93 and accompanying text (discussing the Stockholm Declaration).

employment. An urgent need exists not only for the technology transfer but also for the proper training of local personnel. Advanced examples of work ethics can be used to improve the work habits of local people. An opportunity to learn new ways of thinking and a broader perspective is thus missed.¹⁰² While the principle helps create more jobs, it certainly fails to introduce local people to better work ethics and professionalism, both of which are needed to compete in the global market. Again, the effect is self-denial of a learning process, which is necessary for achieving technological progress and equality. By asking for technology that generates the maximum number of jobs, the developing countries give up efficient methods of production. A technology that is environmentally responsive is more likely to be one that creates fewer jobs, but is much more efficient in the quality of production.

C. *The Earth Summit, 1992*

The Earth Summit was preceded by two meetings: the Tokyo Declaration on Financing Global Environment and Development and the Kuala Lumpur Declaration. At the Tokyo meeting, developed countries emphasized the "need to re-evaluate the thinking which underlies our present society."¹⁰³ They further emphasized that new principles of environmental ethics needed to be established.¹⁰⁴ All that developing countries would have liked to have heard was included in this declaration except for the specifics concerning the transfer of technology. There were commitments for financial assistance and recognition of the need to pass on environmentally safe and sound technology. However, at the Kuala Lumpur meeting, developing countries repeated their positions from the 1972 Stockholm Declaration. They stated:

[W]e call on the developed countries to ensure without further delay a balanced, meaningful, and satisfactory conclusion of the Uruguay Round of Multilateral Trade Negotiations. We further emphasize that

102. It is a well-known fact that the key to Japanese industrial success lies in their superior work ethic, which has given them a decided advantage over their industrial competitors. Both Germany and the United States are not only studying the Japanese work ethic, but are also trying to adopt it. One of the factors that is now well recognized in the West is that workers' participation in product development strategy, production policy, environmental standards, and international market demands is crucial to gain a competitive advantage. Unless developing countries are willing to import such other measures as are now necessary to effectively compete in the global market, they are unlikely to succeed in their objective of achieving parity with developed countries.

103. Eminent Persons Meeting on Financing Global Environment and Development, Tokyo, April 15-17, 1992, reprinted in *Tokyo Declaration on Financing Global Environment and Development*, 22.4 ENVTL. POL'Y & L. 265 (August 1992).

104. See remarks made by Professors Richard Falk, Christopher Stone, and Sudhir Chopra, in *A Round Table Discussion: Nature Conservation in the Face of Atmospheric Degradation*, 83 AM. SOC'Y INT'L L. PROC. 154-55 (1989) (emphasizing the need to create new environmental ethics that will alter our habits of consumption to a more ecologically responsible level).

developed countries should not attempt to impose unilateral restrictions on international trade, in particular, on natural resource-based and other related products on environmental grounds.¹⁰⁵

On the question of transfer of technology, the developing countries stressed the need for "assured access to and transfer of environmentally sound technology on preferential and concessional terms to developing countries, taking into consideration that Intellectual Property Rights should not hinder the transfer of environmentally sound technology."¹⁰⁶ These were the background meetings that set the stage for the Rio Summit.

The Summit dealt with the issues of transferring environmentally sound technology, cooperation, and capacity building under Chapter 34 of Agenda 21.¹⁰⁷ Much of what was said in the two prior declarations was agreed to and constituted the substance of Chapter 34. However, one of the thorniest issues that remained unresolved was the expression "transfer of technology." This term was not acceptable to developed countries, in particular the United States, who preferred the term "technological cooperation." Other differences centered upon intellectual property rights and the possible creation of a code of conduct for the transfer of technology. Developing countries won the right to compulsory acquisition of intellectual property rights to technologies owned by companies operating within their countries. However, such rights were to be acquired in accordance with the current and evolving international law, along with the rules negotiated at the Uruguay Round of the GATT talks. Consideration of the question of an international code of conduct on technology transfer has differed at the ongoing talks at the UNCTAD.¹⁰⁸ On one hand, this chapter asks for environmentally safe technologies that "include know-how, procedures, goods and services, and equipment as well as organisational and managerial procedures."¹⁰⁹ On the other hand, it states that developing countries believe that "such technologies should be compatible with nationally determined socio-economic, cultural, and environmental priorities."¹¹⁰

105. Second Ministerial Conference of Developing Countries on Environment and Development, Kuala Lumpur, April 26-29, 1992, *reprinted in* 22.4 ENVTL. POL'Y & L. 266, ¶ 4 (August 1992).

106. *Id.* at 267, ¶ 14.

107. *Id.* at 219.

108. Agenda Item 21, was a 800-plus-page report that was prepared by the Preparatory Commission to UNCED under the mandate of the U.N. General Assembly Resolution passed in 1989. See A/Conf. 151/4, Part I, and Corr. 1, Part II and Corr. 1, Part III, and Part IV and Corr. 1, *reprinted in Rio Conference on Environment and Development*, 22.4 ENVTL. POL'Y & L. 204-25 (August 1992).

109. *Environmentally Sound Technology*, 22.4 ENVTL. POL'Y & L. 294 (August 1992).

110. *Id.*

It is clear that while developing countries are anxious to acquire the state-of-the-art, environmentally safe and sound technology, along with everything that accompanies it, they fail to recognize that there is no state-of-the-art technology that is designed for and compatible with nationally determined socio-economic and cultural priorities. Developed countries do not possess magic that will convert the technology to these useless demands. There is either state-of-the-art technology that is environmentally sound and safe because it has been designed for that purpose through heavy investment in research and development, or there is out-dated technology that is not quite environmentally safe. Ideally, there would be an ability to convert state-of-the-art technology into the type of technology that developing countries desire. Asking that such technologies also adapt to nationally determined environmental priorities results in stripped-down technology that will no longer be state-of-the-art. What is necessary is state-of-the-art technology that will protect the environment from further degradation. The idea is to keep cleaner areas less polluted. There is only one way to development, and that is to stop converting the technologies to suit developing countries. Developing countries have to understand that such conditions encourage TNCs to move outdated plants and technologies to the Third World. On the contrary, if the developing countries insisted on acquiring the same technology that exists in developed countries, they would then at least be assured of less pollution and improvement of their workforce to the highest levels that are compatible with developed nations.

The grand tactical victory won by developing countries for intellectual property rights will actually result in a total long-term loss. Such demands will discourage TNCs from further technology transfers that are likely to result in a competitive disadvantage in the international market. It is very important to recognize that an open-door policy that allows TNCs to freely compete in the global market will encourage them to transfer the best technology to the needy regions of the world. All of these tactical victories are not going to bring progress to developing countries at the rate necessary for them to alleviate poverty and environmental problems. Only open-market and open-door policies will lead to the creation of a truly global market. The closed-door policies that have been in place for the better part of this century have shown that developing countries remain underdeveloped.

The solution lies not in these tactical victories, but rather in the realization that we live in an increasingly interdependent world. No fully self-sufficient country exists. Furthermore, China, India, and the former Soviet Union have convincingly demonstrated the impossibility of complete self-reliance. Developing countries must recognize that developed countries have an enormous advantage in terms of technology and scientific knowledge; this gives them an edge in terms of further scientific and technological breakthroughs. If developing countries keep their doors closed, they will remain underdeveloped

and will never reach a satisfactory level of development.

However, the idea is not that developing countries should surrender altogether to the whims and desires of developed countries or their TNCs. A code of conduct for technology transfers will be negotiated at UNTAD, and those rules on technology transfer already negotiated at GATT will be further revised. Fragmentation of this international bureaucracy needs to be addressed. Even the Rio Summit is a clear example of the duplicity of bureaucratic bungling where persons dissatisfied with UNEP tried to create a parallel institution in the form of UNCED. Of what value are 800 pages of agenda items, full of repetitive and self-contradicting provisions, if in the end they will transfer a watered-down version of state-of-the-art technology? It will be a waste of public funds to argue over the same principles ten years after the grand event at Rio. Instead, the aspirations of the poor and the rich need to be considered, and our priorities need to be examined in realistic terms. An international framework similar to domestic corporate law is needed to cover every aspect of global trading.

Besides the declarations and principles discussed here, there are many more U.N. Resolutions and regional and international guidelines that, in essence, promote the same ideals.¹¹¹ However, the disjointed nature of the body of soft laws leads to no positive gains. The uncontrolled situation of TNCs remains a challenge for those aspiring to bring some uniformity to international trade. The development of principles or codes does not mean that they will be accepted in practice or that such conflicting laws will bridge the gap or reduce disparities in the Third World. Mere acceptance in principle is the current state of transnational business.

V. AN APPRAISAL

The first goal of this Article was to analyze the factual setting of the Bhopal accident and other accidents in the context of traditional laws. The second was to assess the responsiveness of laws, institutions, policies, and guidelines that were invoked to mitigate the suffering of victims. The third goal was to

111. See generally Symposium, *Environmental Development*, 20 N.Y.U. J. INT'L L. 715 (1988); Stephen McCaffrey, *The Work of International Law Commission Relating to Transfrontier Environmental Harm*, 20 N.Y.U. J. INT'L L. 715 (1988); Maureen A. Bent, Note, *Exporting Hazardous Industries: Should American Standards Apply*, 20 N.Y.U. J. INT'L L. 777 (1988); Harry Otway, *Risk Communication and Policy in the European Communities: Background, Status and Trends*, 6 B.U. INT'L L.J. 5 (1988); Michael Baram, *Risk Communication Law and Implementation Issues in the United States and the European Community*, 6 B.U. INT'L L.J. 21 (1988); Michael Will, *Liability to Warn in the European Community*, 6 B.U. INT'L L.J. 125 (1988). See also OECD Conference on Accidents Involving Hazardous Substances, *Hazardous Installations in Developing Countries*, OECD Doc. ENV/CONF/ACC/88.4 (1987).

examine the international codes, conventions, and declarations as are relevant in the scheme of this inquiry. This process was to help identify the problem areas and hopefully to demonstrate that the existing framework of both national and international law thoroughly lacks the ability to address the issues that arise out of North-South trade, North-North ventures, and the problems within developing countries (South-South trade—the trade between less developed countries and least developed countries). It is this last factor that has remained unaddressed in most scholarly writings and should be a cause of greater concern.

Neither the behavior of multinationals nor the solutions offered by the legal systems of the nation states sufficiently and comprehensively address the objectives that they have set for themselves—the safe, speedy, and ecologically sound progress of less developed societies. While the progress is impressive for identifying the issues and objectives, it is far from impressive in practice. We have seen that problems such as Chernobyl and Sandoz are best left to affected states for speedy dispute resolution. Nonetheless, the case of Bhopal encountered a different problem that could not be resolved with the traditional law of state responsibility. Of course, the issues of immediate concern to victims will be resolved sooner or later. Still unresolved is the question of how to avoid repetition of the Bhopal incident in developing countries and the Seveso incident in developed countries. Bhopal clearly demonstrates the North-South problems with hazardous technology transfers, along with the issue of control over TNCs. Seveso primarily reflects the concern over the irresponsibility of TNCs, as well as the inept attitude of local law enforcement agencies. The two cases jointly indicate that the problems do not reside with exporters or importers alone, but with both. How to address the problem depends upon the objectives. If the goal is to satisfy the aspirations of mankind and to move in the direction of providing basic equality, then these aspirations must first be ascertained in clear terms. Only then can new institutions be built to achieve these goals.

The aspirations of the global society can be reduced to one single concept: “just global order.” This not only seeks to achieve global justice in theory, but strives to create institutions that can deliver global justice in practice. If a just order for the world community is sought, one where the goal is near parity of global societies by reducing developmental, economic, and political disparities, then an optimum level of order for global financial interactions that include all aspects of global trade must be formulated. The existing framework regulating the transfer of hazardous technology to developing countries is a failure of an order and, therefore, amounts to an unjust order. Professor Falk suggests that “the quest of world order, its claim of possibility, always rests on challenging the established wisdom and authority of the day, shattering the realist consensus

of its particular day."¹¹² Before examining alternative remedies, it is essential to fully explore and understand the causes for the failure of the existing system. Such examination must start with problems as perceived in psychological terms and then explore the historical foundations of the international legal order. However, such examination must be carried out with a clear understanding of the historical process that has led to confusion in understanding world order.

A. *The Psychology of the Diplomatic Elite*

For a full understanding of the psychology that pervades and dictates the international negotiations and the law-making process, a look behind the negotiating process is needed, deep into the learning, education, thinking, and motives of bureaucrats who possess the power to seek equality and freedom. Professor Falk writes that "[t]he accelerating velocity of history itself and our improved awareness of it" in modern times, "through a stream of communications actually has the principal effect of denying a sustaining contact with our past, even with our recent past."¹¹³ He further says that our "preoccupation . . . with the future can be substituted for learning or relearning how to remember."¹¹⁴ In his opinion, this is a very "important ingredient of an approach to the future, especially for lawyers who are often in a different and uncreative way tied to the past as a consequence of their veneration of precedent."¹¹⁵ He suggests that "one needs to be extremely attentive to what can be learned from the past but not to insist on some kind of mechanical subservience to that which the past imposes on an evolving present."¹¹⁶

Professors Macdonald, Johnston, and Morris draw our attention to yet another aspect of the perceptions of the governing elite. They observe that "the easiest and least controversial" perspective is "the relevance of the perceptions of the governing elite to any inquiry into the making of government policies."¹¹⁷ In their opinion, "the making of economic policies within a nation state," to some degree, "is discolored by the way in which the governing elite perceives the goals of human development and the alternative methods of

112. RICHARD FALK, *REVITALIZING INTERNATIONAL LAW 74-75* (1989) [hereinafter FALK, *REVITALIZING*]; Richard Falk, *The Quest for World Order: The Legacy of Optimism Re-Examined*, 9 *DALHOUSIE L.J.* 132-48 (1984).

113. FALK, *REVITALIZING*, *supra* note 112, at 58, reprinted from Richard Falk, *Future of International Law*, 75 *AM. SOC. INT'L L. PROC.* 9 (1981).

114. *Id.* at 59.

115. *Id.*

116. *Id.*

117. Ronald St. John Macdonald et al., *International Law of Human Welfare: Concept, Experience, and Priorities*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE*, *supra* note 86, at 5.

ameliorating human welfare."¹¹⁸

Professor Allot describes the hopelessness of the situation in these words: "The great increase in overall energy of public life within nation states in the twentieth century has been matched by a dramatic rise in the energy of the public life of international society."¹¹⁹ As to the causes of the rise of such international activity, he suggests "[i]ncreases in population, [and] increases in the volume of international transactions"¹²⁰ Of the specialists, he writes that they include "the politicians, the diplomats, and the national and international civil servants."¹²¹ He then observes that the "increase in the power of these professionals parallels that of their opposite numbers in national public life."¹²² However, the "difference is that there has not been a corresponding increase either in democratic accountability of such people to citizens whose lives they affect or in the participation of the nonprofessionals in the international decision making process."¹²³ Ironically, he observes that, in the end, "[d]iplomacy is still a relatively closed world, esoteric and remote."¹²⁴

The one common cry that runs through these three passages referred to here is that the public, the masses, and humanity suffer because the fate of human civilization and the planet Earth has been left in the hands of bureaucrats, the representatives of Vattalism. These people are trained to think in the manner that Professor Falk describes as "mechanical subservience" to the past that holds them from progressing further. Professors Macdonald, Johnston, and Morris blame the governing elite for its discolored perception of the goals of human development. Professor Allot very convincingly questions the rising authority of the bureaucrats because, despite their enormous capacity to influence the fate of millions, they have no moral accountability to the masses who they seem to represent. An irony exists here: at the end of the twentieth century, we have failed to evolve into the system that many thinkers had envisioned after the Second World War, a globally responsible system capable of delivering justice to mankind, maintaining peace, and uplifting the downtrodden to a respectable standard of living.¹²⁵ The question is whether these so-called "bureaucratic

118. *Id.*

119. Allott, *supra* note 75, at 9.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, A CONSTITUTION FOR THE WORLD 23-24 (1965). This constitution was originally prepared and published in 1947. *Id.* at 24. It was prepared by a committee chaired by Professor Robert Hutchins. *Id.* at 7. See also Douglas M. Johnston, *The Foundations of Justice in International Law*, in THE INTERNATIONAL LAW AND

elites" are really the elite. Are they not professing a kind of sectarian patriotism, authoritarianism, Machiavellianism of strict observance, or imperialist mysticism? If history is any evidence, such ideologies have been encountered and have, in the final analysis, been buried. This is the kind of thinking that has caused innumerable sufferings to mankind since antiquity. Of course, these attitudes give credence to those who had analyzed the human destiny from a biological perspective.

Bergson wrote:

One of the results of our analysis has been to draw a sharp distinction, in the sphere of society, between the closed and the open . . . [T]he open society is the society which is deemed in principle to embrace all humanity. . . . [T]he closed society is that whose members hold together, caring nothing for the rest of humanity, on the alert for attacks or defense, bound, in fact, to a perpetual readiness for battle. Such is human society fresh from the hands of nature. Man was made for this society, as the ant made for the ant heap.¹²⁶

Yet, Bergson himself believed in one world.¹²⁷

It is necessary for the development of mankind that our society be opened. Open, in this context, means that people should not stop caring for each other regardless of the color of skin, national boundary, language, religion, or economic prosperity. Our behavior ought to demonstrate that we are different from ants, who live a closed life. Without the trust of each other or an interest in the global society, we are not likely to progress with our negotiations. Given the kind of thinking that controls the substance of the international negotiating processes, it is important to question the psychology of our representatives, who are in many ways more important than our elected officials. These people determine the fate of mankind in many ways, and their unaccountability gives them free rein over their fate. It is here that a balance between popular representation and competence is needed. Indeed, competence is necessary to deal with complex social and economic problems; yet, a complete lack of understanding about popular aspirations and sentiments is causing our negotiators to act in a manner that is detrimental to the interests of mankind and the society of nations.

POLICY OF HUMAN WELFARE, *supra* note 86, at 111.

126. HENRI BERGSON, *THE TWO SOURCES OF MORALITY AND RELIGION* 255 (R. Ashley Audra & Claudesley Brereton trans., 1935), *quoted in* G.A. BORGESE, *FOUNDATIONS OF THE WORLD REPUBLIC* 34 (1953).

127. BORGESE, *supra* note 126, at 35.

B. Assigning the Blame

There are two distinct elements in the inquiry to assign moral accountability for accidents.¹²⁸ First, it must be determined whether the accident itself was voluntary. Second, the legal regimes, both domestic and international, that allowed such accidents to occur must be evaluated. Since blame is assigned only in the case of voluntary acts, all factors need to be analyzed. If the act or combination of acts causing the accident was involuntary, then we may find ourselves ready to condone or perhaps express pity. Since the premise of the inquiry is to find ways to prevent such accidents in the future, the limits of voluntary and involuntary acts must be determined in the factual sense.

Actions are generally considered involuntary when they are the result of ignorance or are performed under compulsion. Two theories exist concerning the Bhopal accident. The first is advanced by Union Carbide USA and raises allegations of sabotage. The second, which formed the basis of the plaintiffs' claim, tries to assign blame on the company for negligence in design and management. Indeed, the claim of sabotage is plausible. However, the vast body of factual information indicates that there were also design errors and operational mistakes. If a case of sabotage was certain, then perhaps it would have been simple to assign blame. The immense amount of information that came out of the initial investigation has shown that there were many areas lacking adequacy and effectiveness. Most of these areas point in the direction of a confusing jungle of regulatory regime that had no other objective than to control, dominate, and dictate every conceivable aspect of corporate activity. Whether this act was voluntary depends on how the facts and the doctrinal side of the government's desire to regulate corporate activity are examined. More often than not, excessive regulation leads to confusion, leaving lawyers as the only beneficiaries of the complications. What the government did through its bureaucrats is the object of the assessment here.

All laws are created for a certain purpose, usually to preserve the social good. Whether these laws succeed in achieving their objectives becomes secondary when they begin to do harm in areas other than those for which they were created. For example, the people of Bhopal were allowed to live in dangerous proximity to the plant. Is the excessive desire for the government control which caused the company to develop detail design plans in India or the desire to develop domestic technology that caused such hazardous accidents to occur voluntary or involuntary? Perhaps it can be said that this was an "involuntary" act because there was no clear desire on the part of the lawmakers

128. See generally ARISTOTLE, *THE NICOMACHEN ETHICS OF ARISTOTLE* 77-108 (J. Thomson trans, Penguin Books 1955) (book 3, speaking on moral responsibility).

of the company to cause such an accident, resulting in the death of thousands. However, when the proper role of the lawmaking specialists is examined, an expectation arises that the lawmakers, especially the bureaucratic elite, exhibit the reasonable degree of competence needed for democracy. Failure of the bureaucrats to sufficiently foresee the possible consequences may suggest that the actions were involuntary. But, an act cannot be treated as involuntary when the bureaucrats were sufficiently warned by the TNCs of the hazardous nature of the activity.¹²⁹ It appears more an act of negligent omission on the part of the bureaucracy, an arm of government that is required to balance between the ills of representative government and competence. If this analysis is accepted, the tendency is then toward condoning their incompetence. However, more consideration must be given to see if it was just an oversight or a desire to achieve some objective regardless of the cost. In the latter instance, such an act must be treated as willful, with the full understanding of the possible adverse consequences. In the Bhopal case, it seems that the government's failure to relocate the people from the vicinity of the plant, its willingness to sacrifice the quality of technology for safety, its willingness to allow legal residence in the vicinity of the plant in defiance of its own laws, and its excessive regulation denying the parent company its proper role in safe management shows only one thing, voluntary negligence on the part of the domestic bureaucrats.

Through the international regulation structured by the specialists of international activity in the codes of conduct, resolutions, and declarations, we witness another side of the dominance of bureaucratic elites. This side of the government is indirectly involved in determining the fate of the masses well beyond the borders of their own states. All tactical victories that are earned on the negotiating table indicate a certain perception about the value of human life, a certain mentality about what amounts to the exercise of "freedom" or "equality," a certain, very selective, adherence to history.¹³⁰ To say that these people who normally represent the best of the competents were not familiar with the likely adverse consequences amounts to questioning their competency. If indeed they were competent, then the acceptance of the risk in the form of a watered-down version of hazardous technology amounts to voluntary acceptance of the hazards and voluntary application of such technology to the detriment of the poor masses, who suffer as a consequence of such risks.¹³¹ This is an extension of the concept of utility, in reverse order, and well beyond economic

129. Michael P. Walls, *Chemical Exports and the Age of Consent: The High Cost of International Export Control*, 20 N.Y.U. J. INT'L L. & POL. 753, 755 (1987). The impetus for prior informed consent began with a U.N. General Resolution passed in 1981 that required exchange of information for "banned hazardous chemicals and unsafe pharmaceutical products." *Id.* at 755; G.A. Res. 37/137, 37 U.N. GAOR (109th plen. mtg.) at 1849, U.N. Doc. A/C.2/38/SR.27 (1982).

130. Johnston, *supra* note 86, at 120-30.

131. Handl, *supra* note 21, at 614-22.

terms, to the arena of industrial development. The bureaucrats from the developing countries decide what amount of incremental utility will be added to benefit the minority "privileged class" at the expense of the majority "lower class" within the developing countries, and, as a result, the loser is the majority.¹³² What this amounts to is a further growth of inequality within the developing nations—an expansion of the class system. Interestingly, these competent bureaucratic elites, who adopted for themselves the responsibility of protecting the interests of the majorities in developing countries, have caused further damage to the interests of their own majority. It may appear to be a correct strategy, but, in fact, it is a voluntary infliction of harm on the poor majority by the very people the majority trusted to protect their interests.

C. *Development, Economic Cooperation, and the History of International Law*

With the advent of the industrial revolution and the European colonization of distant nations came a long era of dominance of large corporations. These businesses were incorporated in colonizing countries and were encouraged by their respective governments to expand their businesses to colonies.¹³³ If the difficulties faced by the fictitious personalities, even before they were recognized as corporations, are kept in mind, the problems faced today can be better recognized. Professor Stone correctly pointed out in his famous discourse, *Toward Legal Rights for Natural Objects*, that "trusts, corporations, joint ventures, municipalities . . . and nation states" all went through a difficult legal conceptual battle because all these concepts were found to be "jarring notions"

132. In India, mostly poor people live near industrial complexes and are dependent on the labor economy that grows around these complexes. These people live illegally on government land and have small restaurants or cigarette shops, etc., located in the vicinity of the industrial plants. By permitting these people to live in such close proximity of hazardous activity against the zoning laws, both the politicians and the middle class gain. While the politicians gain by attracting votes, the middle class gains by secluding raw poverty from more affluent areas through keeping the poor masses confined to hazardous localities. The situation serves a dual purpose of supporting political gain and keeping unwanted people away from middle- and upper-class localities. The utilitarian concept believes in increasing the sum total of utility, and to this end it is believed that an incremental utility taken from the minority and given to the majority is justified, to the extent that it helps increase the sum total of utility. The sum total so achieved will have an effect of providing greater utilitarian satisfaction to a larger number of people and will thus lead to increased efficiency. In a third world scenario, quite often the minority of the upper class completely disregards the existence of the poor, takes away their benefits or utility, and adds this incremental utility to their own. Thus, while there is a utility transfer, it is not from minority to majority but from majority to minority. Therefore, the sum total thus achieved completely neglects the existence of the poor as a participant in utilitarian assessment (utilitarianism in reverse order).

133. See generally DONALD WINCH, *CLASSICAL POLITICAL ECONOMY AND COLONIES* (1965) (examining the political economies of colonies); SMITH, *supra* note 96, at 62-97 (remarking on the motives for establishing new colonies); James Mill, *Colony*, in 3 *ENCYCLOPEDIA BRITANNICA* 257-73 (Supp. to 4th, 5th, & 6th eds. 1824). For an examination of international trade in the last century, see generally MILL, *supra* note 96, at 574-82.

by the jurists of yesteryears.¹³⁴ Even in modern times, the recognition of children's rights, the rights of the insane, and the rights of blacks did not come easy. Therefore, it is obvious that to change the order of the day, opposition from the bureaucratic elite, the modern Vattalists, must be faced before there can be any success in transforming the current system so as to recognize the realities of the last decade of this century and those ahead in the next century. This approach will have to be different from the contemporary realist consensus. There is a marked difference between the realists of today and the realist visionaries. The latter are able to predict the problems of tomorrow and provide realistic answers for the future.

Professor Henkin writes that "the need for modern international law can be found in primitive, rudimentary economic law between peoples."¹³⁵ Richard Cobden, a British leader, said in 1850: "I believe Free Trade would have the tendency to unite mankind in the bonds of peace."¹³⁶ History is full of examples where interstate relations were established for economic activity resulting in new treaties and agreements. An important beginning for international law was made when, in the fifteenth century, an agreement between the merchants of various cities was made to permit the exchange of information through a commercial post. Thus, an era of interstate communication was born with very modest beginnings.¹³⁷

The emergence of trade-related international agreements can be traced through the 1886-90 Berne Convention between eight states, the 1888 Treaty for the freedom of navigation through the Suez Canal, and the 1903 Treaty for the administration of the Panama Canal.¹³⁸ Other later developments such as the international postal union,¹³⁹ international telecommunication,¹⁴⁰ sea trans-

134. Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452 (1972). For a historical review of the developments leading to the recognition of corporations as legal entities, see BLUMBERG, *supra* note 83, at 3-20 (citing Carr, *Early Forms of Corporations*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 161 (1909); C. COOKE, *CORPORATION TRUST AND COMPANY* (1951); 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 469-90 (5th ed. 1942); L. GOWER, *GOWER'S PRINCIPLES OF MODERN COMPANY LAW* 25-41 (4th ed. 1979); Samuel Williston, *History of the Law of Business Corporations Before 1800* (pt. 2), 2 HARV. L. REV. 149, 164 (1888)). For a look at the Roman Law roots of corporations, see W.W. BUCKLAND, *ROMAN LAW AND COMMON LAW* (F. Lawson ed., 2d ed. 1965); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *467, *469, *470, *472, *478.

135. LOUIS HENKIN, *HOW NATIONS BEHAVE* 200 (2d ed. 1979), *quoted in* 4 Manfred Lachs, *Collected Courses of the Hague Academy of International Law*, 169 RECUEIL DES COURS 85 n.277 (1980).

136. 2 R. COBDEN, *SPEECHES ON QUESTIONS OF PUBLIC POLICY* 421 (John Bright & James E. Thorold Rogers eds., 1870).

137. Lachs, *supra* note 135, at 87.

138. *Id.* at 87-88.

139. EVAN LUARD, *INTERNATIONAL AGENCIES* 11-26 (1977).

port,¹⁴¹ air transport,¹⁴² satellite communication,¹⁴³ and meteorology¹⁴⁴ clearly demonstrate that the necessity for greater international economic interaction has caused the world community to structure different international regimes. Even though states resist any control of their liberty or freedom, they have willingly accepted controls that come from these specialized international agencies for economic development.

However, the habit of thinking internationally on purely economic problems has lagged behind other areas of necessity. "The present divorce between the schools of political economy and law seems to me," wrote the great lawyer Oliver Wendell Holmes in 1897, "evidence of how much progress in philosophical study still remains to be made."¹⁴⁵ In 1944, Briery observed that "international law is still very definitely in the laissez-faire stage of social development. Without welfare for the world international law is impotent."¹⁴⁶ Professor Friedmann, in his 1969 lecture at The Hague, emphasized a need for "cooperation" as an essential element of the life of every state.¹⁴⁷ Judge Manfred Lachs of the International Court, while hoping that the Code of Conduct for Transnational Corporations might acquire the status of customary international law, said that one day when "ultimate formulation seems an historical necessity,"¹⁴⁸ and the "need for a new economic order may, in world dimension, become even more urgent,"¹⁴⁹ we will then cooperate, regardless of whether we are a western, socialist, or third world state.

There is a common sentiment here that the great international jurists, such as Holmes, Briery, Friedmann, and Lachs, have echoed over a period stretching almost a century: there is a need to recognize the existing divorce between the international political economy and the welfare of the community of nations or mankind. Of the TNCs, Professor Gilpin writes that "the scope of operations and extent of the territory over which some multinational corporations range are

140. *Id.* at 27-43.

141. *Id.* at 44-62.

142. *Id.* at 63-79.

143. See generally *Developments in the International Law of Telecommunications*, 1989 AM. SOC. INT'L L. PROCEEDINGS 385, 385-402.

144. Luard, *supra* note 139, at 107-19.

145. Holmes, *supra* note 1, at 474. Cf. Richard Falk, *Economic Aspects of Global Civilization: The Unmet Challenges of World Poverty*, in WORLD ORDER STUDIES PROGRAM OCCASIONAL PAPER NUMBER 22, at 1 (1992); see also MONDALE POLICY FORUM UNIVERSITY OF MINNESOTA CONFERENCE PROCEEDINGS, THE CHALLENGE OF SOCIAL JUSTICE IN THE GLOBAL ECONOMY 29-34 (Feb. 4-5, 1993).

146. J.L. BRIERY, THE OUTLOOK FOR INTERNATIONAL LAW 11 (1944).

147. W. Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 96 (1969).

148. Lachs, *supra* note 135, at 102.

149. *Id.*

more expansive geographically than any empire that has ever existed."¹⁵⁰ These corporations "have integrated the world economy more extensively than ever in the past, and they have taken global economic interdependence beyond the realms of trade and money into the area of industrial production."¹⁵¹ In his opinion, "internationalization of production impinges significantly on national economies."¹⁵² Even though we have increasingly become interdependent on other countries for our welfare, we have mostly remained a system of laissez-faire international business activity. Primarily, it is due to our desire to maintain "freedom" or "liberty," and this factor continues to dictate the terms of international business or corporate activity. In reality, this desire to maintain freedom or liberty is causing many nations to lose capital, sophisticated technology, and knowledge. Professor Radhakrishnan, former President of India and the greatest philosopher of Hindu philosophy in recent centuries, wrote that "[t]his is an age of interdependence [in which we] must surrender a part of our sovereignty, [and] work together for the elimination of every kind of injustice"¹⁵³ It is amply clear that the diplomats of vision fully appreciate the emerging global order that signifies not only interdependence, but also a compelling necessity for the dilution of sovereignty—a willingness to compromise on liberty and equality. There is an urgent need for building a new global regime that can deliver some degree of satisfaction to the aspirations of mankind by assuring cooperation and welfare to developing countries. Concerning the TNCs, Judge Lachs, in his 1980 Hague Academy lecture, said that "the situation seemed not to have been ripe for the elaboration of a binding agreement but merely for that of a code of conduct."¹⁵⁴ Judge Lachs is clearly disappointed in the softest of the soft law nature of the Code of Conduct for Transnational Corporations. He admits that the time may not have been ripe for the development of *lex lata*—hard law—but he expects that the code so developed ought to have been given an opportunity to evolve into, at least, *lex frenda*—soft law. There are binding treaties, less binding resolutions, and customary law. The resolutions which are somewhat consistent and have stood the test of time may acquire the force of customary law; however, a code of conduct with no definite adherents will always remain a code and nothing more. The same problems that all fictitious legal entities faced before they were accepted as part of the legal phenomenon will exist. However, to say that the status of TNCs cannot be legalized is as wrong as the suggestion that blacks and women cannot have voting rights or that there is no standing for non-sentient

150. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 231-32 (1987).

151. *Id.*

152. *Id.*

153. SARVEPALLI RADHAKRISHNAN, *TOWARDS A NEW WORLD* 14 (1983). This book is a collection of Professor Radhakrishnan's speeches delivered at various United Nations meetings over a period extending more than two decades.

154. Lachs, *supra* note 135, at 101-02.

objects. Many scholars referred to in this section have urged the necessity for bringing a harmony between the international political economy and moral and political philosophy. The latter's objective is to establish a just global social order.

VI. RECOMMENDATIONS FOR THE GLOBALIZATION OF ENVIRONMENTAL RESPONSIBILITY IN TRANSNATIONAL BUSINESS ACTIVITY

At the beginning of this Article, it was suggested that the Bhopal case is different from the other accidents. Later it was suggested that the Seveso incident was perhaps the closest to Bhopal, because both had a common factor: hazardous activity of TNCs operating in a foreign country. If we were to seek solutions based on a few isolated incidents, we would create narrowly conceived remedies. The problem is much more complex than the accidents reveal. The factors that cause distrust need to be recognized. They are: 1) the domestic laws, practices, and perceptions of the bureaucratic and political elite relating to hazardous activity; 2) international law, codes of conduct, declarations, and the psychological perceptions of the diplomatic elite regarding human welfare, equality, and freedom; 3) the long history of the economic exploitation of developing countries, the history of reluctance to adopt new methods to deal with emerging problems, and the recent escalation of the global activities of TNCs that has made the global economy completely interdependent; and 4) the recent awareness about the ineffectiveness of the fragmented nature of environmental laws that are unlikely to provide protection from hazardous activity, which has created an atmosphere of mutual global distrust. These problems must be addressed to create a trusting environment conducive to result-oriented negotiations. To create such an environment, a global institution based on democratic principles and combining both competence and popular representation must be structured.

The ultimate effect of these conflicts is that the developing countries suffer under the self-imposed restrictions on the importation of sophisticated technology. Multinationals suffer because they are not allowed to operate in optimum conditions.¹⁵⁵ In the long run, such accidents either may cause them considerable loss in competitive markets or may make the consumer pay for the fault of others. People of developing countries suffer from economic, environmental, and developmental loss. The only factor that will rescue the

155. This could, though, be argued both ways. While multinationals suffer because they are not allowed to use more efficient means of technology, they also gain by using cheap labor.

developing countries from the dire prophecy of Malthusian predictions¹⁵⁶ is the bitter medicine of the dilution of liberty leading to technology transfer.¹⁵⁷ In the final analysis, this interaction with efficient technologies will save millions from the raw poverty and starvation that seems to be as certain as death.¹⁵⁸ To seek solutions to the problems raised in this study, the issues identified by Professors Allott, Falk, Macdonald, Johnston, Morris, and Judge Lachs must be considered. The role of psychology, perception, and mentality must not be underestimated, for in it lies the cause of all problems. The causation chain of mutual distrust in this situation seems to be founded on behavioral elements.¹⁵⁹

It is not an easy task, however, to identify the basic parameters and then to build an institutional structure that might provide the basis for further inquiry by more informed scholars. We need a comprehensive global regulatory regime covering all aspects of transnational corporate activity that not only endorses the practice of equality in principle, but voluntarily follows it in practice. First, the plans need to be designed so that international business activities are compatible with the aspirations of the people of the host countries, as well as the objectives of multinationals. Second, these activities should be carried through without severely impinging the legitimate expectations of any party. Third, the execution of these plans should lead to the achievement of the social ends of economic development without sacrificing the ecological sanctity of our planet in ways that are efficient and consistent with global social justice. Fourth, the scheme of international social cooperation must be stable. Fifth, these rules must be regularly complied with and willingly acted upon. If and when infractions occur, the apex organization should act as a stabilizing force to prevent further violations and to restore the arrangement of safe and ecologically

156. See generally PAUL KENNEDY, *PREPARING FOR THE TWENTY FIRST CENTURY* (1993). Professor Kennedy insists that because of the global forces that challenge all societies, a change towards integration ought to prevail over those who merely desire to erect a large trading consortium. He further says that the chances of demographically driven struggles, resource wars, mass migration, looming population imbalances between North and South, and the long term dangers of environmental dangers must be addressed collectively.

157. Developing countries must allow multinationals to transfer their most advanced and environmentally safe technology, while the multinationals must stop exploiting the poor and the cheap labor resources of the developing countries.

158. See generally Robert Kurfirst, *Beyond Malthusianism: Demography and Technology in John Stuart Mill's Stationary State*, 3 *UTILITAS* 53 (1991). See also MILL, *supra* note 96, at 746-51; ROLL, *supra* note 96, at 334-35. "The increase of wealth, Mill thought, must sometime come to an end and society must enter upon a stationary condition."

159. This problem can be traced to economic theories. See generally Amartya Sen, *Rational Fools! A Critique of the Behavioural Foundations of Economic Theory*, 6 *PHIL. & PUB. AFFAIRS* 317 (1977).

sound business practices.¹⁶⁰

The following objectives in a new transnational legal regime for multinational corporate activity must be pursued. First, the terms and conditions of such activity must promote the cause of global economic and social justice. Second, there must be global standards of process safety for transnational hazardous and nonhazardous business activity. Third, the activity must satisfy the highest standards of environmental protection. Fourth, the activity must observe the highest standards of human rights. Fifth, dilution of technology to a lesser level while operating in developing countries should be banned, even if the importing nation so desires. Sixth, restrictions against foreign capital investment in developing economies should be set, regulated, and reviewed by an impartial committee consisting of the representatives from both developed and developing countries, but excluding the parties in question so that the solutions agreed upon are free from the psychological biases of interested parties. Last, an international dispute resolution mechanism should be established where preference is accorded to arbitration before appealing the decision to a court of binding jurisdiction.

A comprehensive global approach towards liability prevention can go a long way in establishing healthy trade practices. By establishing such principles, not only will the possibility of environmental disasters be reduced, but also liability for observing different standards in different locations will be effectively avoided. Such a scheme will have to go beyond primary environmental concerns because factors such as recycling, health standards, and employees' rights to know about the hazards associated with particular activities are increasingly being incorporated into national and international standards. However, so long as these standards remain fragmented and scattered, their effectiveness will remain spotty and questionable. The only answer to the quandary lies in the globalization of the issues, concerns, and objectives that fall within the sphere of transnational business activity.

To attain these objectives, we need to structure a treaty that essentially establishes an International Company Law. We can profit by the experience of the European Community. However, we must not fall into the trap that the European Community seems to have fallen into—issuing too many directives and causing an utterly confused state of environmental standards. We need a treaty that provides for a new international organization, similar to the International Civil Aviation Organization, the International Maritime Organisation, or the International Postal Union. The new organization must not only protect the

160. This scheme of general principles has been borrowed from John Rawls and is given here in a paraphrased version as it may apply to international situations. A THEORY OF JUSTICE, *supra* note 77, at 6.

interests of developing countries, but also prevent the bureaucratic mentality from lowering the human rights standards or the pollution standards and risk perceptions simply because the lives of the citizens of developing countries appear to be less significant than their so-called tactical victories in the exercise of liberty. A human is a human and, therefore, must be treated with dignity by both the bureaucratic elite of the developing countries and the TNCs.

All this can be achieved by bringing the functions of several United Nations agencies that relate to the activities of TNCs under one organization. The U.N. Commission on Transnational Corporations can serve as the starting point. Some functions of the U.N. Conference on Trade and Development, especially those relating to the new international economic order, the Code of Conduct for Transnational Corporations, and the ILO standards, need to be brought together and dealt with in a new organization. Such a treaty should create a Board for Multinational Business Activity with both judicial and administrative functions.¹⁶¹ All corporations that are involved in transnational business activity must be required to register as TNCs with the Board. These corporations can be divided into two categories: first, those corporations that have production facilities in more than one country, and, second, those corporations that export their finished products to one or more countries, but their production facilities are confined to one nation. The Board, in addition to registering such corporations, should make sure that the technology being transferred is state-of-the-art, safe, and environmentally responsive. There should be one uniform standard for risk perceptions, process safety, environmental health, recycling, packaging, and products liability.¹⁶² The Board should maintain records of the levels of scientific advancement. Further, all corporations that operate outside the country of their incorporation must convince the Board that the product safety, process safety, and efficiency standards are the same at all of the plants of that corporation regardless of their location, allowing some regard for the older facilities and the time needed to bring them up to the safest standards. A Commission should be established within the Board to look into the matters related to restrictive trade practices that are likely to give unfair advantages to large corporations. A company registered as a multinational corporation should be the parent company, while other units should be treated as subsidiaries. Such incorporation will give them certain protection against problems such as arbitrary nationalization of their property.

161. The European Community (EC) is a perfect example of an organization with both administrative and judicial powers. However, in the EC, these powers are entrusted to separate organs of the Community. For another example of combined judicial and legislative powers, examine the role of the House of Lords in the Westminster system of government in Britain. Perhaps a combination of the EC and the House of Lords will be more suitable for the Board for Multinational Business Activity.

162. This will require negotiation of another convention in the area of private international law.

With regard to taxation, each unit should be taxed in the country of its operation, while the parent multinational should be taxed by the Board of Multinational Corporations. A global auditing mechanism for risk assessment and product and process safety will ensure an environmentally safer trade.

One very important aspect is the membership of the Board. The classical principles of representative government that have now been experimented with by the European Community should be followed, including a balance between popular representation and competence. There should be a general assembly based on proportional representation where members are directly elected by people from various countries. To balance the popular representation, another chamber should be created where governments may nominate both governmental and company representatives to provide for competence as well as to protect their national and business interests.

With this approach, a sense of global justice that can be described as fair international law relating to global commerce can be introduced. Extending these norms to cover the behavior of states vis-a-vis state and corporate entities is not a matter of choice, but a matter of necessity. John Rawls' theory of justice requires that the parties, before beginning negotiations, must be unaware of their strengths and weaknesses.¹⁶³ There must be circumstances of justice, formal constraints of the concept of rights, and rationality of the parties before an institutional structure of the society can be constructed.¹⁶⁴ Once these factors are satisfied, the issue of liberty¹⁶⁵ and equality¹⁶⁶ can be negotiated.¹⁶⁷ In our scenario, we face a slightly different situation. The principle negotiators are states who will negotiate not only for their interests, but

163. Rawls has stated:

This assures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstance. Since all are similarly situated and no one is able to design principles to favor his particular condition the principles of justice are result of a fair agreement or bargain.

A THEORY OF JUSTICE, *supra* note 77, at 12.

164. Thomas Frank & Steven Hawkins, *Justice in the International System*, 10 MICH. J. INT'L L. 133-34 (1989). See also A THEORY OF JUSTICE, *supra* note 77, at 126-36.

165. "[E]ach [party] is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." A THEORY OF JUSTICE, *supra* note 77, at 60; Frank & Hawkins, *supra* note 159, at 135.

166. The principle of equality states that the "[s]ocial and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged" A THEORY OF JUSTICE, *supra* note 77, at 83; Frank & Hawkins, *supra* note 159, at 135. For a critique of Rawls' discussion of international problems, see generally ANTHONY D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 259-76 (1984); Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 DENV. J. INT'L L. POL'Y 525 (1975).

167. For further elaboration of Rawls' conception of justice in a global setting, see THOMAS POGGE, *REALIZING RAWLS* 280-311 (1989).

also for the interests of third-party TNCs. To expect that they can be or will be unaware of their weaknesses, vulnerability, and strengths is unrealistic. Other factors such as circumstances warranting justice, constraints on the concept of rights, and rationality do exist in an international setting. There is no doubt that the underlying issues of the conflict that continue to thwart mankind's interests are liberty and equality. The question then becomes—can we benefit from the Rawlsian framework and construct an international regime based on his conception of justice? The answer is yes; we can, with some modifications.¹⁶⁸

The recommendations contained in this Article will most certainly make both developed and developing countries uncomfortable, for neither wants to relinquish its liberty associated with sovereignty. However, at least this Article does not suggest a solution that will satisfy both the haves and the have nots by maintaining the status quo. The idea here is to displease the elite from both sides while building a regime that benefits the masses. The intention is to move away from the perceptions of trained ignorance—the ones who seem to know it all yet, in actuality, know very little about the masses. Someone must remind these public servants that very reason they negotiate international conventions is to represent the interests of the masses. They are doing a gross disservice not only to mankind, but to their nations, by rigidly adhering to their narrowly conceived perceptions and objectives.

Let me conclude by saying that Bhopal and the other accidents should not be treated as grim reminders of destiny and should not be forgotten as still mere episodes of the cost-benefit era. It will be a pity if “we, the people,” who like to call ourselves civilized, fail to realize the priceless beauty of our planet that has sustained our lives, and the lives of our ancestors, and the necessity of uplifting the downtrodden from raw poverty. The ideas expressed in the conclusion are, at best, fragments of a paradigm that has become a necessity in an era eclipsed by Malthusian prophecy. Many learned, informed scholars and pragmatists might find a degree of absurdity in the propositions presented in this discourse. My only suggestion is that we think not as individuals, a nation, or an interest group, but as one who looks at the grim realities of the world while searching from within for a solution that can at least mitigate the sufferings of the poor, if not alleviate them altogether. Besides the business of money-making, multinational corporations also need to realize their responsibility toward global social justice. They need to help reduce the inequity between the haves and have nots while respecting the sanctity of the planet earth. Professor

168. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993). Professor Rawls has modified his theory of justice, which now accommodates a plurality of incompatible doctrines—religion, moral, philosophical, and cultural. All of them coexist within the framework of a democratic regime.

Borgese wrote in 1953 that “the era of humanity has not begun, but the age of nations has ended.”¹⁶⁹ Is it not yet the time to start the era of humanity?

169. BORGESSE, *supra* note 126, at 3.