The Accountability of Multinational Enterprises
and the Right to Development: The Compensation
of Industrial Accident Victims from Developing
Countries

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The present paper seeks to ask a general question in a particular context. The question concerns the extent to which multinational enterprises (MNEs) can be accountable at law for activities that result in a violation of the right to development as a human right; the context is that of compensation for the victims of major industrial accidents in less developed countries (LDCs), of which the Bhopal gas leak of 3-4 December 1984 is the most notorious example.

The liability of a MNE for violations of the right to development as a human right raises an initial problem as to whether a nonstate entity, such as a corporation, has any responsibilities at all in the field of human rights. This issue will be addressed in the first section of the paper, along with the difficult question of the relevance and utility of characterising issues, such as those surrounding the health and safety aspects of industrial operations run by MNEs in LDCs, as human rights issues.

Thereafter, the paper will concentrate on the problems involved with the compensation of victims of industrial accidents in LDCs. Under this heading it will deal, first, with the limitations of existing legal approaches to this matter, which have been vividly highlighted in the Bhopal litigation. Secondly, the paper will introduce a speculative new proposal for the compensation of victims of major industrial accidents arising out of the operations of MNEs in LDCs. This takes the form of a transnational fund which can offer immediate compensation on a no-fault basis, and which seeks to establish a new system of accountability for MNEs as regards the safety of their operations in LDCs. The role and utility of human rights standards

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in such a scheme will be considered to see whether the proposed fund can offer more than merely a “band-aid” approach, concentrating on compensation for industrial accidents, and act as an institution for furthering economic and social development in the field of industrial safety in LDCs.

I. The Liability of MNEs for Violations of the Right to Development as a Human Right

As a corporation in municipal law, a MNE has no separate legal personality at international law. Consequently, a MNE can become the subject of international rights and duties only if this is the effect of an international convention between states.

In the field of international human rights law, while there exist instruments and conventions that permit a legal person to bring a complaint that its rights have been violated against a signatory state, no international instrument or convention places a duty upon a private legal person to observe fundamental human rights, or to answer complaints as to such non-observance.

There appears to be only one case in which acts, carried out in the name of a private legal person, could amount to a violation of international human rights law. This occurs where the natural persons, who direct the corporation, are accused of committing an international crime, such as war crimes, genocide or crimes against humanity in the course of their control of that entity. Such a case is perhaps better seen as an instance of personal rather than corporate

1. Brownlie Principles of Public International Law (4th ed. 1990) p. 67. In legal terms the MNE consists of a series of national companies and or branches whose controlling sharehold or owner is the foreign incorporated parent company.


3. See further Brownlie op. cit. pp. 561-564.
responsibility. However, the Nuremberg Tribunal did consider the nature of the responsibility for war crimes and crimes against humanity of certain Nazi organisations. Of these the Gestapo and 55 were declared criminal. This may suggest that corporate responsibility for war crimes and crimes against humanity is possible. Nevertheless, this analogy is not very helpful in relation to a private company and its responsibility for harm caused in the conduct of its lawful commercial activities. Such activities do not amount to a conspiracy to commit international crimes under existing principles of international law.

The existing machinery for the protection of human rights does not envisage the private legal person as a respondent. Only the states parties to the relevant convention or instrument are contemplated as respondents to complaints. However, the so-called “Drittwirkung” doctrine may be capable of invoking human rights principles against private legal persons.

This doctrine accepts that certain constitutionally protected fundamental human rights, whose main purpose is to protect the individual from the state, can also be invoked in relations between individuals, particularly against large-scale private organisations holding considerable economic and social power. In the opinion of Sir Vincent Evans this theory could be applied to, inter alia, MNEs:

It is recognised that the European Convention was essentially intended to protect the fundamental rights of the individual in his relations with the State. However, it appears that there is now a move towards the concept that certain human rights need to be protected and can be invoked, not only against public authorities but also against private persons, groups and organisations, and to relate constitutional and Convention rights to

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4. For example, the 1948 Genocide Convention UKTS 58 (1971) Cmd. 4421 Art. IV. mentions only “persons,” not “natural or legal persons.” But see § 5 and Sched. 1. of the UK Interpretation Act 1978 which takes the word “person,” when it appears in a statute, to include a legal person unless the context otherwise requires.

5. See 41 American Journal of International Law 172 (1947).


relations between them. This trend is encouraged by a growing awareness that in modern life the traditional human rights are increasingly threatened by new dangers from e.g. multi-national corporations [emphasis added], mass media, mechanical devices (such as data banks) and other phenomena of a private nature and consequently should be protected erga omnes.  

However, there is little decided case-law or other precedent on the international level to establish the "drittwirkung" concept as a principle of international human rights law. Thus, under the European Convention on Human Rights, individual applications directed against private persons are inadmissible ratione personae.  

At most the Convention may create indirect obligations for individuals by obliging the state authorities to protect individuals from one another, and to ensure that violations of human rights do not arise as a result of private action. The state can respond by enacting positive obligations for private persons to observe human rights standards under the laws of the state in question.

From the above, it appears that no rule of international law, nor any international institutional structure, imposes duties directly upon private legal persons to observe fundamental human rights and to

8. Written Communication to the Colloquy about the European Convention on Human Rights in Relation to other International Instruments for the Protection of Human Rights (Strasbourg 1979) ¶ 3.44.

9. See Article 25.

10. See Articles 17 and 13 of the Convention to support this analysis. See Drzemczewski, op.cit. p. 220. See too his analysis of the Convention and his analysis of such case-law as may be relevant, especially: National Union of Belgian Police Case Commission Report 27 May 1974 ¶ 59; Deweer v Belgium, Eur. Ct. HR Judgement 27.2.80 ¶ 49; Young James & Webster v United Kingdom Commission Report 14.12.79 ¶¶ 168, 169. See too ibid. Judgement Eur. Ct. HR 13.8.81 ¶ 49. (All citations can be found in Drzemczewski at p.221-224.) Most recently the European court of Human Rights has held that Art. 5 of the Convention is inapplicable to a case where a deprivation of liberty of a child results from the action of a private person, the mother, in the exercise of her custodial rights in the interest of her child: Neilson Case 7/1987/130/181 Judgment 28.11.88 ¶ 73. However it would be wrong to read this case as conclusive authority against the power to invoke the Convention in relation to the acts of private persons. The Court’s decision turns on the fact that the mother’s decision to deprive the liberty of her child amounted to a responsible exercise of her custodial rights in the interest of her child. It is unclear whether Art. 5 would have been inapplicable if there was evidence of improper motive and/or conduct on the part of the mother. The case is, therefore, equivocal on the issue of "drittwirkung": it neither supports nor denies the principle.
answer for violations thereof, save, possibly, in the field of war crimes and crimes against humanity. Only with the creation of a new international institutional structure, accepting the applicability of international human rights norms to private natural and/or legal persons, will international human rights law be applied to the activities of such persons. In the absence of such a development, the only other possibility is the unlikely case of holding the state responsible for failure to regulate the activities of private persons, in a manner that protects human rights under the unsettled "drittwirkung" doctrine.

The further question arises: is it necessary to extend human rights standards to private corporations in order to regulate matters such as the compensation of victims of major industrial accidents in LDCs? A strong case can be made for the use of such standards when judging the health and safety activities of MNEs. First, human rights standards offer a body of internationally accepted obligations which inform public policy concerning the treatment of human beings in political, social and economic contexts. As such, they act as the foundation for more technical legal norms that seek to operationalise those standards, and as the measure of success or failure of resulting policies. Thus, the object of any policy of industrial and environmental health and safety can be described as the preservation of the human rights to life, liberty and security of person, the right to health, to an adequate standard of living, and to the peaceful enjoyment of property. The failure to uphold these rights would indicate a failure of policy. Secondly, human rights standards can be referred to as a means of articulating political concern with the absence of effective control over the activities of MNEs, especially where these activities result in large-scale loss of life and personal injury. Human rights standards have, therefore, an important hortatory role to play, a role which can result in concrete policy and legal developments.

However, appeals to human rights standards can act as no more than the beginning of a policy concerning the accountability of MNEs for the conduct of hazardous industrial activities in LDCs. Human rights standards do not offer detailed solutions to the numerous practical and legal problems that arise in the context of a major industrial accident in an LDC, involving the operations of a foreign owned and controlled corporation. To these we now turn, using the Bhopal case as an illustrative example.

II. The Difficulties Surrounding Existing Legal Responses to Major Industrial Accidents in LDCs Involving MNEs

The Bhopal case has shown how inadequate private litigation can be in providing swift and effective compensation to the victims of major industrial accidents in developing countries. Although such accidents happen in developed countries, the legal and insurance consequences of such an accident are likely to be more unfavourable to the victims in a developing country.

In particular, the majority, or far fewer of the victims are unlikely to possess life or personal injury insurance. They must therefore rely on other sources of compensation, such as litigation with the defendant corporation.

This raises many problems. First, if the defendant is a MNE there will be difficulties over the choice of forum and choice of applicable law. Secondly, there are problems concerning the legal basis of the corporation's liability. Should liability be strict or based on fault? Should the foreign parent company be responsible for the acts of its subsidiary? Thirdly, even if the corporation is found liable it may be underinsured and so unable to meet its liability. Fourthly,

14. This section, and section (3) of the paper below, are based on a paper, written by the author, setting out in greater detail the technical legal problems involved in establishing the proposed fund. See Muchlinski, "The Right to Development and the Industrialisation of Less Developed Countries: The Case of Compensation for Major Industrial Accidents Involving Foreign-Owned Corporations," published in November 1989 by the Human Rights Unit of the Commonwealth Secretariat. Copies can be obtained by writing to: The Human Rights Unit, The Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX.
the home and host countries may take sides in the litigation and use their legal systems to protect their nationals in a way that undermines legal impartiality.

Furthermore, a host country may discourage litigation against a foreign corporation if it is concerned that a finding against the corporation might be construed as an act hostile towards foreign investors.

These facts suggest that a new system of dealing with major industrial accident compensation in LDCs is needed. It must be supranational in nature, so as to avoid conflicts between home and host countries. The new system needs to provide a readily available source of funds from which compensation can be paid as soon as possible after the accident. An international fund set up for this purpose is desirable.

III. An International Compensation Fund

The use of an international compensation fund is not unprecedented. The most significant example occurs in the field of oil pollution from ships. Here both private and public sector funds have been established. On the public side, there is the International Oil Pollution Compensation Fund set up by Convention in 1971, as amended in 1984.15 This has the force of English law under Part I of the Merchant Shipping Act 1974. The Fund provides compensation to victims of oil pollution whose losses have not been covered under the International Convention on Civil Liability for Oil Pollution damage 1969, as amended in 1984.16 The Fund Convention has set up an international organisation, the IOPC Fund, to administer the system. The Fund is financed by contributions from those who receive, in a contracting state, "contributing oil", which the Fund Convention defines as crude and fuel oils. Contributors are those who have received in the relevant calendar year more than 150,000 metric

15. See D.W. Abecassis and R.L. Jarashow, Oil Pollution From Ships (2nd ed. Stevens and Sons 1985) Ch. 11.
16. See ibid. ch. 10. This convention was enacted into English law by the Merchant Shipping (Oil Pollution) Act 1971.
tonnes of contributing oil. Thus it is mainly oil companies and the owners of power plants that contribute.\textsuperscript{17}

Claims can be made by anyone who has suffered "pollution damage" within the meaning of the Liability Convention but who cannot recover under the terms of that Convention, or because the shipowner liable for damages under the Liability Convention is financially incapable of meeting his obligations, or because the damage suffered goes beyond the Liability Convention limits. The claim will usually be made after the shipowner has paid money into a limitation fund covering his liability up to the Convention limit. Procedures exist for claims to be made even before the shipowner has done so.\textsuperscript{18} Nonetheless, it is fair to describe the Fund as a "last stop" compensation system.

On the private side, the major oil companies have set up their own scheme for the compensation of oil pollution victims. Known as CRISTAL,\textsuperscript{19} it establishes a fund which is held by a company incorporated in Bermuda and to which the member companies contribute a proportion of their receipts of crude and fuel oil. The fund will pay compensation to any person who has suffered oil pollution damage as a result of an incident.\textsuperscript{20} This scheme can also be described as a "last stop" system. It will only pay on proof that the claimant has exhausted all other means of obtaining recovery.

These precedents can be modified to offer a useful model for a fund in the field of hazardous manufacturing industries operating in LDCs. First, a major contribution from the private sector to such a fund is essential. However, public sector contributions from the participating states should also be made. This is important as both home and host states have a responsibility to oversee industrial safety.

\textsuperscript{17} Ibid. ¶ 11-60.
\textsuperscript{18} Ibid. ¶¶ 11-50 to 11-51.
\textsuperscript{19} Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution.
\textsuperscript{20} On CRISTAL see Abecassis and Jarashow, op. cit. note 15 above ¶¶ 12-21 to 12-38 and CRISTAL: "Memorandum of Explanation Cristal Contract Rules of Cristal Limited" (revised February 20, 1989), obtainable from Cristal Services Limited, London. See too by the same body: "TOVALOP and CRISTAL A Guide to Oil Spill Compensation" which explains the relationship between Cristal and the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP), the private sector equivalent to the 1969 Liability Convention.
Furthermore, a public contribution may be necessary to avoid any shortfall of funds raised from the private sector.

Secondly, the proposed fund should not operate as a "last stop" system operating only after litigation has ended, in the manner of the oil pollution funds. Given the absence of widespread personal insurance in developing countries, which could offer immediate compensation for the victims and allow the insurer to continue litigation against the defendant corporation, the need is for a "first stop" approach whereby the proposed fund acts as the initial source of compensation.

The major practical obstacle to the development of an effective fund concerns its size. It must be large enough to cope with any foreseeable claims. Apart from the obligation on participating states and corporations to make substantial contributions, it would be valuable to give the body administering the fund the legal capacity and powers to use a proportion of its deposits as investment capital. However, a further power must be given to the fund to make emergency calls on contributors, in the case of an accident of unforeseeable dimensions.

The fund should be incorporated as a company wholly owned by the international organisation that would need to be set up as its supervisory body. Incorporation should take place in the most legally favourable jurisdiction, either an established "tax haven" or a participating state that offers special tax concessions to the fund. Its tasks would be to invest the fund prudentially and to ensure that an adequate reserve for the payment of claims was available. It would also be charged with the task of conducting any litigation against defendant corporations and/or states in the exercise of its rights of

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21. The proposed international organisation could be expected to follow the model set up in the oil pollution field. Thus there would be a Secretariat, charged with the administration of the organisation, and composed of persons with relevant experience in those fields required for the effective operation of the organisation. In particular, it would be important to draw on persons with experience in the insurance industry and in industries using ultrahazardous technology. Secondly, there would be an Assembly of all the contacting states, which would give policy guidance to the organisation. Provision should also be made for industry representatives to take an active part in the fund, so as to avoid disinterest and possible opposition to its work. Collaboration with the international insurance industry may also have to be formally provided for. The operational bodies of the organisation would be the fund company and the claims commission (see below).
subrogation after payment of claims. The fund company would be administered by officials of the international organisation and supervised by it.

Ideally, the fund should become largely self-financing, with the proportion of private and public contributions going down as investment income goes up. This is important as neither the participating states nor the contributing corporations are likely to be very enthusiastic givers. If their contributions can be reduced over time without injuring the fund so much the better.

A further practical problem involves the targeting of corporations that should be invited to contribute to the fund. The number of firms engaged in the overseas exploitation of hazardous industrial technology is considerable. The answer may be to restrict the fund initially to an identifiable industrial sector, such as chemicals, define “hazardous technology” in that context, then identify the main corporate users of such technology and invite them to become participants in the fund.

Finally, the fund may earmark a proportion of its income to assist LDCs in financing adequate health and safety monitoring programmes, so as to remove the excuse that lack of funds prevents such activity. The fund may also become involved in the promotion of research and development in industrial health and safety. These are, however, matters that need to await the evolution of a sizeable fund.

In order to achieve its objectives the fund must offer an effective claims procedure that is reasonably simple to activate and administer. First, the procedure must be free from obstruction by national authorities and laws. Consequently, it should take the form of a standing international claims commission, set up by prior agreement

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22. The fund company could only do this in jurisdictions that recognised its authority and locus standi. Such recognition would be an automatic consequence of entry into the parent organisation by a participating state. A non-participating state may be obliged to recognise the fund company as a municipal juridical person: Arab Monetary Fund v Hashim (No 3) [1991] 1 All ER 871 (HL) reversing the decision of the Court of Appeal [1990] 2 All ER 769. (When sovereign states enter into an agreement by treaty to confer legal personality upon an international organisation, and the United Kingdom is not a party to that agreement, the registration of that treaty in one of the sovereign states confers legal personality on the international organisation and thus creates a corporate body which the English courts can and should recognise as a foreign municipal juridical person, with the capacity to bring proceedings in the English courts.)
between all the participating states, whose powers would be recognised by the internal laws of the participating states.

Secondly, as noted above, the fund procedure is envisaged as a “first stop” compensation scheme. Consequently, the fund should not be treated as a bar to subsequent national litigation against the corporation responsible for the accident, if this offers the prospect of higher damages. The fund should not act as a limitation fund. Once an award has been made to the victims, the fund itself would be empowered to sue the defendant corporation(s) (and possibly the host state if it is a codefendant) by way of subrogation. Any damages awarded over and above the fund award can be held by the fund as trustee for the victims and distributed to them according to the proportion that their claim bears to the total of claims.

Thirdly, fund awards should be made on a “no-fault” basis in the manner of insurance payments. All the claimant has to prove is that he, she or it suffered personal or proprietary injury as a result of the accident. This should avoid complex legal questions concerning fault and, in the case of a foreign owned multinational, parent company liability for the acts of its locally incorporated subsidiary.

Finally, the proceedings of the commission should be run on an administrative, rather than an adjudicatory, basis. Claims would be submitted in writing to an official supervised by the commission. The commission itself should be composed of an agreed number of legal and other experts drawn from a panel appointed by the international fund composed of persons from the host, home and neutral participating countries. They would oversee the functioning of the claims processing procedure and could give reasoned awards where necessary. It will be necessary to draw up rules as to the quantification of claims to be used. Like the fund, the claims commission would also be overseen by the new international organisation.

Thus far, the proposal has been considered without reference to the role of human rights standards as an active element in the operation of the fund. First, as noted above, such standards can have an important role to play by offering a justification for the existence of the fund, it being an institutional and operational expression of the accident victim’s right to an effective remedy. Secondly,
room in the operation of the fund for an institutional policy of respect for human rights as an aspect of the right to development. In particular, the proposed role of the fund as a focus for research into industrial safety, and for assistance to LDCs in health and safety matters, can prompt action designed to increase awareness of the obligations of such countries, and of the corporations operating within them, to observe relevant human rights standards. In this connection, there is scope for introducing consultation with people affected by the operations of MNEs in less developed host states as an element of the fund’s research.

However, as noted above, such developments depend on the growth of sufficient financial resources within the fund to allow for a diversification of activities beyond those immediately associated with the compensation of accident victims. There is also a danger that the fund could lose essential support from LDCs and MNEs if it were to go too far beyond its narrow purpose of providing compensation and technical assistance, and to engage in the more general discourse of human rights and the right to development. The continuity between respect for human rights as the motivation for the fund and its more technical activities should be stressed, but not to the point where discussion over the right to development, and its content in relation to industrial health and safety, takes over the fund’s work. A balance would have to be found between formulating health and safety policy in the light of human rights standards and the immediate task of compensating victims.

However, even in relation to the immediate task of compensation, an approach based on respect for the interests of the victims, requiring consultation with them, would be a significant principle of action based on human rights standards. The compensation of accident victims may have to go beyond simply making good the financial loss to the victim and/or his dependents. As the Bhopal case shows, there may be substantial loss to the community as a whole. As much as it needs to put right damage caused by the accident to the physical infrastructure, the human community may need special services, medical and social, to heal itself. In a developed country the resources and the means to do so usually exist. However, in the case of an LDC, the lack of resources means that the fund may need to
assist in the rebuilding process. In this there is an opportunity to revitalise a community and, possibly, to improve it. Such a task should not be taken on without consultation with the affected population, as its vital interests are at stake.

Herein lies a further danger to the fund. LDCs may prefer to go without the assistance it could offer if the fund were perceived as an outside element that had the potential to effect changes within the community on the basis of local consultation alone, thereby challenging the sovereignty and effectiveness of the local government. Clearly, the host state would have to be engaged in the process of consultation. However, the potential for conflict over the application of funds is foreseeable, where local opinion differs from government policy. In this respect, the fund could find itself in deep political waters.

IV. Conclusion

This article has suggested an approach to the compensation of victims of major industrial accidents in developing countries that is not without its major difficulties. In particular, the introduction of human rights standards as a guide to the wider activities of the fund could create political tensions that the narrower object of acting as no more than a victim's compensation fund would not. The constituent assembly of the international organisation, charged with the supervision of the fund, would play an important role in ensuring that such tensions do not incapacitate the fund. Some will no doubt dismiss this proposal as fanciful. Nevertheless, it is hoped that the proposal will generate constructive criticism from which the beginnings of a workable scheme will emerge.