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Industrial disaster: should it be considered as a corporate crime against humanity?-an analysis with special reference to Bhopal gas tragedy

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ABSTRACT

The corporate sector is built for making profit any how and this tendency leads them for breach in regulation and norms. Bhopal gas tragedy (BGT) is burning example of it which was widely regarded as the World's worst ever industrial disaster in human history. It was a corporate crime of historic proportions. Actually Globalisation has opened the door for every nation and almost every nation depends upon another for one or another reason. Technology transfer is one of the examples of dependency. Any fault in technology either or along with human error become cause of such disaster in which human and humanity both suffer generations to generations. Strange are ways of law. Ironically, Indian law system is not capable of handling corporate criminals where masses are to be compensated for loss of life, health and property. At least verdict of CJM Court (Bhopal) on Bhopal Tragedy, attesting this statement. So we need international approach. This paper is a humble attempt to match the essential elements of Crimes against Humanity with facts of Bhopal Gas Tragedy where recklessness, continuous gross negligence could be apparently seen. If it is matched then it should be considered as corporate crimes against humanity.

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Introduction

One day a frog was sitting by the bank of the river enjoying the warm sun and cool breeze. It so happened that a scorpion approached him rather quickly as to inquire about crossing the river. "Frog," said the scorpion, "I am in need of passage across the river upon your back. I am prepared to pay you with this mealworm that I have not eaten." The frog thought about it for a moment, then replied "Scorpion, I know if I grant you a ride across the river upon my back, you will poison me on the other side. For that alone I shall say "no thanks." "Frog," again said the scorpion, "Please, I have no wish to harm you, I promise. I just need to go across the river to find more food. There is nothing left on this side for me to eat." The frog thought about it again for a moment and then agreed to help the scorpion get across the river. Half way across, the frog felt a rather sharp, stinging sensation in his back. The scorpion had stuck him with his venom. "Scorpion!" cried the frog, "You have killed me and you as well. Why have you done this?" "Because I am Scorpion and this is my nature."¹

* This article is modified and revised version of paper entitled, "Industrial Disaster: Should It Be Considered As A Corporate Crimes Against Humanity?-An Evaluation With Special Reference to the World's Worst Industrial Disaster [Bhopal Gas Tragedy]", in International Conference on Corporate Social Responsibility and Industrial Disaster, Held at National Law Institute University, Bhopal, MP on December 5- 6, 2009. This article is inspired by the article of, Stuart Ford entitled, "Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis", available at: <http://ssrn.com/>. For that author acknowledged the same.

The corporations are chartered for the purpose of making money and they tend to do that well like SCORPION. This tendency leads them for breach in regulation and norms. Bhopal gas tragedy (BGT) is burning example of it which was widely regarded as the World's worst ever-industrial disaster in human history. The tragedy occurred in December 1984 when a storage tank at a pesticide plant run by Union Carbide spewed cyanide gas into the air in Bhopal, immediately killing thousands of people. The leak was caused by a series of mechanical and human errors. Researcher has chosen this particular incident because of its gravity and easy availability of factual position so that it can be testified with the parameters of international crime *i.e.* crimes against humanity.

This article is aimed to determine whether there is sufficient reason to believe that crimes against humanity were being committed in Bhopal Gas Tragedy, and if such industrial disaster will be happened again, should it be considered as crimes against humanity? Prior to analysis first just look a brief overview of incidents of Industrial disasters.

Incidents of Industrial Disaster before and after Bhopal Gas Tragedy:

Prior to Bhopal Gas Tragedy and even aftermath of Bhopal several other Industrial Disasters have been taken place. Right now JAPAN is facing leakage in their Nuclear Power Plants at fukusima, due to Natural calamity. But what will happen when it will be man-made or due to irresponsible behaviour of few some

¹ Ms. Garden Plum, The Frog and the Scorpion, (cited 4/11/2009) available from <http://www.gardenplum.com/girls/gratree/frogandscorpion.html>

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people. Several incidents² of industrial disaster across the globe have been taken place like in Jaipur-2009 (India)³, China Coal Gas explosion-2004⁴, France Fertilizer Factory-2001⁵, Thailand-1993⁶, USA Alaska-1989⁷, Ukraine-1986⁸, India, Bhopal-1984⁹, USA Missouri chemical waste-1982¹⁰, USA Pennsylvania-1979¹¹, France-1978¹², USA-1977¹³, USA-1976¹⁴, USA West Virginia-1972¹⁵, USA West Virginia-1968¹⁶, Russia-1967¹⁷, Japan-1956¹⁸ which caused immense harm to humanity

² Goerge Draffin, "Chronology of Industrial Disasters", (cited 4/11/20010) available from <http://www.endgame.org/industrial-disasters.html>

³ Patrol and Diesel Fire in Indian Oil Depot took life of many people and millions lit. Oil was burnt.

⁴ In Daping coal mine in Henan province killed 56 people and left dozens more missing and 148 were trapped .In 2004, 6,027 Chinese mine workers were killed--an average of about 16 deaths a day.

⁵ September 21 explosion at Azote de France agricultural chemicals factory near Toulouse. 31 people dead, at least 650 people hospitalized.

⁶ Toy Factory killed 188 women and injured over 400.

⁷ Oil Tanker Exxon Valdez tanker spills 11 million gallons of crude oil into Price William Sound.

⁸ Nuclear Chernobyl nuclear power station in USSR chemical explosion at the station's fourth reactor and an uncontrolled graphite fire that followed led to the release of more than 450 radio-nuclides, comprising about 3.5 per cent of the fuel stored in the reactor core. The Ukrainian government has estimated the number of deaths among clean-up workers alone as 7,000-8,000.

⁹ Toxics Explosion at Union Carbide pesticide plant in Bhopal India released cloud of methyl isocyanate, killing at least 2,000 and injured 50,000

¹⁰ In 1996-97, 265,354 tons of soil and other dioxin-contaminated material from Times Beach and 26 other sites in eastern Missouri had been incinerated. In 1982, Times Beach's 2,242 residents were evacuated after dioxin found in soil.

¹¹ Nuclear Three Mile Island nuclear power plant. Over 140,000 people evacuated within a 15 mile area.

¹² Oil tanker Amoco Cadiz tanker runs aground off the coast of France, spilling 1.6 million barrels of crude oil.

¹³ New York chemical waste Hooker Chemical Company used uncompleted canal for dumping by-products. Once the canal was filled with waste, the land was covered over and sold to the Niagara Falls city school board for \$1.00 and a school and subdivision of homes was on top. The chemicals were detected leaking out of the site in 1977 and residents were eventually evacuated.

¹⁴ Massachusetts oil spill Argo Merchant runs aground on the Nantucket Shoals off Cape Cod , spilling 7.6 million gallons of No. 6 fuel oil.

¹⁵ Coal mine Dam failure at Buffalo mine in Saunders kills 125.

¹⁶ Coal mine Explosion and fire killed 78 men at the Consol No 9 mines at Farmington, West Virginia.

¹⁷ Toxics Accident at Chelyabinsk nuclear complex near Kyshtym.

¹⁸ Chemical waste Minamata disease officially recognized. Mercury poisoning that developed in people who ate contaminated seafood taken from Minamata Bay and adjacent coastal waters in the period after World War II when methyl mercury was dumped into the sea as an unwanted by-product of

Bhopal Gas Tragedy and Aftermath:

The Union Carbide plant opened in 1969 at Bhopal to manufacture pesticides. Union Carbide Corporation (UCC) is the parent company and Union Carbide India Limited (UCIL) the Indian subsidiary. 51 % of the stock was held by UCC and 49 % by different governmental departments and organisations.¹⁹

UCC vindicates that it was not responsible for the maintenance of the safety systems of the UCIL plant in Bhopal. But UCC was allowed majority ownership despite government limitations on foreign investment, because of the technological sophistication of its operations. UCC chose all production processes, supplied all plant designs and designated operational procedures. UCC also conducted safety audits.²⁰

In the procedure for manufacturing the pesticides Sevin and Temik, methyl isocyanate (MIC) was used as an intermediate. In the beginning, MIC was imported, but in 1979 UCIL built an MIC unit. The company was offered a site outside the town, but insisted on using the existing plant area, close to the railway station. Safety audits were done every year in US and European plants, but only every two years in other parts of the world.²¹

What Exactly Happened at Bhopal?

During the night of December 2-3, 1984, large amounts of water entered tank 610, containing 42 tones of methyl isocyanides²² (MIC) exposing more than 500,000 people to MIC and other chemicals at a Union Carbide pesticide plant in the city of Bhopal, Madhya Pradesh. Thousands died immediately from the effects of the gas and many were trampled in the panic. The first official immediate death toll was 2,259. The government of Madhya Pradesh has confirmed a total of 3,787 deaths related to the gas release.²³ Others estimate 8,000-10,000 died within 72 hours and 25,000 have since died from gas-related diseases.²⁴

Broadly the factors which most responsible for this tragedy were-

➤ The deficiencies in the Bhopal plant design can be summarised as: choosing a dangerous method of manufacturing pesticides; large-scale storage of MIC before processing;

acetaldehyde processing at the Chisso industrial plant in Minamata, Japan.

¹⁹ Ingrid Eckerman, "Chemical Industry and Public Health Bhopal as an Example" Essay in Master of Public Health Nordic School of Public Health, Göteborg, Sweden MPH 2001:24 at pg. 13

²⁰ *Id.*

²¹ *Id.*

²² A crystalline compound, C₂H₃NS, used as a pesticide. It is an extremely toxic chemical that can come in contact inhalation, ingestion and contact in quantities as low as 0.4 ppm. Damage includes coughing, chest pain, dyspnea, asthma, irritation of the eyes, nose and throat as well as skin damage.

²³ Visit <http://www.mp.gov.in/bgtrrdmp/relief.htm> (last visited on 31/10/09)

²⁴ Eckerman, Ingrid, "Chemical Industry and Public Health-Bhopal as an example" (2001) (cited 5/1/2011) available from http://www.dnsy.se/_upload/lfm/2006/bhopal%20gas%20disaster.pdf.

location close to a densely populated area; under-dimensioning of the safety features; dependence on manual operations.²⁵

➤ Deficiencies in the management of UCIL can be summarised: lack of skilled operators due to the staffing policy; reduction of safety management due to reducing the staff; insufficient maintenance of the plant; lack of emergency response plans.²⁶

Previous Warnings And Accidents:

The plant of UCC in India and West Virginia underwent safety audit in May 1982. The results of safety audit pointed out many deficiencies in the working system of the plant and warned about the possible dangers from the plant. The company did not take any precautionary action against the safety audit report.²⁷

A series of prior warnings and MIC-related accidents had occurred which are as follows:

➤ In 1976, the two trade unions reacted because of pollution within the plant.²⁸

➤ In 1981, a worker was splashed with phosgene. In panic he ripped off his mask, thus inhaling a large amount of phosgene gas; he died 72 hours later.²⁹

➤ In January 1982, there was a phosgene leak, when 24 workers were exposed and had to be admitted to hospital. None of the workers had been ordered to wear protective masks.

➤ In February 1982, an MIC leak affected 18 workers.³⁰

➤ In August 1982, a chemical engineer came into contact with liquid MIC, resulting in burns over 30 percent of his body.³¹

➤ In October 1982, there was a leak of MIC, methylcarbaryl chloride, chloroform and hydrochloric acid. In attempting to stop the leak, the MIC supervisor suffered intensive chemical burns and two other workers were severely exposed to the gases.³²

➤ During 1983 and 1984, leaks of the following substances regularly took place in the MIC plant: MIC, chlorine, monomethylamine, phosgene, and carbon tetrachloride, sometimes in combination.³³

➤ Reports issued months before the incident by scientists within the Union Carbide Corporation warned of the possibility of an accident almost identical to that which occurred in Bhopal. The reports were ignored and never reached senior staff.³⁴

➤ Union Carbide was warned by American experts who visited the plant after 1981 of the potential of a "runaway reaction" in the MIC storage tank; local Indian authorities warned the company of problems on several occasions from 1979 onwards. Again, these warnings were not heeded.³⁵

UCC admitted, in their own investigation report that most of the safety systems were not functioning on the night of the 3rd December 1984.³⁶ The report contained following information: Tank temperatures were not logged; The vent gas scrubber (VGS) was not in use; The cooling system was not in use; A slip bind was not used when the pipes were washed; The concentration of chloroform in Tank 610 was too high; The tank was not pressurized; Iron was present because of corrosion; The tank high-temperature alarm was out of function; Tank 619 (the evacuation tank) was not empty.

In addition, other faults are recorded: The meters monitoring tank E610 were showing abnormally low pressure. The reason might be either a faulty meter or an inability of the tank to maintain pressure.³⁷ The line connecting the VGS to the flare tower was master carded.³⁸ Many valves, vent lines, feed lines etc. were in poor condition.³⁹ This shows UCC's gross negligence and recklessness which ultimately resultant to Bhopal Gas Tragedy 1984.

Role of Government:

Government was known to the fact the unit manufactured dangerous chemicals in the heart of the city of Bhopal without adequate safety measures. After the disaster, The Indian government was failure to make data public. The CSIR report⁴⁰ was formally released 15 years after the disaster. The authors of the ICMR studies on health effects were forbidden to publish their data until after 1994. UCC has still not released their research about the disaster or the effects of the gas on human health.

Medical staffs were unprepared for the thousands of casualties. Doctors and hospitals were not informed of proper treatment methods for MIC gas inhalation. They were told to simply give cough medicine and eye drops to their patients. Complaints of a lack of information or misinformation were widespread.⁴¹ The Bhopal plant medical doctor did not have proper information about the properties of the gases. Roll of government was far from satisfaction and showing poor disaster management. The government and UCC was both ill-equipped to respond to the crisis and reluctant to expend the effort necessary to organize an effective response. All the ill-effects of chemicals have been affecting the lives from generation to generation.

Compensation:

UCC offered US\$350 million, the insurance sum. But The Government of India claimed more from UCC. In 1989, a settlement was reached under which UCC agreed to pay US\$470 million (the insurance sum, plus interest) in a full and final settlement of its civil and criminal liability.⁴² This amount of compensation was based on the assumption, that the number of

²⁵ Eckerman, Ingrid, "The Bhopal Saga — Causes and Consequences of the World's Largest Industrial Disaster" India: Universities Press. ISBN 81-7371-515-7. (2004).

²⁶ *Id.*

²⁷ Sandipa Lahiri Anand, "Bhopal Gas Disaster and Dow Chemical: Need for CSR" available at www.ssm.com (last visited on 30/10/09)

²⁸ Eckerman, Ingrid, *Supra* note 24. *See also Supra* note 25

²⁹ *Ibid.*

³⁰ *Supra* note 12

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Kovel, J, *The Enemy of Nature: The End of Capitalism or the End of the World.* London: Zed Books. (2002).

³⁵ *Id.*

³⁶ Bhopal Methyl Isocyanate Incident. Investigation Team Report. Danbury, CT: Union Carbide Corporation, 1985.

³⁷ *Bhopal gas tragedy.* New Delhi: Delhi Science Forum, 1985.

³⁸ Chouhan TR et al. *Bhopal: The inside story. Carbide workers speak out on the world's worst industrial disaster.* New York: The Apex Press, 1994. *See also* Bhopal gas tragedy. New Delhi: Delhi Science Forum, 1985.

³⁹ *Id.*

⁴⁰ Varadarajan S et al. *Report on Scientific Studies on the Factors Related to Bhopal Toxic Gas Leakage.* New Delhi: Indian Council for Scientific and Industrial Research. (1985)

⁴¹ Eckerman, Ingrid, *Supra* note 24

⁴² Eckerman, Ingrid, "The Bhopal Saga," *Supra* note 25

deaths were 3000 and the number of injured were 1, 00,000. But according to the figures calculated as on March 2003 the death claim stood more than 15,180 and injured at 5,53,015 which was miscalculated to around 5 times. The compensation money was not increased according to the actual data and thus it reduced by 5 times or more leaving back an average monetary rehabilitation of Rs 200 per person per year. It was an unsatisfactory amount for the victims of gas disaster of such a large scale.⁴³ Due to this several people died in absence of adequate aid.

Inadequate Legal Action:

There were 3 foreign and 9 Indian accused in the Bhopal case. Charge was culpable homicide not amounting to murder. The three foreign accused refused to present themselves before the court, and therefore they were declared as 'proclaimed absconders' by the Judicial Magistrate in Bhopal. Later the magistrate ruled if they fail to turn up, their property will be attached. Now, their property was their share in the Union Carbide. Those shares in Union Carbide were wickedly invested to float a trust called Bhopal Hospital Trust (BHT) endowing all their shares in UCC to BHT, with an obvious aim to defeat the attachment. And all these were done on 20th march 1992, just seven days prior to the hearing. The Magistrate, anyway, attached Union Carbide's property and asked CBI to extradite the Chairman Union Carbide, Mr. Warren Anderson. Later US government disclosed that no such request of extradition was received from the Government of India.⁴⁴ No relief from US courts for victims.

About the Indian accused, the case was separated from foreign accused and in their case, SC quashed the charge of culpable homicide and enforced 304 A of Indian Penal Code in stead, which is Rash Negligent Act. This is normally invoked in motor accidents in rash driving. But

Ultimately on 7th of June 2010, nearly 26 years to hand down a verdict for the world's worst industrial accident in Bhopal. This is too late and too little. Seven Indian accused are found guilty and they are sentenced to two years imprisonment and awarded a fine of Rs one lakh each under section 304 (a) (causing death by negligence), 304-II (culpable homicide not amounting to murder), imprisonment of 3 months and a fine of Rs 250 under Section 336, (gross negligence) 6 months and Rs 500 under Section 337 and 2 years and Rs 1,000 under Section 338.⁴⁵

All this happened due to apparent omission by prosecuting agency CBI, which clearly shows that in this era of globalization, not many are agreeable to punish a big Multi National Companies fearing it will discourage foreign

investment. We are failed to punish any of foreign authorities of UCC.

This is pointer to the fact that the present substantive criminal law is too inadequate to deal with mass torts.⁴⁶ Thus we need to revisit the law pertaining to industrial disasters.

With the respect to above mention facts it will be better to search International solution to meet with Justice when such incidents take place. Charges of Crimes against Humanity might be a best solution to punish culpable. First must be determined whether or not the situation in Bhopal constituted a crime against humanity.

Were Crimes Against Humanity Committed In The Bhopal Gas Tragedy?-

Crimes against humanity committed if: (1) one or more of the following acts – murder, extermination, enslavement, deportation or forcible transfer of populations, imprisonment, torture, rape and sexual violence, persecutions, or other inhumane acts – was committed; (2) in connection with a widespread or systematic attack upon a civilian population. Both elements must be present for a crime against humanity to exist.⁴⁷

Now its worth to discuss and determine whether crimes against humanity were committed by correlating the "facts" described above.

The Existence of the Underlying Acts of a Crime against Humanity:

This section will discuss whether any of the enumerated crimes those form the basis for a crime against humanity charge were committed. Not all of the enumerated acts that could constitute a crime against humanity will be addressed below. The author has found no compelling evidence to suggest that there were widespread acts of enslavement, imprisonment, torture, or rape and sexual violence. The discussion below will focus on the crimes of murder, extermination, forcible transfer, persecution and other inhumane acts. The issues of omission, motive and intent will be discussed first because of their importance to any discussion of whether any of the underlying crimes were committed.

Intent and Motive:

In order to commit a crime against humanity, the perpetrator must have the intent to commit the underlying offense.⁴⁸ Intent, of course, refers to the mental state of the accused at the time the alleged crime was committed, but unless the accused confesses or testifies there is very rarely any direct evidence of the accuser's mental state. For this reason, intent is usually inferred from circumstantial evidence.⁴⁹ The concept of intent as used by

⁴³ *Id.*

⁴⁴ Industrial disasters: booming in an unsafe environment, CSE Draft Dossier: Health and Environment A. Environment and Diseases. Industrial Disasters (cited 4/11/2010) available from <http://www.cseindia.org/programme/health/pdf/conf2006/a6industry.pdf>

⁴⁵ *Bhopal gas verdict slammed, demand for stricter law*, Mumbai, June 08, 2010 (cited 4/11/2010) available from <http://www.hindustantimes.com/india/Bhopal-gas-verdict-slammed-demand-for-stricter-law/554801/H1-Article1-554919.aspx>. see also Bhopal gas tragedy verdict, June 7, 2010, (cited 4/11/2010) available from <http://news.rediff.com/slide-show/2010/jun/07/slide-show-1-bhopal-gas-tragedy-verdict.htm>

⁴⁶ *Supra note 28*

⁴⁷ Rome Statute, Art. 7. (The Rome Statute includes two additional physical acts: apartheid and the enforced disappearance of persons, which are not present in the statutes of any of the other international tribunals. Rome Statute, Art. 7(i), 7(k).)

⁴⁸ Kordic and Cerkez, (Appeals Chamber), December 17, 2004, para. 99; Prosecutor v. Blaskic, ICTY Appeals Chamber, Case No. IT-95-14-A, Judgment dated 29 July 2004, para. 124; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 37.

⁴⁹ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 523 (Sept. 2 1998) (noting that "in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact"); Prosecutor v.

most international courts does not require proof of a deliberate purpose to commit the crimes. In many cases, courts have held that an accused intended an act if he or she knew that the criminal outcome was the probable result of an act or omission yet chose to commit the act or omission anyway.⁵⁰ This is similar to the common law concept of recklessness, but has been held to constitute the requisite intent for prosecution of international crimes.⁵¹

Motive and intent are separate concepts and motive is generally irrelevant to the question of criminal intent.⁵² Intent focuses on the question of what the perpetrator intended to do. Motive focuses on the question of why the perpetrator did something.⁵³

Crimes of Omission:

The jurisprudence of the international courts demonstrates that crimes against humanity can be caused either by acts of the accused or by omissions, if those omissions are accompanied by the requisite criminal intent. For example, an accused can be criminally liable for murder if he omits to act, while intending that the omission will result in the death of the victim, and the victim dies as a result of the omission.⁵⁴ This is a very important point because it applies to the situation in Bhopal. Killing by omission, so long as it is accompanied by the requisite criminal intent, is just as much a crime against humanity as killing by commission.

Probable Scenarios:

There are a number of allegations that could be made based on the facts described above that, at first glance, resemble the underlying crimes of a crime against humanity. These include: (1) the government allow UCC to run hazardous industry in the heart of the city (2) Government and UCC's allegedly deliberate failure to warn the population, (3) the UCC's act was allegedly negligent and recklessness (4) the government and UCC's offered inadequate aid, so greatly increased the number of deaths and also created inhumane living conditions for many of the survivors. This is probably the strongest argument that the actions of the constituted crimes against humanity. These deaths would most likely be treated as murder, extermination or other inhumane acts. Murder will be addressed first.

Murder:

Murder as a crime against humanity requires three elements: (1) the death of a person; (2) that was caused by an act or

omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he/she bears criminal responsibility, with an intent to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.⁵⁵ There is no need to produce a body so long as there is sufficient circumstantial evidence that the victim is dead.⁵⁶

It would have seemed logical at the time to conclude from these facts that deaths were occurring that would not have occurred if proper measures had taken prior to disaster and aid had been distributed and disaster management had been proper after disaster. There are not any estimates of how many people died because of a lack of aid, but it is probably not necessary to know the exact number of deaths. It is probably enough that there is a credible body of evidence that indicates deaths were occurring.

The next element of a murder charge would be evidence that the deaths were caused by an act or omission of the Government and UCC. The deaths were caused by the government if an act or omission of the government and UCC contributed substantially to the deaths. As noted above, there appear to have been deaths occurring that were caused by the recklessness and gross negligence. In short, there does seem to be a credible body of evidence indicating that the deaths were caused by an act or omission of the UCC and government.

The final element of murder as a crime against humanity is the criminal intent. First of all, the required intent for murder as a crime against humanity encompasses both direct intent and indirect intent.⁵⁷ Direct intent is a deliberate purpose to kill someone. Indirect intent is similar to a recklessness standard. Accused are found to have legally intended to kill someone if they were aware that the death was a probable consequence of their acts or omissions, they act or omit to act anyway, and the death does occur.⁵⁸ To be intended, the death must be probable, not simply possible.⁵⁹ In this respect, indirect intent encompasses recklessness but not negligence or gross negligence.⁶⁰

It was widely known that hundreds of thousands of people lives were in danger because of the plant of UCC which was at heart of city and series of recklessness and negligent acts were taken place. This is sufficient to draw a conclusion that the

Brdjanin, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004, para. 387; ICC Elements of Crimes, General Introduction, para. 3 ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.")

⁵⁰ *infra*

⁵¹ *Kupreskic et al.*, (Trial Chamber), January 14, 2000, para. 561 ("The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.")

⁵² *Supra note 48* para. 99(Kordic and Cerkez); Prosecutor v. Blaskic, ICTY Appeals Chamber, Case No. IT-95-14-A, Judgment dated 29 July 2004, para. 124; Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 103.

⁵³ Knojelic, (Appeals Chamber), September 17, 2003, para. 102, *Jelusic*, (Appeals Chamber), July 5, 2001, para. 49.

⁵⁴ Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 556; *Krstic*, (Trial Chamber), August 2, 2001, para. 485; Blaskic, (Trial Chamber), March 3, 2000, para. 217; Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 236.

⁵⁵ Prosecutor v. Brdjanin, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004, para. 381.

⁵⁶ *Id.* at paras. 383-85.

⁵⁷ See Prosecutor v. Strugar, ICTY Trial Chamber, Case No. IT-01-42-T, Judgment dated 31 Jan.

2005, para. 235; Prosecutor v. Strugar, ICTY Appeals Chamber, Case No. IT-01-42-A, Judgment dated 17 July 2008, para. 270. (Indirect intent is also sometimes referred to by the Latin name *dolus eventualis*.)

⁵⁸ Prosecutor v. Brdjanin, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004,

paras. 386 (referring to indirect intent as *dolus eventualis*), See Prosecutor v. Stakic, ICTY Trial Chamber, Case No. IT-97-24-T, Judgment dated 31 July 2003, para. 587.

⁵⁹ See Prosecutor v. Strugar, *Supra* note 57, paras. 235-236.

⁶⁰ Prosecutor v. Brdjanin, *Supra* note 58, paras. 386; Prosecutor v. Strugar, *Supra* note 57, para. 270; Prosecutor v. Stakic, *Supra* note 58.

government and UCC intended (might be indirectly) to cause the deaths. So there was a reliable and consistent body of evidence that established a reasonable basis to believe that murder as a crime against humanity was being committed in the Bhopal Gas Tragedy.

Extermination:

Extermination requires proof of two elements: (1) that an act or omission resulted in the death of persons on a massive scale; and (2) the accused intended to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people.⁶¹ Extermination is similar in many ways to murder, except that it occurs on a massive scale,⁶² and it may be proved by evidence that victims were intentionally subjected to conditions that contributed to their death, such as the deprivation of food and medicine.⁶³ Consequently, many of the arguments made above with respect to murder also apply to the analysis of extermination. For example, the intent element of extermination is the same as that for murder and encompasses both direct and indirect intent.

The discussion of murder as a crime against humanity has already established that there was reason to believe that people were dying as a result of the acts or omissions of the UCC and that those acts or omissions were intentional. The only additional element necessary for there to be extermination is that the deaths occurred on a massive scale.

There is no minimum number of victims needed to satisfy the “massive” requirement and the applicability of extermination must be based on a case-by-case analysis of all the relevant factors.⁶⁴ Nevertheless, in the *Brdjanin* Trial Judgment, the court concluded that the deaths of at least 1669 people were sufficiently massive to be considered extermination.⁶⁵ If less than 2,000 deaths can be considered massive, then the apparent scope of the deaths in Bhopal should probably be considered massive as well. At the time, these figures would have provided reason to believe that deaths were occurring on a sufficiently massive scale for those deaths to be considered extermination as a crime against humanity. The lower the actual number of deaths, the harder it would be to prove that deaths took place on a massive scale.

⁶¹ *Blagojevic* Trial Judgment, para. 572; *Brdjanin* Trial Judgment, para. 388. See also ICC Elements of the Crimes, Art. 7(1)(b).

⁶² Prosecutor v. *Brdjanin*, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004, para. 388.

⁶³ *Brdjanin* Trial Judgment, para. 389; See also, Prosecutor v. Radislav Krstic, Judgment, ICTY Trial Chamber, Case No. IT-98-33-T, 2 August 2001, para. 503 (“*Krstic* Trial Judgment”). See also Rome Statute, Art. 7(2)(b) (“‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”)

⁶⁴ *Blagojevic* Trial Judgment, para. 573; *Brdjanin* Trial Judgment, para. 391; *Stakic* Trial Judgment, para. 640; Prosecutor v. *Krajisnik*, Judgment, ICTY Trial Chamber, Case No. IT-00-39-T, 27 September 2006, para. 716 (“*Krajisnik* Trial Judgment”).

⁶⁵ Prosecutor v. *Brdjanin*, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004, para. 465. The *Brdjanin* Trial Judgment also noted that extermination had been found in other cases when as few as 733 persons had died. *Id.* at fn. 926.

Inhumane acts:

While murder and extermination focus on killings, the category of “other inhumane acts” is a residual category of crimes against humanity which criminalizes other acts of similar gravity to those that are specifically enumerated in the definition of crimes against humanity.⁶⁶

Acts are considered inhumane if: (1) the victim suffered serious bodily or mental harm or a serious attack on human dignity; (2) the suffering was the result of an act or omission of the accused or someone for whom the accused bears criminal responsibility; and (3) the accused or the person for whom the accused bears criminal responsibility intended to inflict the suffering upon the victim.⁶⁷ The severity of the act must be of “similar seriousness” to the enumerated crimes against humanity.⁶⁸ As with murder and extermination, intent can be demonstrated by either direct or indirect intent.⁶⁹

Consequently, there is a credible body of evidence that suggests that a very large number of people suffered a lack of shelter, food, clean water, and medical care. Many of the people who received no aid would have received aid if the Government had taken strong measures. In effect, this makes out virtually all the elements of the crime of inhumane acts: large numbers of people suffered as a result of the UCC’s acts.

The only question that remains is whether the denial of food, water, housing, and medical care constitutes a serious bodily or mental harm or a serious attack on human dignity. The denial of food, water, housing and medical care, when done in conjunction with other acts like unlawful imprisonment, physical and psychological abuse or beatings does constitute an inhumane act.⁷⁰ It is less clear whether the denial of these things, standing alone, constitutes an inhumane act, although at least one case has appeared to hold that it does.⁷¹ Whether or not the

⁶⁶ *Blagojevic* Trial Judgment, para. 624; *Kordic* Appeal Judgment, para. 117; *Galic* Trial Judgment, para. 152.

⁶⁷ *Kordic* Appeal Judgment, para. 117; *Vasiljevic*, (Appeals Chamber), February 25, 2004, para. 165; See also *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 626; *Galic*, (Trial Chamber), December 5, 2003, para. 152. See also ICC Elements of the Crimes, Art. 7(1)(k).

⁶⁸ Prosecutor v. Mitar Vasiljevic, Judgment, ICTY Appeals Chamber, Case No. IT-98-32-A, 25 February 2004, para. 165 (“*Vasiljevic* Appeal Judgment”); *Blagojevic* Trial Judgment, para. 627.

⁶⁹ *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 628. See also *Galic*, (Trial Chamber), December 5, 2003, para. 154; *Krnjelac*, (Trial Chamber), March 15, 2002, para. 132; *Simic, Tadic, and Zaric*, (Trial Chamber), October 17, 2003, para. 76; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 236.

⁷⁰ Prosecutor v. Blaskic, ICTY Appeals Chamber, Case No. IT-95-14-A, Judgment dated 29 July 2004, para. 155; Prosecutor v. Simic et al., ICTY Trial Chamber, Case No. IT-95-9-T, Judgment dated 17 Oct. 2003, paras. 97, 773, 775; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, paras. 605-610; *Nikolic – Momir*, (Trial Chamber), December 2, 2003, paras. 36-37.

⁷¹ Prosecutor v. Blaskic, ICTY Appeals Chamber, Case No. IT-95-14-A, Judgment dated 29 July 2004, para. 155.

lack of aid was an inhumane act depends on the particular circumstances of the crisis and of the victims.

The combination of the lack of aid and the terrible conditions appear to have inflicted severe physical and mental trauma on some survivors. This physical and mental suffering is the hallmark of an inhumane act. Thus, there is reason to believe that the UCC's and government actions constituted the crime of inhumane acts.

Persecution:

Persecution requires: (1) an act; (2) that discriminates in fact and denies or infringes upon a fundamental right; and (3) was carried out with the intent to discriminate based on political, national, racial, ethnic, cultural, religious, gender or other impermissible grounds.⁷² The underlying acts that can constitute persecution must be of equal gravity to the enumerated acts of a crime against humanity,⁷³ and thus include but are not limited to the enumerated acts.⁷⁴ This means that the acts described above that constitute murder, extermination and inhumane acts would also constitute persecution if they discriminated in fact and were carried out with the requisite discriminatory intent.

The facts described above do not seem to constitute sufficient evidence of Persecution. There is no reliable and consistent body of evidence that indicates that the people were persecuted as being members of a particular political, national, racial, ethnic, cultural or religious group.

To constitute a crime against humanity, the underlying crimes must be committed in connection with a widespread or systematic attack on a civilian population,⁷⁵ and the perpetrator must know the attack is taking place and that his acts are part of the attack.⁷⁶ The following section will evaluate whether the Bhopal Tragedy in the context of an attack on the civilian population of the Bhopal. It will also look at whether the architects of that policy knew an attack was taking place and that their acts or omissions were part of the attack.

Did An Attack Take Place?

It is now generally agreed that the customary international law definition of crimes against humanity requires that crimes against humanity take place in connection with a widespread or systematic attack on a civilian population.⁷⁷

This attack requirement is often referred to as a jurisdictional or contextual element because the existence of the attack is a prerequisite to charging crimes against humanity, but the prosecution does not have to prove that the accused caused the attack or intended the attack. The prosecution only needs to show that the accused was aware of the facts that constituted the attack and knew that his or her acts formed part of the attack.

⁷² See, e.g., *Deronjic*, (Appeals Chamber), July 20, 2005, para. 109 (describing the elements of a persecution charge). The list of groups that can be discriminated against is taken from Art. 7(1)(h) of the Rome Statute.

⁷³ See, e.g., *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 102.

⁷⁴ *Krnojelac*, (Appeals Chamber), September 17, 2003, para. 219; *Brdjanin*, (Trial Chamber), September 1, 2004, para. 994.

⁷⁵ See Rome Statute, Art. 7(1); SCSL Statute, Art. 2; ICTR Statute, Art. 3; ECCC Law, Art. 5.

⁷⁶ *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 100; *Kunarac, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 99; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 190.

⁷⁷ Rome Statute, Art. 7(1).

The motive of the perpetrator is irrelevant and it is not necessary to show that the perpetrator approved of or desired the attack.⁷⁸ Nor does the perpetrator need to know all the details of the attack. It is sufficient if the perpetrator knows the attack is taking place.⁷⁹

The Meaning of Attack:

An attack is generally defined by the International Criminal Court (ICC) and the International Criminal Tribunal for Rwanda (ICTR) as an unlawful act or series of acts of the kind enumerated in the definition of crimes against humanity.⁸⁰ The purpose of the "attack" requirement is to prevent single, random or limited acts from being categorized as crimes against humanity.⁸¹ While the underlying acts that can constitute the attack are often carried out through violence, the attack does not have to be violent⁸² and may involve other inhumane mistreatment of the civilian population.⁸³

The International Tribunal for the Former Yugoslavia (ICTY) and The Special Court for Sierra Leone (SCSL) adopt a somewhat different approach but ultimately arrive at a similar result. They have held that an attack is different from an armed conflict and that, while an attack may take place during an

⁷⁸ *Kordic and Cerkez*, (Appeals Chamber), December 17, 2004, para. 99, "The accused need not share the purpose or goal behind the attack."; *Blaskic*, (Appeals Chamber), July 29, 2004, para. 124;

Kunarac, Kovac, and Vokovic, (Appeals Chamber), June 12, 2002, para. 103; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 548; *Brdjanin*, (Trial Chamber), September 1, 2004, para. 138; *Galic*, (Trial Chamber), December 5, 2003, para. 148.

⁷⁹ *Kunarac, Kovac, and Vokovic*, (Appeals Chamber), June 12, 2002, para. 102; *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 548; *Brdjanin*, (Trial Chamber), September 1, 2004, para. 138; *Galic*, (Trial Chamber), December 5, 2003, para. 148; *Krnojelac*, (Trial Chamber), March 15, 2002, para. 59. See also ICC Elements of the Crimes at page 116.

⁸⁰ Rome Statute, Art. 7(2) (describing an attack as a "course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7]"); *Akayesu*, (Trial Chamber), September 2, 1998, para. 581 ("The concept of 'attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc."); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 70; *Musema*, (Trial Chamber), January 27, 2000, para. 205; *Semanza*, (Trial Chamber), May 15, 2003, para. 327.

⁸¹ *Akayesu*, (Trial Chamber), September 2, 1998, para. 579; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 194; AFRC Trial Judgment, para. 215. See also Stuart Ford, Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?, 24 UCLA Pacific Basin Law Journal 125, 157-158 (2007).

⁸² *Akayesu*, (Trial Chamber), September 2, 1998, para. 581 (noting that apartheid is a crime against humanity and imposing such a system can constitute an attack, even if done without violence); *Rutaganda*, (Trial Chamber), December 6, 1999, para. 70; *Musema*, (Trial Chamber), January 27, 2000, para. 205.

⁸³ *Semanza*, (Trial Chamber), May 15, 2003, para. 327.

armed conflict, it need not be part of the armed conflict.⁸⁴ As a result, the attack “is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”⁸⁵ A line of ICTY cases suggests that an attack is a “course of conduct involving the commission of acts of violence,”⁸⁶ but this line of cases implicitly accepts that the attack can be broader than just violence because the decisions always note that the attack is not limited to the use of armed force and also includes any mistreatment of the civilian population.⁸⁷ Thus the ICTY and the SCSL agree that any mistreatment of the civilian population can constitute an attack if it is widespread or systematic.

The broadest of the underlying crimes, other inhumane acts, still requires severe mental or physical suffering or a serious attack on human dignity. Mistreatment generally means “to treat badly,”⁸⁸ which does not seem to require severe suffering. Consequently, the definition of attack used by the SCSL and the ICTY may be broader than that used by the ICTR and ICC. However, it seems possible that if the ICTY or SCSL were forced to define mistreatment that they would conclude that it involves the commission of other inhumane acts.⁸⁹

These actions were both a course of conduct involving the commission of the underlying acts of a crime against humanity and the mistreatment of the civilian population of the Bhopal.

Widespread and Systematic:

The attack was probably both widespread and systematic. It was widespread because it was large-scale and it affected a large number of people. There is evidence that the attack was systematic because it consisted of an organized pattern of non-accidental repetition of criminal conduct.

Directed Against a Civilian Population:

Many crimes against humanity occur in the context of armed conflicts, and the definition of civilian is geared towards distinguishing between civilians and combatants during an armed conflict. In general, a civilian is any person who is not

taking an active part in hostilities, even including members of the armed forces if they are *hors de combat*.⁹⁰

In the case of Bhopal, there was no armed conflict and no suggestions that there were any people who could be called combatants among the victims. Consequently, the victims should be considered almost entirely civilians. The attack was directed against the civilian population of the Bhopal. This means that the civilian population of Bhopal was the only object of the attack. Moreover, the government committed the acts that constitute the attack knowing that the victims would be almost entirely civilian. Though there seems to be little doubt that the attack was directed against a civilian population.

One final element of a crime against humanity is the perpetrator’s knowledge. The perpetrator must be aware that the attack is occurring and that his or her criminal acts constitute a part of the attack.

In addition, the alleged criminal acts that give rise to the underlying crimes – the pre and post behaviour of UCC and government – are the exact same acts that give rise to the attack and it has already been shown that the government must have been aware of the attack. Consequently, the leaders must have been aware that their acts were part of the attack.

Industrial Disasters As Per Se Attacks:

The author had originally intended to argue that Bhopal Gas Tragedy was a *per se* attack on a civilian population, and the Industrial disasters that resulted in large scale losses of life should always be “attacks” for purposes of determining whether a crime against humanity had been committed.

However, after researching this proposition, the author has come to believe that treating Industrial disasters as *per se* attacks is both necessary and a good idea. As demonstrated above, the existing definition of crimes against humanity is sufficient to cope with the consequences of Bhopal Gas Tragedy.

Moreover, it would probably be a bad idea to extend the definition of attack to encompass all Industrial disasters that result in large scale loss of life. We should ensure that crimes against humanity only be applied in situations of sufficient gravity. If every Industrial disaster was an attack, then many ordinary and apparently unrelated crimes that occurred in conjunction with Industrial disasters would constitute crimes against humanity.

This would vitiate one of the main purposes of the jurisdictional element, which is to prevent random, single or isolated acts of violence from being treated as crimes against humanity.

The preceding sections have demonstrated that there is reason to believe that all of the elements of a crime against humanity were present in Bhopal. There was a widespread and systematic attack on a civilian population.

There is also reason to believe that crimes were being committed, including murder, extermination and inhumane acts. In short, there was reason to believe that the UCC’s response to constituted a crime against humanity. There was reason to believe that the crimes against humanity were being committed by the state against its own population by giving no objection to UCC for setting plant near to civilians.

⁸⁴ *Kunarac* Appeal Judgment, para. 86; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182; AFRC Trial Judgment at para. 214; CDF Trial Judgment at para. 111.

⁸⁵ *Kunarac* Appeal Judgment, para. 86; *Stakic*, (Trial Chamber), July 31, 2003, para. 623.; AFRC Trial Judgment at para. 214; CDF Trial Judgment at para. 111.

⁸⁶ *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 543; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182; *Brdjanin*, (Trial Chamber), September 1, 2004, para. 131; *Galic*, (Trial Chamber), December 5, 2003, para. 141.

⁸⁷ *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 543; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 182; *Brdjanin*, (Trial Chamber), September 1, 2004, para. 131; *Galic*, (Trial Chamber), December 5, 2003, para. 141.

⁸⁸ See Merriam-Webster Online, (cited 4/12/2010) available from <http://www.merriam-webster.com/dictionary/mistreatment>

⁸⁹ For example, a Trial Chamber at the ICTR suggested that mistreatment might have to be inhumane when it said that an attack “could also involve other forms of inhumane mistreatment of the civilian population.” *Semanza*, (Trial Chamber), May 15, 2003, para. 327.

⁹⁰ *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 544 (“The term ‘civilian’ refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention or any other cause.”)

Place for Trial:

There is universal jurisdiction for crimes against humanity, which means that theoretically any country could try. However, there are significant practical limitations on the application of universal jurisdiction. The ICTY and ICTR have proved to be extremely expensive and very slow.

Thus constitution of Hybrid tribunals will be better option because they are supposed as being cheaper and quicker than fully international tribunals, while still meeting international standards. It would be significant due to its mobility. It would be staffed by a mix of international and national staff and would probably largely be funded by the international community.

Doctrine of the Responsibility to Protect:

If the situation in Bhopal was a crime against humanity, then the responsibility to protect⁹¹ would be applicable. First and foremost, this would impose a burden on Union Carbide Corporation (UCC) to take all necessary action to ameliorate the situation. If UCC was unable or unwilling to take the appropriate action, it would impose a burden on the Government to take steps to protect the civilian population of Bhopal.

If crimes against humanity were being committed, then it raises the possibility that some person or group of persons could be held individually criminally liable for those crimes. There are two very different kinds of responsibilities at work: (1) the obligations of UCC and states to the civilian population and (2) the possible criminal liability of individuals for crimes against humanity.

The responsibility to protect doctrine was initially developed by the International Commission on Intervention and State Sovereignty (ICISS) in an attempt to lay the foundation for an international consensus on the legality of humanitarian interventions,⁹² at a time when the legality and legitimacy of such interventions was a very contentious issue.⁹³

⁹¹ See generally, Gareth Evans, From Humanitarian Intervention to the Responsibility to Protect, 24 *Wisconsin Int'l Law Journal* 703 (2006). See also See Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 *Va. J. Int'l L.* 693, 698-700

⁹² See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001, the International Development Research Centre) at 1-2 (Responsibility to Protect Report). The ICISS was a response to a call by Secretary-General Kofi Annan for the international community to reach agreement about how to balance state sovereignty against humanitarian concerns during so-called "humanitarian interventions." *Id.* at 2. As the report notes, the international community was criticized both when it did intervene (Somalia, Kosovo and Bosnia) and when it did not intervene (Rwanda). The Secretary-General identified the need for common agreement on a set of principles that would guide the international community in deciding when humanitarian intervention would be appropriate. Gareth Evans provides a useful overview of the development of the responsibility to protect doctrine. See generally Gareth Evans, From Humanitarian Intervention to the Responsibility to Protect, 24 *Wisconsin Int'l Law Journal* 703 (2006).

⁹³ See Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 *Va. J. Int'l L.* 693, 698-700 (describing the

The ICISS's major innovation was reframing the debate from one about the right of states to intervene, which was controversial, to one about the obligation of states to protect their own citizens, which enjoyed far broader acceptance.⁹⁴ Thus, the ICISS concluded that the primary responsibility to protect populations lies with the concerned state.⁹⁵

The concept of the responsibility to protect went through several iterations⁹⁶ before a narrower version was unanimously adopted by the United Nations at the 2005 World Summit.⁹⁷ The language of the responsibility to protect has subsequently been used by the Security Council⁹⁸ and one of the co-founders of the doctrine suggests that it is now a "broadly accepted international norm."⁹⁹ The heads of states and governments present at the Summit acknowledged that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing¹⁰⁰ and crimes against humanity."¹⁰¹ This is a narrower understanding of the responsibility to protect. The four crimes listed are often accompanied by large scale human suffering; it is not true that every case of humanitarian disaster constitutes one of the enumerated crimes. Consequently,

acute failures of and bitter disputes over humanitarian intervention during the 1990s).

⁹⁴ See Evans, *supra* note 91, at 708; Max W. Matthews, Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur, 31 *Boston College Int'l and Comp. L. Review* 137, 140 (2008) .

⁹⁵ Responsibility to Protect Report, Core Principles, Art. 1(A). See also Joyner, *supra* note 93, at 708.

⁹⁶ See Evans, *supra* note 91, at 713-714 (describing the appearance of the responsibility to protect doctrine in the report of the High-Level Panel on Threats, Challenges and Change in 2004 and again in the Secretary-General's 2005 report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, which served as the basic working document for the 2005 World Summit); Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, 101 *A.J.I.L.* 99, 99-100, 105-107 (2007).

⁹⁷ United Nations General Assembly Resolution 60/1 entitled *World Summit Outcome*, U.N. Doc. No. A/RES/60/1, dated 24 October 2005 (hereafter 2005 World Summit Outcome Document).

⁹⁸ See Stahn, *supra* note 96 at 100; Max W. Matthews, Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur, 31 *Boston College Int'l and Comp. L. Review* 137, 148-50 (2008) (arguing that the Security Council implemented some aspects of the responsibility to protect in responding to the humanitarian crisis in Darfur).

⁹⁹ See Evans, *supra* note 91, at 715. *But see* Stahn, *supra* note 96, at 110-116 (arguing that, while parts of the responsibility to protect rest on traditional legal concepts, others are radical and largely unaccepted); Matthews, *supra* note 98, at 147-48 (arguing that the responsibility to protect is on its way to becoming a binding international norm but that it has not reached that stage yet).

¹⁰⁰ No international tribunal has jurisdiction over ethnic cleansing as a separate crime, although its inclusion in the *World Summit Outcome Document* may be the first step on its journey to becoming a separate crime.

¹⁰¹ 2005 World Summit Outcome Document ¶ 138.

the inclusion of the enumerated crimes limited the application of the responsibility to protect during humanitarian disasters.

The UN's articulation of the responsibility to protect was also narrower than the ICISS's proposal because it rejected the possibility that interventions could occur without the approval of the Security Council. The document produced by the World Summit noted that the international community also has the responsibility to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, but stressed that the duty would be implemented "through the United Nations."¹⁰²

Once there is reason to believe that a crime against humanity is taking place, the first duty falls on the state in which the crime is occurring to protect its own population by preventing the commission of the crimes. The international community is supposed to encourage and help states exercise this responsibility.¹⁰³

Indeed, in the aftermath of BGT, there was reason to believe that the crimes against humanity were being committed by the Company and state against its own population. At the time of happening of BGT this principal was not developed but it can be invoked in future if such incidents are repeated.

The existence of crimes against humanity is not simply a predicate for the invocation of the responsibility to protect. They are international crimes in their own right, for which individuals can be held criminally liable. As noted above, there is reason to believe that crimes against humanity were committed in Bhopal. This reason to believe is sufficient to invoke the responsibility to protect. However, it is also sufficient to initiate a criminal investigation at any of the existing international courts. This suggests that because the threshold for the initiation of a criminal investigation is lower than or equal to the threshold for the application of the responsibility to protect, every application of the responsibility to protect should also result in a criminal investigation.

Steps taken by India: Disaster Management Act-

The Disaster Management¹⁰⁴ Act, 2005 was enacted on 26th December; 2005. This will permit the States also to have their own legislation on disaster management. National Disaster Management Authority (NDMA) under the Prime Minister with nine more members for laying down the policies, plans and guidelines for disaster management. The National Authority to recommend guidelines for the minimum standards of relief.

The Act is aimed at providing requisite institutional mechanism for drawing up and monitoring the implementation of the disaster management plans, ensuring measures by various means of Governments for prevention and mitigating effects of disasters and for undertaking a holistic, coordinated and prompt

response to any disaster situation. This was in response to the Yokohama Strategy 1994, The Geneva Mandate on Disaster Reduction 1999 and Hyogo Framework for Action 2005, which called for building up national mechanisms for managing disasters.¹⁰⁵

Though India learnt the lessons from such incidents but it was too late and the domestic law is inadequate to combat the menace of globalised industrial development and punish governmental and Industrial Scorpion. India's Power Plants also in sensitive zone, and who will take responsibility of any calamity, if will be occurred in future. Proposed site for *JAITAPUR* power plant is facing same questions regarding their future preparations as it has faced 92 trembles in last 20 years.¹⁰⁶ Thus such disaster should be come under the purview of International crime and need for determine and fix the each and every one's criminal liability.

Since the Fukushima crisis erupted, several countries have announced steps to scale back or review nuclear power, with Germany, Switzerland and even China, known for its lack of respect for safety issues, has announced that it is suspending new plant approvals until it could strengthen safety standards. In India, Tarapur, one of the world's oldest operating nuclear plants, has some of the same risk factors that played a role at Fukushima¹⁰⁷. Despite safety and equipment upgrades at Tarapur, the fact is that first-generation reactors have generally some dangerous weaknesses. In fact, much before the Fukushima incidents, several US experts had warned that this Boiling Water Reactor (BWR) model was susceptible to explosion and containment failure.¹⁰⁸

Given the gravity of the Fukushima crisis, India must review its nuclear power policy and systems to ensure that long-term risks of nuclear accidents are contained. The consequences of a nuclear accident in a large, densely populated country like India are going to be greater than in an island nation like Japan. In part because of its geography and the prevailing wind patterns The Wikileaks disclosures over the cash-for-votes scandal only confirm what has been well known -- the role of big money in lubricating the nuclear deal. In fact, given the way India handled the Bhopal gas catastrophe that killed at least 22,000, Fukushima holds important implications.¹⁰⁹

Conclusion:

It is obvious that public reminiscence is short. But Bhopal is an experience too traumatic to forget. And it is self-evident too that we now live in a high-risk society. Whether by choice or default, impact is going to be felt by everyone because hazardous substances have already demonstrated their run away

¹⁰² 2005 World Summit Outcome Document ¶ 139.

¹⁰³ 2005 World Summit Outcome Document ¶ 138.

¹⁰⁴ Section 2(e) of the Disaster Management Act, 2005 defines disaster management as "continuous and integrated process of planning, organizing, and implementing measures which are necessary or expedient for- (i) prevention of danger or any threat of any disaster; (ii) mitigating or reduction of risk of any disaster or its severity or consequences; (iii) capacity-building; (iv) preparedness to deal with nay disaster; (v) prompt response to nay threatening disaster; (vi) assessing the severity or magnitude or effects of any disaster; (vii) evacuation, rescue and relief; (viii) rehabilitation and construction;"

¹⁰⁵ Vishnu Konoorayar and Jaya V. S (Eds.), *Disaster Management and Law*, The Indian Law Institute, New Delhi, p. 215 fn 1. (2005)

¹⁰⁶ Times of India, Jaipur, March, 17, 2011 at pg. 1

¹⁰⁷ All six reactors at the Fukushima Daiichi plant were designed by General Electric and The prototype of this reactor model -- known as the Boiling Water Reactor (BWR) Mark I -- was supplied to India by GE, which built the twin-reactor Tarapur station in the 1960s on a turnkey basis.

¹⁰⁸ Brahma Chellaney, Can corrupt India handle nuclear safety?, March 18, 2011

(cited 4/11/2010) available from <http://www.rediff.com/news/column/india-corruption-nuclear-safety/20110318.htm>

¹⁰⁹ *Id.*

capabilities. Therefore, expectation of mass torts is very real. It has become clear that safety is still not the top priority for the industries. Rules and norms fail to be abided by. This enhances the chance of accidents. The big question haunting the country is whether it has become too corrupt and institutionally corroded to be able to effectively uphold nuclear safety in the long run.

On the other hand weak civil and criminal laws are inadequate to ensure commensurate relief and compensations. Worse, lessons from various accidents have not beefed up laws but in stead, hurdles have increased. So that we need separate law namely Corporate Crimes against humanity.

The modern understanding of crimes against humanity is clearly broad enough to be applied in many situations that have no connection with armed conflicts, including the Bhopal Gas Tragedy.

It should be noted that some expansion of the crimes against humanity is need of hour, so that corporate criminals can be punished and victims can meet with justice. If such incidents will be happened again then these should be considered as corporate crimes against humanity.