

# Criminal Failure and “The Chilling Effect”: A Short History of the Bhopal Criminal Prosecutions

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UNION CARBIDE’S GASSING OF BHOPAL WAS FIRST A CRIMINAL JUSTICE ISSUE. CRIME No. 1104/84 was registered, *suo moto*, by Hanumanganj Police Station House Officer Surinder Singh Thakur on December 3, 1984,<sup>1</sup> less than 24 hours after the onset of the disaster, while hundreds of corpses still lay scattered across the roads, parks, and gullies of the old city.

On the day that Crime No. 1104/84 was registered, five local junior officers of Union Carbide India Limited (UCIL) were the first company officials to see the inside of a jail. They were also the last: their release on bail after 12 days marked the final day in custody for any Union Carbide representative before or since. Though convictions were secured for seven UCIL officials over 25 years later, each of the convicted were granted immediate bail and remain at liberty at time of writing, with vigorous appeals still pending.

Faring better still have been the foreign accused in the case, which India’s Interpol agency, the Central Bureau of Investigation (CBI), took over on December 9, 1984. Not one of the foreign accused has faced a single day in court, having long ago elected to withdraw their consent from the process of their own prosecution.

This essay focuses most acutely upon the first seven years following Union Carbide’s 1984 Bhopal disaster, a period in which the pattern of unlawful impunity was set. Later events are presented in summary. It is no exaggeration to say that when the three-decade pattern of legal apathy and misconduct is examined in totality, the complete failure to achieve justice for the crimes committed against the citizens of Bhopal looks like the deliberate consequence of an elaborate conspiracy to obstruct the course of justice—a conspiracy involving private and state actors that includes the governments of two major democracies: the world’s largest and the world’s most powerful.

## The First Getaway

The crime’s First Information Report (FIR) was registered under Section 304A of the Indian Penal Code (IPC), which concerns causing death by negligence.<sup>2</sup>

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Nine individuals and three corporations were indicated as accused, of which one individual and two corporations were based overseas. The foreign corporations were Union Carbide Corporation (UCC), incorporated in New York State, and its wholly owned subsidiary, Union Carbide Eastern, Hong Kong (UCE), which is registered in Delaware (1966) and designed to oversee UCC's equity and interests across the Asia region of its worldwide operations.<sup>3</sup> Union Carbide India Limited (UCIL), a 50.9 percent majority-owned Indian subsidiary of UCC, was the final corporate accused.

The only official of a foreign company charged, Union Carbide Chairman Warren Martin Anderson, arrived in Bombay on December 6. On a high visibility "mission of mercy," Anderson carried with him an "assurance of safe passage" from India's Foreign Secretary, M.K. Rasgotra. Anderson was joined in Bombay by two Indian executives of UCIL, and all three later took dinner with US consular officials (Kurzman 1987). William Krohley, senior attorney at UCC's law firm, Kelley Drye & Warren, and the first American representative to travel to Bhopal to assess the legal situation,<sup>4</sup> also met with Anderson in Bombay prior to Anderson's flight to Bhopal. A trained lawyer himself, Anderson later admitted that he had taken the decision to go to Bhopal "to head off lawsuits" (Fink 1986).

Anderson and his UCIL companions flew on to Bhopal on the morning of December 7, accompanied by US foreign commercial attaché James Becker (Kurzman 1987). To their astonishment, local Superintendent of Police Swaraj Puri arrested the three corporate officials upon their arrival at Bhopal's airport. Subsequently, they were kept under house arrest at the Union Carbide Research and Development Centre. Criminal charges were formally filed against the three in the presence of a magistrate within two hours. After six hours, Anderson was released on bail of 25,000 Indian rupees [or 407.50 in current US dollars], given on guarantee by a junior employee of UCIL. It was initially reported that bail was arranged after the US Embassy intervened.<sup>5</sup> Later reports claim that Prime Minister Rajiv Gandhi ordered Anderson's release, following the personal involvement of President Ronald Reagan (Samanta 2010).

The bail bond signed by Anderson to secure his release contained several serious charges, including Section 304 of the Indian Penal Code (culpable homicide, punishable by 10 years to life imprisonment and a fine), a strictly "non-bailable" offense.<sup>6</sup> Granting of bail was therefore unlawful. This appears to have been recognized at the time by Bhopal's District Collector and Superintendent of Police, as well as by the Madhya Pradesh state's Law Secretary, who argued that it would be "impossible" to arrange bail following the earlier pressing of charges. State Chief Minister Arjun Singh, attending a political rally with Prime Minister Gandhi at the time, apparently ordered the officials to "find a way to do so" (ibid.). Flown to Delhi in a state-owned aircraft shortly after being released, Anderson was met by more US Embassy officials (Kurzman 1987) and remained under diplomatic care until leaving India less than two days later.

There was a stark difference in the application of law against the two Indian directors arrested along with Anderson. Keshub Mahindra and V.P. Gokhale were kept in custody and produced before Chief Judicial Magistrate (CJM) on December 8. Shortly after, the CJM rejected an oral plea for bail on the grounds that one of the sections of the Indian Penal Code under which Mahindra and Gokhale were accused was “non-bailable.” The Madhya Pradesh High Court finally granted bail on December 14, on condition the two remain available to investigators in Bombay.

Though Anderson’s bail bond explained that, by the granting of bail, Anderson was, “*thus undertaking to be present whenever and wherever I am directed to be present by the police or the Court,*” he has never returned to India.<sup>7</sup> Twenty-five years later, Foreign Secretary Rasgotra insisted in *The Hindu* (2010) that it had been in India’s economic interests to release Anderson: “*If let us say this gentleman Anderson had been arrested and tried in India unilaterally, would the corporates anywhere in the world or the countries who are interested in India’s well-being and progress, would they look at India in those circumstances?*”

Anderson’s flight from custody was neither the first nor last time the legal rights of Bhopal’s citizens were to be sacrificed for the purported benefit of India’s “investment climate,” or the rule of law twisted or circumvented to make the passage of investment into India’s economy more easeful for North American business interests. Three years after Anderson’s arrest, criminal charges were formally instituted into proceedings in the court of the Chief Judicial Magistrate, Bhopal. The delay is only partly explained by the technical complexity and breadth of the ensuing investigation. The politicization that began with Anderson’s premature release continued in the months following the disaster. In May 1985, Indian newspapers reported that the CBI had been ordered to “go slow” on their investigation pending what were legally unrelated civil settlement talks between the government of India and UCC.<sup>8</sup> By 1986, “even the accused from UCIL began treating the case as good as closed.”

This complacency persists almost 30 years later, but not only among the accused. With the utmost inconvenience, whenever the laggardly internal momentum of the case has brought its pertinacious reality to the in-trays of public and private officials, responses have included stymieing, backroom dealing, buck-passing, or diffident aversion of eyes.

### **Bureaucratizing Justice**

While seven junior officers and senior officials of UCIL languished in jail awaiting bail hearings, large numbers of US-based personal injury lawyers arrived in Bhopal. Characterized as “ambulance chasers,” they rapidly signed up hundreds of thousands of gas-affected claimants for legal actions (Jones 1988, 122–124). The extraterritorial nature of much of the ensuing litigation resulted in the direct involvement of US jurisdiction. Accordingly, between December 1984 and February 1985, around 186,000 legal claims for personal injury and death worth \$250 billion

dollars were filed against UCC in the US alone.<sup>9</sup> The US courts thus gained prime responsibility for ensuring the enforceability of civil remedies against UCC (Cassels 1993, 110–117).

Since UCC was able to fight potential determination of legal liability with enormous financial resources, a satisfactory conclusion of the deluge of cases was far from assured.<sup>10</sup> Contingency fees at the standard US rate of 33 percent threatened to severely diminish the value of any compensation awards, and also provided a material incentive to US lawyers for quick settlement. Quick settlement would be unlikely to allow sufficient time to obtain a ruling on liability, without which the prospect of achieving punishment and restitution proportionate to the scale of wrongdoing was remote.

In response to this situation, on February 20, 1985, the government of India intervened by means of a Presidential Ordinance that authorized itself exclusive rights to control all claims for compensation arising from the Bhopal gas disaster. A mere week later, UCC—in the form of Vice President Ralph Towe and the recently bailed-out UCIL Managing Director VP Gokhale—made its first formal settlement approach to the Indian government. A formal proposal followed on March 4, 1985, adumbrating a miserly compensation claims and categorization scheme that would be followed almost to the letter four years later within India and UCC's final settlement agreement. The proposal also contained an unequivocal *quid pro quo*: “In exchange [for monies] UCIL and UCC require that all claims by Indian citizens, corporations, partnerships or other entities arising out of or connected with the Bhopal gas leak disaster against either or both of them, their affiliates, directors, officers and employees to be fully released and extinguished in all respects.” This, too, would be followed to the letter, and once more the letter of Indian law would require a rewrite to properly satisfy the company's interests.

On March 29, 1985, the Indian Parliament enacted the *Bhopal Gas Leak Disaster (Processing of Claims) Act 1985*, whereby the Union of India arrogated to itself sole power of legal representation in any civil suit against UCC and other defendants arising out of the disaster.<sup>11</sup> The act applied to related litigation inside and outside India and placed the process of categorizing and adjudicating claims under the direct control of the government.

In its ensuing role as *parens patriae*, India proceeded to act as plaintiff in the consolidated civil suits seeking compensatory damages from UCC in the Southern District Court of New York. Pursuing unspecified punitive and restitutionary damages, India alleged that UCC was in breach of a duty to prevent the escape of lethal MIC gas [methyl isocyanate], which it manufactured in Bhopal and stored in unnecessarily large amounts close to populated areas. India specifically asserted that UCC owned, designed, constructed, operated, and controlled the Bhopal plant. India also alleged that UCC contributed to the disaster by using defective safety systems, instrumentation, warning systems, and operating and maintenance procedures.<sup>12</sup>

UCC responded by moving the court to dismiss on grounds that the United States was an improper forum for the claims. Though the forum objection meant that substantive arguments concerning control and liability would have to wait, UCC also invoked the doctrine of separate legal personality: “*The Bhopal plant was managed, operated and maintained entirely by Indians in India.*”<sup>13</sup> Arguing a hands-off relationship, one UCC official deposed UCIL to be a “*free standing entity.*”

### **The Question of Control**

But statements by UCC in court starkly contradicted the company’s claims in the immediate aftermath of the disaster. “*To the best of our knowledge,*” explained UCC Vice President Jackson Browning, “*our employees in India complied with all laws and we are satisfied with the facilities and the operation of them*” (*Guardian*, December 7, 1984; emphasis added). A few weeks later, CEO Warren Anderson admitted: “*We have 100,000 employees in Union Carbide, and half of them reside outside of the United States.*” During his visit to Bhopal, he explained that “*it was absolutely essential to give backbone to our India company*” (*Hartford Courant* 1985; emphasis added).

Establishing the degree of UCC’s control of UCIL, while essential for fixing liability, would also emphasize the evidentiary connection to the US forum. According to the plaintiff’s legal committee, “*Union Carbide ... operates an integrated worldwide empire through a forged network of ownership and interlocked directors, common operating systems and procedures, global distribution and marketing and shared financial and technological resources.*”<sup>14</sup>

Preliminary discovery of UCC unearthed several thousand pages of supporting corporate policy documents: “*it is the General Policy of the Corporation to secure and maintain effective management control of an Affiliate.*”<sup>15</sup> Supervision of UCC’s far-flung holdings, according to its corporate charter, was achieved through managerial control: “*The UCC management system will be designed to provide centralized, integrated corporate strategic planning direction and control.*”<sup>16</sup> Standard UCC policies advised that control of overseas subsidiaries be levied by majority ownership of company equity and managed by careful composition of the boardroom.

Four UCE executives, including its chairman, A.W. Lutz, sat on the UCIL board. Lutz also acted as UCC corporate vice president. James Rehfield, a UCC executive vice president and member of its executive management committee in Danbury, Connecticut, similarly retained a seat on UCIL’s board.<sup>17</sup> In all, executives of the two overseas Union Carbide companies made up the majority of UCIL’s board membership.

The Bhopal plant itself came under divisional control of Union Carbide Agricultural Products, Inc. (UCAPC), another wholly owned subsidiary of UCC.<sup>18</sup> R. Natarajan, UCE vice president and UCIL board member, also had a coordinating role for agricultural products in the region. Through the medium of these management

officials, “UCIL’s budgets, major capital expenditures, policy decisions and company reports had to be approved by UCC headquarters” (*Business India*, December 2–15, 1985). Indian officials later claimed that every UCIL expenditure above US\$10,000 required clearance by UCC.<sup>19</sup>

Documents discovered through US litigation decades later suggest that UCC’s specific responsibility for the detailed design of the Bhopal plant was set out at the project proposal stage. A 1973 capital budget plan and finance proposal—approved by a senior UCC management committee in New York—noted that “UCC will provide the necessary technology and process design and review any technology developed outside UCC” (quoted in Amnesty International 2004, 47). The responsibility continued for the life of the project: “No design changes have been made without the concurrence of general engineering or Institute plant engineering” (*ibid.* 48). A 1982 application for renewal of its foreign collaboration agreement detailed UCIL’s ongoing dependency upon UCAPC in key technical, safety, and operational areas (*ibid.*). According to Warren Anderson, “the truth is that the plant in India was built under our design criteria, and our design criteria for the Indian plant has [*sic*] every safety feature in it that we have over here” (*Hartford Courant* 1985).

### US Courts Side with Carbide

On May 12, 1986, Justice Keenan acceded to UCC’s arguments and dismissed the suits on the grounds of *forum non conveniens*. Keenan supported UCC’s contention that it could not be held responsible for the design, training, and safety failures alleged to be causally involved in the disaster. Citing three UCC employees, Keenan found that “defendant seeks to refute this contention, with notable success.”<sup>20</sup> This success depended largely on the testimony of UCC (and former UCIL) manager Ranjit Dutta, who was favorably quoted by Keenan throughout his judgment: “Mr. Dutta asserts that Union Carbide’s role in the project was ‘narrow,’ and limited to providing ‘certain process design packages for certain parts of the plant’” (*Dutta Aff. at 9*).<sup>21</sup>

Therefore, it was ordered that civil proceedings be transferred to India. Not totally satisfied, UCC lodged an appeal against conditions contained within the ruling. In a judgment that upheld the District Court’s forum decision, the US Court of Appeal for the Second Circuit also struck down the requirement that UCC abide by any Indian decisions. “Any denial by the Indian courts of due process,” the court warned, “can be raised by UCC as a defense to the plaintiff’s later attempt to enforce a resulting judgment against UCC in this country.”<sup>22</sup> The order also struck down the condition allowing broader US-style discovery, thus obstructing India’s access to crucial evidentiary material held by UCC.

Though its ruling was limited to the issue of forum, the US Appeal Court unequivocally supported UCC’s position that it had little responsibility for Bhopal. “As Judge Keenan found,” the court noted, “UCC’s participation was limited.” The assertion is again largely founded upon the testimony of UCC manager Ranjit Dutta,

who in a sworn affidavit claimed, “*at no time were Union Carbide Corporation engineering personnel from the United States involved in approving the detail design or drawings prepared upon which construction was based. Nor did they receive notices of changes made....*”<sup>23</sup> The court therefore concluded: “*In short, the plant has been constructed and managed by Indians in India ... communications between the plant and the United States were almost non-existent.*”<sup>24</sup>

### **Alter Ego of UCIL, Joint Liability of UCC**

Ranjit Dutta’s key testimony was recently proven to be entirely unreliable. In a 2010 interview, Mr. Dutta reversed his position that the lead Bhopal plant project engineer had been “*primarily a UCIL employee*”<sup>25</sup>:

John Couvaras was sent in early stage ... If two-inch pipeline is made four-inch by these people here (UCIL), then he has to take approval. He is the connector.... He has to take approval from his counterpart in the U.S. Group Engineering Management.<sup>26</sup>

Discoveries gained in recent litigation further undermine UCC’s claim that its relationship with UCIL was at arm’s length and give support to Dutta’s radically changed second testimony.

On January 1, 1970, UCIL applied for a license to manufacture “*2,000 tons high purity MIC a year, based on continuous operation*” in Bhopal. While UCIL awaited license approval, in the spring of 1972 UCC engineers performed a “*corrosion review*” of the existing MIC system at UCC’s West Virginia factory at Institute. The review concluded that, after just 448 days of operation, “*almost every item in this unit has failed and been replaced since start up.*” Then it issued a stark warning: “*If another facility is built to produce MIC based on the process used at Institute, materials of construction at least as good as those presently used at the facility in Institute will be required .*”

Plans for the manufacture of ultra-hazardous and highly corrosive MIC in Bhopal therefore created a “*need for special definition of relationships*” between UCC and UCIL engineers. A July 1973 memorandum details the range of services to be provided by UCC’s Engineering Department and notes the necessity for “*unusually good ongoing communications between UCC and UCIL process engineers for the sound implementation of the US technology.*” To effectuate this communication, UCC’s Engineering Department would provide “*a project manager on loan to UCIL for the project.*” Additionally, any modifications UCIL made to the US design would require “*written-change notices ... to obtain the concurrence of the U.S. engineers.*” The range of potential changes to be reviewed and approved by UCC engineers included “*Plant capacity or performance; Raw material specifications; Basic equipment design; Materials of construction; Equipment construction quality and standards; Major elements of the process configuration or piping; Equipment*

layout; Valve and Piping specifications; Mode of instrument control.” In summary, UCC’s South Charleston, West Virginia, Engineering Department was “charged with the basic responsibility for the safety and operability of the plant design.”<sup>27</sup>

Six months later, a UCC Management Committee—including Warren Anderson—ratified the pending financial and technical proposals for “back-integrating” MIC-Sevin technology into the existing Bhopal formulation plant. Within these proposals lay—less than two years after UCC engineers sounded clear warnings—a plan to install technology in the MIC-Sevin production process that had seen only a “*limited trial run*.”<sup>28</sup>

The objective behind taking this reckless technology risk was UCC’s desire to retain majority equity control over its entire range of businesses in India. In 1973, India’s imminent Foreign Exchange Regulation Act (FERA) threatened UCC’s control of UCIL via majority equity.<sup>29</sup> As it was “*not prepared to accept any situation*” that would reduce its equity below 51 percent, UCC therefore calculated a deliberate “*under-investment*” totaling US\$8 million—over 25 percent of the projected plant costs—making substantial savings on the MIC-Sevin process. In light of this broader equity control strategy, the use of “unproven technology” was deemed “*an acceptable business risk*.”<sup>30</sup>

UCIL’s subsequent struggles to insure UCC equity remained at 51 percent or above are explicable only in terms of UCC’s overarching management control interests. UCIL’s first attempt to gain exemption from FERA’s equity dilution rules—and thereby meet UCC’s strategic objectives—was rejected by India’s Ministry of Finance in 1974. Soon after UCIL made a second proposal based on the claim that its proposed new projects would bring 60 percent of its total business activities into the “*high priority*” areas of FERA’s new amplified guidelines.<sup>31</sup> The proposal was again rejected as UCIL’s existing structure of activities lacked a 60 percent ratio of “*high priority*” ones. However, an important caveat was added: if UCIL’s new projects were implemented—including most significantly the MIC project—the case for UCC retaining more than 40 percent equity in UCIL would be reconsidered.<sup>32</sup>

### “American Concerns”

The back-integration of MIC manufacturing technology in Bhopal therefore became the key to UCC’s policy-driven need to retain majority equity in UCIL. However, UCIL still had not obtained a full official license to implement the MIC project. According to the former deputy director of the concerned authority (the Indian Ministry of Industrial Development), “*the entire department was against granting the industrial licence.... We knew that it was discarded technologies being transferred to India. It was obsolete in the United States, but it was being dumped in our country. We all knew that.*” The license application therefore lay pending for over five years until it was finally processed during India’s Emergency in October 1975, alongside rumors of high-level political interference (Jeberaj 2010).



Those rumors were fully substantiated upon a recent release by Wikileaks of historic US diplomatic cables. The cables show that the US mission in Delhi shared UCC's preoccupation with the effects of FERA upon US shareholdings in India and consistently lent its shoulder to lobbying efforts on behalf of UCIL and UCC.

FERA mandated that fresh overseas investments would be subject to "equity dilution" procedures. It meant that substantial direct investment by UCC in Bhopal would have had the effect of diluting its overall equity holding in UCIL. To avoid this outcome, UCIL sought external loans to cover the foreign exchange expenditures required for the MIC project. At the time, Indian government policy placed strict limits upon foreign exchange allocations and preferred that loans be procured through local institutions. However, loans from Indian state-owned banks or other financial institutions were often accompanied by onerous conditions, such as the right to convert part of the value of the loan into equity capital. In the spring of 1973, US Ambassador Moynihan and the visiting US Deputy Secretary of State stepped into this intractable situation. "*B.V. Salenius, managing director of Union Carbide (India) Limited, has called requesting 10 or 15 minutes with Kenneth Rush. He wants to ask him to persuade the GOI [Finance Minister Chavan] to permit American concerns to borrow Cooley loan funds.*"<sup>33</sup>

As a result of US lobbying, within 18 months the Indian government had "*already agreed to compromises not usually available to Indian borrowers.*" These included an agreement that UCIL would be able to borrow from American lenders, with the caveat that 45 percent of the total borrowing would derive from the Export-Import Bank, the official export credit agency of the US federal government. The US mission in Delhi consequently contacted the US State Department to "*recommend Exim favorable consideration of full 45 percent participation in this borrowing. We do not believe it established a precedent and only arises because of the US majority ownership involved. No other Indian applicant for Exim could put forward a similar case.*"<sup>34</sup>

Three months after India declared a State of Emergency (June 1975)—involving suspension of elections, civil liberties, and rule by decree—the US mission in Delhi reported that "*in the last two weeks there has been a flurry of initiatives from the GOI to deal with US financial/commercial/economic problems.*" It provided the perfect opportunity for the "high level political interference" whispered of by Indian civil servants:

We are trying to take advantage of the opening provided by [M.G.] Kaul's interest in solving economic problems by asking for finance action to resolve a large variety of problems ... pending investment proposals such as Union Carbide and National Starch as well as an easing of the more onerous FERA guidelines. (*As this cable was being prepared Union Carbide telephoned to say that its proposal had been suddenly approved after 6 months of waiting.*) We hope to get more results.<sup>35</sup>

With licensing approval secured, only the financing arrangements barred commencement of construction of UCIL's MIC project. Then US Secretary of State Henry Kissinger delivered the news that Export-Import Bank had authorized credit "*to finance 45 percent of the cost of construction of plant to produce insecticides and other agricultural chemicals.*"<sup>36</sup> Among the \$2.8 million worth of equipment and services to be purchased with the help of the loan in the United States would be "*reactors, distillation towers, heat exchangers, centrifuges, filters, dryers, valves, control instrumentation, safety equipment.*"<sup>37</sup> Back integration of the MIC-Sevin technology could finally commence in Bhopal, though, crucially, additional capital expenditure would still fall under the aegis of FERA guidelines.

### The Costs of Cutting

By 1977, the need to meet FERA requirements led UCC and UCIL to make reckless compromises in the handling, operating, storage, maintenance, and safety procedures for the manufacture of MIC. The Bhopal project had entered its first phase of crisis: "*UCIL's cash flow throughout 1976 was critical and could not support the Project expenditure programme.*" Beset by "*slower growth rates, higher prices, reduced market potential, greater competition, a construction overrun, diminished finished returns and necessity of loan and equity financing for UCIL,*" UCC considered abandoning the MIC-Sevin project altogether. However, completion of the original build plan was agreed to because:

A decision to drop the project will materially affect UCIL's chances of retaining a UCC equity of 51%.... UCIL has elected with the concurrence of UC Eastern to implement an equity reduction to 50.9% and focus its efforts on qualifying as a 50.9% FERA company under GOI guidelines.<sup>38</sup>

To achieve this qualification, therefore, UCIL accepted and implemented a series of "*cost reductions*" that fatally undermined the essential safety features of an already compromised and uniquely hazardous factory. One major cost reduction stipulated a move to "batch processing" of MIC, contravening the "*continuous operation*" claim within UCIL's original license application and necessitating bulk storage. MIC manufactured in Bhopal would therefore be kept in situ, in large quantities, over long stretches of time. There were also "*changes in operating criteria, material specifications, elimination of non-essential items, substitution of UCC standards with Indian standards on valve and piping specifications....*"<sup>39</sup> All changes consciously contravened numerous stipulations detailed for the safe manufacture of MIC by UCC engineers less than three years earlier.<sup>40</sup>

The prized "special exemption" from FERA's equity dilution rules was provisionally granted to UCIL shortly after the MIC-plant began production in February 1980. The savage cost savings within the 1977 Revised Capital Budget Plan had nevertheless failed to abate the MIC project crisis. Union Carbide's wholly

owned and US registered Agricultural Products Company (UCAPC) consequently took increasingly firm control over UCIL's business strategies. Commercial decision-making became the preserve of an executive panel known as the Worldwide Agricultural Products Team (WAPT), led by UCAPC senior executives. The WAPT insisted that the Bhopal plant, described as "*our only basic investment abroad that is completely integrated in terms of product development, R&D, engineering and production,*" would henceforth "*be run to optimize UCC's profits.*"<sup>41</sup>

By June 1981, UCIL's "*survival-plan*" was in service to "*a corporation endorsed strategic plan which it has been following for three years.*"<sup>42</sup> At a three-day Bhopal Task Force meeting at Raleigh, North Carolina, in July 1981, Bhopal's Indian Works Manager summarized the relationship: "*All of us are part of Union Carbide world and UCIL will not recommend any strategy by which UCC/(UC) APC incur any loss.*"<sup>43</sup>

More than three years after the second round of cost cutting on the MIC project, the project remained loss-making. A 1981 UCIL-UCAPC strategy document again considered the chief options. In a section titled "*Walk Away from UCIL/APD Business,*" the author outlined exactly why the Bhopal project could not be abandoned:

UCIL must fulfill two specific conditions in order to be permitted to retain UCC's present level of equity holding.... Failure to comply ... would result in UCIL being compelled to dilute UCC's equity holding from 50.9% to 40%. Sales of APD products fall within the classification of Core Sector and discontinuance of this business will have a direct impact of a reduction in the core sector turnover to a level below 60% of the total turnover. This in turn could lead to equity dilution by UCC.<sup>44</sup>

Though the Bhopal plant lost US\$7.5 million between 1978 and 1983, the imperative need to avoid dilution of UCC's majority equity and the consequent loss of "effective management control" meant that the project would continue. The parallel need to offset losses and reduce investment led UCIL into the third major phase of cost cutting in Bhopal.

Several serious safety incidents, including the death of one worker, prompted an operational safety audit. The US audit team sent in spring 1982 identified 10 major hazards at the Bhopal plant, the majority within the MIC-Sevin production area. Among these hazards were the "*potentials for the release of toxic materials in the phosgene/MIC unit and storage areas, either due to equipment failure, operating problems or maintenance problems.... Potentials for contamination, overpressure or overfilling of the SEVIN MIC feed tank. Deficiencies in safety valve and instrument maintenance programs.... Problems created by high turnover of personnel at the plant, particularly in operations.... High turnover rates make training on and understanding of procedures particularly important, in view of the materials handled here.*"<sup>45</sup>

Nevertheless, in 1983 a major “operations improvement program,” including a reduction of 333 workers, saved the company a cool US\$1.25 million. As a result, UCIL managers made Bhopal unions sign a memorandum of agreement “*eliminating such work practices which are not conducive to efficient working of the plant.*”<sup>46</sup> Numbers of field maintenance staff and operators in the MIC unit were subsequently halved. Operator training was slashed from six months to two weeks. Safety devices were put out of commission or fell into disrepair. UCE managers observed that “*future savings of such magnitude would not be easy.*”<sup>47</sup>

The Bhopal factory had been stripped to its bare bones. Inadequate materials and design, alongside the operational impacts of the savage cutbacks overseen before, by, and after the Bhopal Task Force, are the reasons that on December 3, 1984, there was no immediate detection of a problem. The problem then became apparent that it could not be found and could not be contained; when the resulting lethal cocktail of gases spewed from the top of a high smoke stack, it could not be neutralized.<sup>48</sup>

### **The First Criminal Proceedings: A Farce, in Several Acts**

On December 1, 1987, following three years investigation and collection of evidence, the CBI finally filed a detailed charge sheet before Kanatilal Sisodia, the Chief Judicial Magistrate (CJM) of Bhopal.<sup>49</sup> According to one legal commentator at the time, public interest lawyer Rob Hager, the charges “*define a whole new relationship between multinationals and the Third World.*” But in a highly prescient caveat, Hager added, “*an extradition request will be the only proof of the government’s sincerity.*” As India and the United States had been co-signatories to an extradition treaty for over 45 years—making manslaughter an extraditable offense—extradition seemed the obvious route to the American accused.<sup>50</sup>

The charges laid against the 12 accused were under Sections 304, Part II, 326,<sup>51</sup> 324,<sup>52</sup> and 429,<sup>53</sup> read with 35 of the Indian Penal Code. The Section 304, Part II, charge of culpable homicide is broadly equivalent to the US charge of manslaughter. The supporting text of the charge sheet outlined the necessity for CBI officials to inspect the facilities of the Union Carbide MIC manufacturing plant at Institute, West Virginia, which would enable investigators to make an informed comparison of the differing standards employed in the United States and Bhopal.

From the charge sheet it is clear that the preliminary investigation had determined the major source of responsibility for the disaster. “*UCC was nominating its own Directors to the Board of Directors of the UCIL and was exercising strict financial, administrative and technical control on the Union Carbide India Limited. Thus all major decisions were taken under the orders of the Union Carbide Corporation of America. The evidence collected during the investigation proves that UCC was in total control of all the activities of UCIL.*”<sup>54</sup>

Summonses were issued immediately against Anderson and UCC, but were not served. The same fate was met by two subsequent summonses. On May 16,

1988, a further summonses issued against Anderson and UCC prompted a starkly worded response from Robert Berzok, UCC's then director of communications: "*Union Carbide will not appear because, as a United States corporation, it is not subject to India's jurisdiction*" (Reuters 1988).

After consultation with the National Central Bureau, Washington, it was found that the service of summonses could be pursued through letter rogatory or letter of request. Summonses dated July 16, 1988, were therefore sent for service. "[*Chief Bhopal judicial magistrate Kanhaiya Lal*] Sisodia also ordered Robert D. Kennedy, now chairman of the company, based in Danbury, Conn., to appear in court Sept. 24 in connection with the criminal charge against Union Carbide."<sup>55</sup> The Embassy of India in Washington reported on September 20, 1988, that a summons had been served on Warren Anderson. By September 24, 1988, summonses had also been served on John Macdonald, secretary of UCC, and on Peter J. Whitley, solicitor for UCE in Hong Kong. Since no summons received a response, on November 15, 1988, the CJM issued a bailable warrant against Warren Anderson and the responsible officers of UCC and UCE for causing judicial delay and deliberately disobeying court orders.<sup>56</sup>

### **Shape Shifting in the East**

Roughly two weeks after summonses were served upon UCE's acting solicitors (October 11, 1988), with Machiavellian foresight UCC incorporated a new entity named Union Carbide Asia Pacific, Inc. (UCAP—Singapore) under Delaware law in the United States. Former employees of UCE, Hong Kong, testify that in December 1988—just weeks after the bailable arrest warrant was issued against UCE and the others—UCE's business operations, including its Asia region management responsibilities, began a wholesale move to UCAP in Singapore. All aspects of UCE's business activities, including legal contracts drawn by UCE, appear to have been included in the transfer. UCE itself would be wound up within two years, with its key officials reappearing upon the board of the Singapore company.

Indian prosecuting agencies have effectively abandoned pursuit of the accused from UCE ever since, aside from the occasional outbreak of judicial lip service. A CBI officer confided during case hearings in the 1990s that his organization was powerless to proceed against a deregistered company.

### **International Judicial Resistance**

As summons after Indian summons landed in the United States, between January 11 and December 16, 1988, at least nine memoranda and letters on the subject of the criminal proceedings had passed between Drew C. Arena, then director of the Office of International Affairs in the US Department of Justice, Richard C. Steiner, chief of Interpol in the United States, Thomas G. Snow, trial attorney, and David P. Stewart, legal adviser to the US Department of State. We are still unaware of

the contents of those discussions. Discovered via requests submitted under the terms of the US Freedom of Information Act, the Criminal Division of the Office of International Affairs, US Department of Justice, has withheld each piece of correspondence as classified.<sup>57</sup>

Yet one happenstance contemporaneous to those opaque discussions is known. Subsequent to the bailable warrants issued in November 1988, the US Department of Justice communicated to Indian officials that the warrant against Anderson could not be executed because “*execution of warrant is not covered by the statutory provision of US laws on International Judicial Assistance.*”<sup>58</sup> Appropriate procedures were familiar to a department that since 1977—via its Office of International Affairs—had administrated a number of bilateral treaties addressing Mutual Legal Assistance on Criminal Matters. Additionally, US law provided alternative procedures that do not appear to have been communicated to Indian officials: “*an individual seeking to enforce a foreign judgment, decree or order in this country must file suit before a competent court.*”<sup>59</sup>

Around that time, attempts were being made to inspect the Institute factory in West Virginia. On July 6, 1988, the Chief Judicial Magistrate of Bhopal issued letters rogatory to the US administration seeking permission for the CBI to inspect safety systems installed at UCC’s MIC unit in Institute. Consequently, Detective Inspector General K. Mahadevan of the CBI and his team traveled to the United States in the second half of November 1988 and held several meetings with officials of the US Justice Department to clarify matters of law. Procedural issues, involving the appointment of a commissioner by the district attorney and the service of subpoenas to UCC officials, resulted in a deferment of the inspection.<sup>60</sup> It was instead fixed for early 1989.

### Quashed and Acquitted

By the beginning of 1989, reports began to emerge of a settlement agreement between the Indian government and UCC. The motives were developments in the criminal case and India’s seriousness in pursuing it (*The Sunday Observer*, January 7, 1989). On February 9, 1989, the CJM in Bhopal declared Warren Anderson, UCC, and UCE to be absconders (equivalent to the status of “fugitive”) and issued non-bailable arrest warrants against the accused.

The non-bailable warrants were not delivered and the inspection of the UCC facility at Institute, West Virginia—slated for early 1989—did not take place. Instead, on February 14, 1989, an Indian Supreme Court panel of judges led by Chief Justice Pathak suddenly interrupted civil appeal hearings concerning the 1984 disaster to propose a full and final settlement between India and Union Carbide. The two parties agreed immediately. Beyond the civil settlement, the resulting Supreme Court order directed that “*to enable the effectuation of the settlement . . . all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.*”<sup>61</sup> A consequential order of February 15, 1989,

joined UCIL as a party and directed that “*all such criminal proceedings including contempt proceedings stand quashed and the accused deemed to be acquitted.*”<sup>62</sup> In a later submission to the Supreme Court, Attorney General Soli Sorabjee alleged that inspection of the Institute plant was planned for the middle of February and that the settlement “*was intended to circumvent that inspection....*”<sup>63</sup>

### **Motives and Considerations**

The settlement orders provoked ferocious criticism of India’s Supreme Court, in particular the manner in which the settlement had been arrived at. On May 4, 1989, the Supreme Court admitted review petitions challenging the validity of the settlement orders. Four of the main contentions concerned the criminal proceedings. For instance, compounding of criminal charges, it was argued, violated the Indian Penal Code,<sup>64</sup> and by being unlawful and opposed to public policy it invalidated the settlement contract itself.

Following the election of a new coalition government in early 1990, advocates representing gas victims received the support of India’s Attorney General Soli Sorabjee. When it became evident that quashing the criminal charges would not stand up to a review, finger pointing began. A judgment concerning the lawfulness of the 1985 Bhopal Act—the aegis under which the Indian government had hatched the settlement without consulting with gas survivors—placed all blame upon the 1989 Supreme Court panel. But during the first review hearings in July 1990, the new attorney general submitted that UCC and the Indian government had together persuaded the Supreme Court to intervene with the impugned settlement orders. Supreme Court Justice Ojha complained that “*the government could have said ‘I’m sorry I misled the court to pass such an order.’*” According to Justice Venkatachaliah, “*we were not invited to sit in judgment over the settlement. We were only invited to pass an order ad invitum.*”

But the review process required the Supreme Court to judge the settlement and justify its own role within it. In its October 1991 review judgment, the Supreme Court panel therefore argued that the settlement did not amount to a stifling of prosecution, and attempted to preserve the settlement’s contractual validity via a tortuous distinction between the terms “consideration” and “motivation.”<sup>65</sup> The panel asserted the Court’s power under Article 142 of the Indian Constitution to extinguish criminal charges; denied that this extinguishing was a “consideration” for the settlement; denied that the extinguishing of criminal charges had been introduced by the Indian government; and implied that the extinguishing may have been a “motive” for settlement, without saying why the Court would have had this motive. “*In reaching this conclusion,*” the Court explained, “*we do not put out of consideration that it is inconceivable that Union of India would, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof (emphasis added)....*”<sup>66</sup>

Rhetorical use of the word “inconceivable” was an important deflection: if even one dollar of the settlement had been a “consideration” for the quashing of criminal charges, the entire contract would be made void under Indian law. Significantly, the earliest report of the settlement—six weeks before its announcement—made it clear that imminent developments within the criminal case formed at least part of the consideration for the settlement to come:

UCC sources said the multinational had shown readiness to marginally hike up the settlement amount if some agreement could be reached. *The UCC eagerness stems firstly from the increased costs of litigation. It has already spent Rs. 90 crores [\$56.25 million in 1989] on litigation in the United States and India since 1985.* Secondly, it has now realised that if a settlement is not reached fast the criminal case filed against its former chairman Warren Anderson and eight other officials may be seriously pursued by the government of India. (*The Sunday Observer*, January 7, 1989)

If the report is correct, the infamous and widely maligned \$470 million settlement between India and UCC was almost certainly unlawful and contractually invalid from the outset. Unable to identify a plausible “motive” for quashing of criminal proceedings, the Supreme Court reinstated them with immediate effect. “*It is a matter of importance that offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated,*” the Court intoned. “*The shifting stand of the Union of India on the point should not by itself lead to any miscarriage of justice.*” As this 1991 review judgment also upheld the civil settlement, party to the proceedings UCC accepted it in its entirety.

### **Disappearances, Dilutions, and Delays**

Though revived by judicial review, progress within the criminal proceedings was subsequently hampered by jurisdictional issues, efforts by the foreign accused to obstruct justice, foot dragging by those handling the prosecution, and the diffidence of an Indian state that was increasingly keen to attract foreign investment. Shortly after resumption of the criminal proceedings, summonses were served upon the two Americans accused and a proclamation was published in the *Washington Post* requiring their attendance in court. By March 1992, the Chief Judicial Magistrate, Bhopal, threatened fugitive status and asset seizure unless the foreign accused appeared in court. Two weeks before the decisive hearing and to evade the threat of attachment of assets, UCC attempted to endow its entire 50.9 percent shareholding in UCIL (valued at between 80 and 100 million US dollars) to a newly registered Charitable Trust in London. The CJM refused to recognize the trust and declared the asset transfer to be “malafide,” or in bad faith, and designed to defeat the order of the court. The CJM therefore directed immediate attachment of all of UCC’s movable and immovable property in India. Two years later, however, following a



special plea by UCC's advocate, the Supreme Court modified the attachment order to allow the sale of UCC shares for the purpose of building a hospital. Attempts by survivor groups to petition for recall of this order suffered five adjournments, by which time the sale of UCC's 50.9 percent shares had already been completed. With this October 1994 sale, UCC seemed to have exited India for good and Indian courts effectively lost all direct power to compel UCC's appearance to face trial.

To enable faster progress, the case against the Indian accused was separated and moved to a local Sessions Court. The Indian accused appealed the framing of charges against them by filing criminal revision petitions in the Madhya Pradesh High Court. When these petitions were dismissed, the accused filed appeals in the Supreme Court. The appeal was heard by a panel led by Chief Justice Ahmadi, who was a member of the 1991 review panel that had upheld the 1989 settlement and was also responsible for the Supreme Court decision that modified the order of attachment upon UCC's assets. In his September 1996 judgment, and despite the volume of incriminatory material already on record, Ahmadi asserted that no *prima facie* evidence existed to suggest that any of the Indian accused had knowledge that storing highly volatile MIC in bulk quantities could likely prove fatal. He consequently diluted the main charge from culpable homicide to that of a rash and negligent act, which carries a maximum sentence of two years. Stunned, survivor groups pressed the prosecuting CBI to file a review. When the CBI failed to act, the *Bhopal Gas Peedith Sangharsh Sahyog Samiti* filed a review in its place, pointing to the evidence on record. In March 1997, the Supreme Court dismissed the petition without a word of explanation. Shortly after, Chief Justice Ahmadi was appointed chairman of the Indian Trust responsible for overseeing approximately US\$80 million generated by the sale of UCC's shares.

On April 10, 1992, the CJM, Bhopal, issued a non-bailable arrest warrant against Warren Anderson and requested the CBI to arrange extradition proceedings against him. Between 1992 and 1995, five questions concerning the extradition of Warren Anderson within the Lok Sabha (Indian Parliament) received the same response: "*the matter is under consideration.*" It was later revealed that the CBI did not begin sending the required paperwork to the Indian Ministry of External Affairs until September 1993. The ministry, in its turn, only began to examine the sufficiency of the case presented within the case files in February 1995, a process that took until September 1998. At this point, Indian Attorney General Sorabjee queried whether the evidence on record would meet the probable cause standard of US law and directed that advice should be obtained from a "*competent American attorney,*" a process that took another three years.

The plodding pursuit of Anderson and UCC coincided with the institution of India's New Economic Policy reforms, directed by the International Monetary Fund following a balance of payments crisis and subsequent bailout by international finance. Among the structural neoliberal economic reforms the IMF imposed were an opening of India to international trade and investment, deregulation, and

privatization. Consequently, foreign investment in India grew from a mere US\$132 million in 1991–1992, to \$5.3 billion by 1995–1996. Courting of foreign direct investment therefore became fundamental to India’s economic policy.

As director of the Indian Central Bureau of Investigation between May 1994 and July 1995, B.R. Lall was in charge of criminal prosecutions in the Bhopal case. In 2010, he went on record to claim that the Indian Minister for External Affairs had directly instructed him at the time not to actively pursue the case against the foreign accused.<sup>67</sup> Two other former CBI directors subsequently supported Lall’s claim.

While the extradition process continued upon its glacial course, survivor groups filed a set of 15 claims against UCC and Anderson in New York under a provision of the Alien Tort Claims Act and international human rights and criminal law. Attempts to summon Anderson to the proceedings failed, and the court summarily dismissed the claims. In September 2001, a US Appeals Court ruled that, despite their fugitive status, the 1989 settlement precluded further claims against UCC and Anderson. However, the court did allow that, *“the amended complaint asserts that Anderson exercised significant direct control over management of the Bhopal plant, including control over safety procedures, the plaintiffs submitted at least some evidence to support these allegations....”*

In 2002, the CBI suddenly applied in the CJM, Bhopal, to have the main charge against Anderson diluted from culpable homicide to that of criminal negligence—a non-extraditable offense. Following a high-profile 22-day hunger strike by survivor organizations, the CJM rejected the application, explaining that Anderson had not turned up to plead for dilution and again directed the CBI to pursue his extradition. A severe parliamentary rebuke of the CBI and concerned ministries followed, finally leading to action. On April 29, 2003, the US consular section in New Delhi was formally asked to notarize the extradition documents. On May 20, 2003, Francis Aranha of the Embassy of India in Washington, DC, handed over the case files on Anderson to Linda Jacobsen and Harry Marshall of the State and Justice Departments. When finally delivered to US authorities, the extradition request had taken 16 years since the inception of the criminal proceedings.<sup>68</sup>

### **Role of US Government and Business Agencies in Stifling Prosecutions**

Freedom of Information Act requests in the United States have had limited success in illuminating US government involvement in the non-development of the criminal proceedings against UCC and Warren Anderson. Several formal requests for documents from the US Department of Justice have been declined, and most of the documents obtained from other departments of the US government have been redacted of significant content.

Circumstantial evidence strongly implies there has long been a political-economic motive behind India’s reluctance to pursue the US accused. Beginning in 1975, influential entities in industry and commerce have come into existence to promote expanded trade and investment between the two countries, such as the

US-India Business Council, the US-India Economic Dialogue (CEO Forum), the US-India High Technology Cooperation Group, US-India Energy Dialogue, the Defense Procurement & Production Group, and the US-India Trade Policy Forum. Consequently, the United States has become India's largest foreign investor and technology exchange partner, and third-largest trade partner behind the U.A.E. and China.

Not all evidence of interference in the course of justice in Bhopal is circumstantial, however. Several faxes, emails, and cables released under provisions of the Freedom of Information Act by the US Department of State reveal *prima facie* evidence of collusive activity between US officials, agencies, and important business interests to pressure the government of India on the issue of the criminal charges, as well as extralegal intervention in the process of assessing the evidentiary merit of the May 20, 2003, request to extradite Warren Anderson.

Months before India's formal delivery of its extradition request, Secretary of State Colin Powell officially responded to direct pressure from the US Chamber of Commerce. "*We have been following this issue since 1984, and are aware of the importance of this issue to the US business community. The Department of State has met several times with interested US parties, who have conveyed their concerns to us.*"<sup>69</sup>

In response to the same organization, the Assistant Legal Adviser of Law Enforcement and Intelligence, Linda Jacobsen, added: "*In those meeting we have learned a great deal about the concerns of Union Carbide and the US business community. We have also received and reviewed written documentation from the private sector related to these concerns.... The Government of India is also aware of the concerns you have expressed.*"<sup>70</sup>

A May 1, 2003, email from the US Department of Justice elaborated on the extent of the lobbying efforts by US government and business agencies:

I understand there had been extensive discussions with India in the past about [how] pursuing a criminal homicide case against UCC executives would not be helpful.... A virtual who's who of high-powered law firms have represented Union Carbide and Anderson, the U.S. Chamber of Commerce, and who knows who else with respect to the Bhopal case and potential civil and criminal action in India action (sic) UCC and its executives and have in the past met with various officials at State (and perhaps Justice)...."<sup>71</sup>

An emotive fax from Joseph E. Goeghan, Union Carbide's former vice president and general counsel warned of dire consequences if the process of extraditing Anderson was allowed to go ahead.

No issue has a greater potential to destroy U.S. business leaders' confidence in India than the handling of the Warren Anderson case.... *Extradition*

*in [a] case like this would place in jeopardy any officer of an American corporation with significant interests in foreign enterprises anywhere in the world in the event of some future disaster. The chilling effect on American investment abroad cannot be overstated (emphasis added).*<sup>72</sup>

### **Request and Refusal**

More than a year after the extradition request was filed, the US Department of State prepared the text of its refusal. “*The Government of the United States has carefully considered the Government of India’s extradition request for Warren Anderson, and has concluded that the Government of India’s request cannot be executed, as it does not meet the requirements of Articles 2(1)<sup>73</sup> and 9(3)<sup>74</sup> of the Extradition Treaty.*”<sup>75</sup>

In December 2005, Indian officials provided more details of the official reasons given for the refusal:

The US authorities rejected the extradition request on various grounds including purported failure to meet the requirements of dual criminality, omitting to show probable cause or intent to commit the crimes with which Mr. Warren Anderson was charged, lack of knowledge of accused Mr. Warren Anderson of any deficiencies in the Bhopal plant etc. The US Government also informed the Government of India that the request for extradition could not be executed because it did not meet the requirements of the provisions of the extradition treaty between India and the United States.<sup>76</sup>

The most opaque claim—concerning a failure to meet treaty requirements—is possibly the most procedurally significant. Section 9(c) of the Indo-US Extradition Treaty appears to allow for a large amount of discretionary judgment. If it were accepted that the requirements were met, it would be necessary to transmit the extradition request to the office of the US Attorney within the appropriate judicial district, whereupon a complaint would be filed seeking a determination of extraditability. This process, involving an examination of the available evidence, would necessarily become a part of the public record. If a finding of extraditability were to be made, the case would be referred back to the Secretary of State for a final decision on the surrender of the person sought.<sup>77</sup>

### **Crime without Punishment**

Almost a quarter century after India’s Supreme Court solemnly revived what should never have been quashed, the three foreign accused in the Bhopal criminal proceedings have evaded numerous summonses and arrest warrants. Whereas the Indian accused were finally convicted of lesser charges on June 7, 2010, and issued

the maximum sentences of two years, they also remain at liberty, their convictions unsettled and the likelihood of custodial sentences being served ever more remote.

Overwhelming evidence exists that UCC's management control policies played an essential role in decisions that led to the utter degradation of safety at the fateful pesticides factory, as does evidence that it maintained a "constructive presence" within India throughout the time that the factory was conceived, designed, built, and operated in Bhopal. Yet, attempts to procure the appearance of its nominated representatives in court have constantly floundered in the face of the company's defiance of numerous lawful judicial summonses. A former Fortune 500 American multinational corporation therefore remains a "proclaimed absconder," or fugitive from justice. The fugitive UCC also remains sheltered by the US multinational, Dow Chemical, which since 2001 has been its 100 percent owner. Attempts to summon Dow to explain the whereabouts of its subsidiary have languished within a legal process that has been underway for over nine years.

Elected Indian officials, Indian ministries, and the Indian judiciary have collectively failed to take appropriate responsibility for expediting prosecution of the Bhopal accused. Scofflaw games by multiple agencies seem to have been designed to stymie and thwart serious efforts to see the proceedings through to a resolution. All, it appears, have largely acted in the service of political and economic interests aimed at making India as attractive as possible to foreign investment, no matter what the cost.

Further warrants for the arrest of Warren Anderson—who is now over 90 years old—were sent from India to the US Department of Justice in 2009 and 2011. Though the 1997 Indo-US Extradition Treaty mandates that "*Each Contracting State shall, to the extent permitted by its law, afford the other the widest measure of mutual assistance in criminal matters in connection with an offense for which extradition has been requested,*" an extradition request for Anderson sent to US authorities still remained "*under consideration*" in April 2011. Since 2001, India and the United States have also been co-signatories to a formal treaty concerning Mutual Legal Assistance on Criminal Matters, yet on the issue of Bhopal the United States appears to have primarily tendered the widest assistance on criminal matters to the US business community.

The Deepwater Horizon disaster, in which 11 workers lost their lives, resulted in British Petroleum being forced to pay US\$4.5 billion in criminal fines a little over three years after the spill. When the pursuit of Edward Snowden was at its height in the summer of 2013, US officials carped that Hong Kong had enjoyed a whole nine days in which to extradite Snowden. The sheer extent of US hypocrisy over Bhopal, in which the families of the nearly 25,000 dead still await justice, needs no further elaboration.

## NOTES

1. Committee on Government Assurances report (2003–2004), Thirteenth Lok Sabha, twelfth report (Extradition of Former Chairman, Union Carbide Corporation). Chapter 2, para. 7.

2. Section 304A, causing death by negligence: “Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” The Indian Penal Code, Chapter 16.

3. Warren Anderson, a national of the United States, and since 1982 the serving chairman of UCC; Keshub Mahindra, an Indian national, UCIL chairman; V.P. Gokhale, an Indian national, UCIL managing director; Kishore Kamdar, an Indian national, vice president and in charge of the UCIL Agricultural Products Division; Jagannath Mukund, an Indian national, works manager of the Bhopal plant; Dr. R.B. Roy Choudhary, Indian national, UCIL assistant works manager; S.P. Choudhary, Indian national, production manager of the Bhopal plant; Shakeel Ibrahim Qureshi, Indian national, plant superintendent; and K.V. Shetty, Indian national, production assistant at the Bhopal plant. The corporations accused were Union Carbide Corporation, Union Carbide Indian Limited, and Union Carbide Eastern, Inc., a wholly owned subsidiary of UCC, based in Hong Kong but incorporated in the United States.

4. Telex No. 420542 UCC UI, Patrick J Morgan, Union Carbide Corporation, Law Department LWG—Danbury, CT.

5. The *New York Times* (Reinhold 1984) quoted a diplomatic source concerning the intervention: “Throughout the day we were in close consultation with the Indian Government at a high level,” the spokesman said. “We expressed deep concern and our hope that the situation could be rectified.”

6. Indian Penal Code, section 304, Chapter 16. “Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

7. The full bond reads: “*I, Warren M Anderson s/o John Martin Anderson am resident of 63/54 Greenidge Hills Drive, Greenidge, Connecticut, USA. I am the Chairman of Union Carbide Corporation, America. I have been arrested by Hanumanganj Police Station, District Bhopal, Madhya Pradesh, India under Criminal Sections 304A, 304, 120B, 278, 429, 426 & 92. I am signing this bond for Rs. 25,000—and thus am undertaking to be present whenever and wherever I am directed to be present by the police or the Court. Signed: Warren M Anderson.*” Note: Mr. Anderson’s signature was obtained after the language of this bond was translated into English by Mr. Gokhale and read out to Mr. Anderson.

8. “*Carbide Offers \$300 Million*,” May 28, 1985. A facsimile is available from the author.

9. Though it was illegal in India to sign claimants on the basis of contingency fee agreements, US lawyers framed their consent forms in terms of compensation according to US personal injury “customs.” “What else but profit motives could have brought to the doorsteps of the impoverished people of India some of the finest legal talent in America?” (Rhode 1986, 317, 323).

10. From projected earnings of \$290 million in 1987, UCC set aside \$85 million to cover costs of litigation—almost 30 percent of earnings. Source: Press Trust of India, January 13, 1988.

11. *Act No. 21 of 1985*, at [www.commonlii.org/in/legis/num\\_act/bgldoca1985390/](http://www.commonlii.org/in/legis/num_act/bgldoca1985390/).

12. “*The Union of India, Plaintiff, against Union Carbide Corporation, Defendant*,” United States Southern District Court of New York, April 8, 1985, reproduced in “*The Bhopal Tragedy, One Year After*,” an APPEN report, Sahabat Alam Malaysia, 1985, 223–28.

13. *Memorandum of Law in Support of Union Carbide Corporation's Motion to Dismiss These Actions on Grounds of Forum Non Conveniens*, 31 July, 1985, in *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in December 1984*, 634 F Supp 842 (SNDY 1986).

14. *Memorandum of Law in Support of Union Carbide Corporation's Motion to Dismiss These Actions on Grounds of Forum Non Conveniens*, Plaintiffs' Executive Committee, Michael V. Ciresi, Stanley M. Chesley, F. Lee Bailey, United States District Court, Southern District of New York, MDL Docket No. 626, Misc. No. 21–38 (JFK), 85 Civ. 2696 (JFK), p. 4.

15. *Ibid.*, p. 5.

16. *Ibid.*

17. *UCC's Response to Plaintiff's First Combined Set of Interrogatories and Requests for Admissions*. MDL Docket No. 626 Misc. No. 21–38 (JFK) 85 Civ. (JFK), reproduced in *D'Silva* (2006, 250).

18. NYS Department of State, Division of Corporations, Entity Information, at [www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html).

19. *India Today*, December 15, 1987.

20. *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 634 F Supp 842 (SNDY 1986), reproduced in Baxi (1986, 52).

21. *Ibid.*, pp. 54–55.

22. *Ibid.*, p. 204.

23. *Ibid.*, p., pp. 54–55.

24. *Re Union Carbide Corporation Gas Plant Disaster at Bhopal India in December 1984*, 809 F 2d 195 (2nd Cir., 1987).

25. “Mr. Couvaras, whom plaintiffs assert was a ‘key engineer’ for the project, and enjoyed mobility between Union Carbide and UCIL, is described by Mr. Dutta as primarily a UCIL employee.” *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SNDY 1986), reproduced in Baxi (1986, 54–55).

26. Rajan H. Sharma, attorney, video interview with Ranjit Dutta, Bhopal, February 2, 2010, submitted *In Re: Sahu et al., v. Union Carbide Corporation et al.*

27. J.E. McConnell Jr., “*India SEVIN Project—Definition of Services and Plans for Continuing Process Liaison for Technology Supplied by UCC*,” UCC 12131–12144, July 12, 1973.

28. Project Proposal, Union Carbide India, Ltd. Methylisocyanate-Based Agricultural Chemical Project No. 73–8, December 2, 1973.

29. India's Foreign Exchange Regulation Act, effective from January 1, 1974.

30. Memorandum, Union Carbide India, Ltd. Methyl Isocyanate-Based Agricultural Chemical Project Capital Budget Proposal 73–8, December 2, 1973.

31. FERA mandated reduction of foreign capital in “non-priority” areas of commerce, such as trading and manufacture of consumer goods, while making exemptions for foreign capital inputting to “priority areas,” such as high technology. Foreign businesses not inputting to priority areas were required to reduce their equity in Indian enterprises to no more than a 40 percent share. As a result, companies such as IBM and Coca-Cola that were unwilling to forfeit majority equity control of their Indian operations were forced to leave India altogether.

32. Affidavit of K. Subramanian, November 22, 1985.

33. At [www.wikileaks.org/plusd/cables/1973NEWDE03990\\_b.html](http://www.wikileaks.org/plusd/cables/1973NEWDE03990_b.html). Emphasis added.

34. At [www.wikileaks.org/plusd/cables/1975NEWDE01606\\_b.html](http://www.wikileaks.org/plusd/cables/1975NEWDE01606_b.html). Kaul was with the Finance Ministry. Emphasis added.

35. At [www.wikileaks.org/plusd/cables/1975NEWDE12918\\_b.html](http://www.wikileaks.org/plusd/cables/1975NEWDE12918_b.html).

36. At [www.wikileaks.org/plusd/cables/1975STATE272385\\_b.html](http://www.wikileaks.org/plusd/cables/1975STATE272385_b.html).

37. At [www.wikileaks.org/plusd/cables/1976STATE001679\\_b.html](http://www.wikileaks.org/plusd/cables/1976STATE001679_b.html).

38. *Review of the Core Business Plan: 73–78 Methyl Isocyanate-Based Agricultural Chemicals Project*, UCIL, February 1977.

39. Examples of potentially fatal safety compromises include: “use of carbon steel in place of stainless steel baffle plates; replacement of stainless steel safety valves with bronze safety valves; ‘costly’ American Standard testing materials are replaced with ‘cheaper’ butt welded pipes; galvanized pipes replace bronze ones; costly globe and gate valves for chlorine, another potentially deadly material are replaced with ‘cheaper plug valves,’ ‘non-essential’ instruments are ‘deleted,’ including ‘miscellaneous major and minor instruments in all work orders.’” *Review of the Core Business Plan*, February 1977.

40. Union Carbide India Limited India MIC-based Pesticide Project Bhopal, India, *Phosgene Unit & Methyl Isocyanate Unit Safety Considerations Report*, W.O. 930–4533/930–4534, Engineering Department, Chemicals and Plastics, Union Carbide Corporation, South Charleston, West Virginia, December 16, 1974.

41. *UCIL Strategic Plan and Bhopal Task Force*, R.J. Hughes, senior vice president UCAPC, June 26, 1981.

42. Confidential telex, *UCC 05537*, R. Natarajan, vice president Union Carbide Eastern Ltd., June 11, 1981.

43. *Summary of Bhopal Task Force Meeting at Raleigh—July 8, 9 & 10*, UCC 05667, DN Chakravarty, July 17, 1981.

44. *UCIL—APD Strategic Plan*, Agricultural Products Limited, Union Carbide India Limited, Bhopal, India, UCC 05651, 1981.

45. “*Operational Safety Survey—CO/MIC/SEVIN units—Union Carbide India Ltd., Bhopal Plant*,” L.A. Kail, J.M. Poulson, and C.S. Tyson, July 23, 1982.

46. Signed on May 14, 1983.

47. Memorandum, *A Review of U.C. India Ltd.’s Ag Products Business*, R. Natarajan, vice president Union Carbide Eastern Ltd., February 24, 1984.

48. “*In retrospect, it appears the factors that led to the toxic gas leakage and its heavy toll existed in the unique properties of very high reactivity, volatility and inhalation toxicity of MIC. The needless storage of large quantities of the material in very large size containers for inordinately long periods as well as insufficient caution in design, in choice of materials of construction and in provision of measuring and alarm instruments, together with the inadequate controls on systems of storage and on quality of stored materials as well as lack of necessary facilities for quick effective disposal of material exhibiting instability, led to the accident. These factors contributed to guidelines and practices in operations and maintenance. Thus the combination of conditions for the accident were inherent and extant.*” Conclusion of the “*Report on Scientific Studies on the Factors Related to Bhopal Toxic Gas Leakage*,” Dr. S. Varadarajan et al., Council on Scientific and Industrial Research, New Delhi, December 1985.

49. Case RC 3/84/ACU-I (Bhopal Gas Tragedy Case).

50. See *Rosline George v. Union of India and Ors*, on December 14, 1990, ILR 1991 Delhi 308 and Extradition Treaty between the United States of America and Great Britain, December 22, 1931 (at [www.oas.org/juridico/mla/en/traites/en\\_traites-ext-usa-guy.pdf](http://www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-guy.pdf)).

51. Voluntarily causing grievous hurt by dangerous weapons or means, punishable with a maximum of 10 years, or with fine or with both.

52. Voluntarily causing hurt by dangerous weapons or means, punishable with a maximum of three years, or with fine, or with both.

53. Mischief by killing or maiming cattle of the value of 50 rupees, punishable with a maximum imprisonment five years, or fine, or with both.

54. Case RC 3/84/ACU-I (Bhopal Gas Tragedy Case).

55. AP, July 18, 1988.

56. Committee on Government Assurances (2003–2004), Thirteenth Lok Sabha, twelfth report (Extradition of Former Chairman, Union Carbide Corporation).



57. Letter, December 23, 2008, from Rena Y. Kim, Freedom of Information/Privacy Act Unit, Office of Enforcement Operations, Criminal Division, US Department of Justice.

58. Committee on Government Assurances (2003–2004), Thirteenth Lok Sabha, twelfth report (extradition of former chairman, Union Carbide Corporation). Formal requests for International Judicial Assistance between the United States and foreign states ordinarily concern the obtaining of civil or criminal evidence by means of a comity-based system of letters rogatory. Evidence may take the form of documents or witness statements.

59. Though execution of foreign court orders fell outside the remit of International Judicial Assistance provisions, in 1976 the US Secretary of State communicated that alternative remedies were available to foreign tribunals: “(2); *foreign judgments, decrees or orders cannot be enforced in the United States by means of a request for judicial assistance, and the Department of State will return such request unexecuted. Return of a request under these circumstances does not imply that a judicial remedy is not available in the United States; it simply means that the remedy cannot be had through the medium of letters rogatory. Under the laws of the United States, an individual seeking to enforce a foreign judgment, decree or order in this country must file suit before a competent court. The court will determine whether to give effect to the foreign judgment. As with most legal proceedings, it is necessary to retain counsel to conduct the suit. In all cases, the Department’s primary consideration will be the furtherance of the administration of justice through effective cooperation with the judicial authorities of other States, subject to the condition of reciprocity and the limitations imposed by United States law.*” Circular diplomatic note, the Secretary of State, February 3, 1976 (at [www.iprocessservers.com/intl/rogatory.pdf](http://www.iprocessservers.com/intl/rogatory.pdf), Exhibit 932).

60. *Ibid.*, Chapter 3, paragraphs 8–9.

61. *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674 at 675.

62. *Ibid.*, at 678.

63. *Union Carbide Corporation v. Respondent: Union of India*, March 10, 1991.

64. Section 320 of the Indian Penal Code.

65. “11.1 *The distinction between the ‘motive’ for entering into agreement and the ‘consideration’ for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into the agreement—and not its consideration the doctrine of stifling of prosecution is not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability*” [329 G-H; 330-A].

66. The full quote from *Union Carbide Corporation v. Union of India* is: “37 *On a consideration of the matter, we hold that the doctrine of stifling of prosecution is not attracted in the present case. In reaching this conclusion we do not put out of consideration that it is inconceivable that Union of India would, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof much in reality as in a sense of proportion. 38. Accordingly on Contention (F) we hold that the settlement is not hit by Section 23 or 24 of the Indian Contract Act and that no part of the consideration for payment of 470 million US dollars was unlawful....*”

67. At [www.ndtv.com/article/india/was-told-to-go-soft-on-warren-anderson-former-cbi-official-30511](http://www.ndtv.com/article/india/was-told-to-go-soft-on-warren-anderson-former-cbi-official-30511).

68. The Extradition Treaty that has been in operation between India and the United States since 1942 was reaffirmed through diplomatic exchanges in April 1966. The treaty was revised and a fresh Extradition Treaty was signed on June 25, 1997, and came into force on September 14, 1999. The procedure for extraditing criminals from the United States has remained the same under the old and the new Extradition Treaty.

69. Letter dated March 24, 2003, in response to a letter of February 12, 2003, from Thomas J. Donohue, president of the US Chamber of Commerce (kept classified).

70. Letter dated March 26, 2003.

71. May 1, 2003, email from Molly Warlow of the US Department of Justice entitled “*Mike or Bruce may start getting calls on Indian extradition request in Bhopal case.*”

72. Fax to the US State Department, “Warren Anderson should not be extradited to India,” dated July 24, 2003.

73. Article 2 of the Indo-US Extradition Treaty states: “An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty including imprisonment, for a period of more than one year or by a more severe penalty.”

74. Article 9, clause 3, of the treaty states: “such information as would justify the committal for trial of the person if the offense had been committed in the Requested State.”

75. Fax, May 25, 2004, Ashley Deeks, US State Department, Office of the Legal Adviser, Washington, DC, 20520.

76. Written reply by the Ministry of Chemicals and Fertilisers to a parliamentary question, December 2005.

77. The process is described in a Press Guidance note entitled “Extradition Request for Warren Anderson,” obtained by FOIA request in the United States.

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