CHAPTER 7
CONCLUSION

Companies cannot and should not be the moral arbiters of the world. They cannot usurp the role of governments, nor solve all the social problems they confront. But their influence on the global economy is growing and their presence increasingly affects the societies in which they operate. With this reality comes the need to recognize that their ability to continue to provide goods and services and create financial wealth - in which the private sector has proved uniquely successful - will depend on their acceptability to an international society which increasingly regards protection of human rights as a condition of the corporate license to operate.

Sir Geoffrey Chandler

The notion and crystallization of human rights is one of the most unique contributions to the evolution of human civilization. It is recognized as universal, indivisible and inalienable. Yet it was originally considered applicable only against the State and its agencies. However, in the last few decades, thanks to Civil Society and the U.N. activities, the human rights discipline is being extended to non-state actors particularly to those who occupy public space and exercise enormous power on the people i.e. Transnational Corporations. This is as it should be in the context of what is understood in developing countries under several labels such as privatization, liberalization, globalization and marketisation of what was earlier managed by the governments.

As the world moves into twenty first century, global interdependence has increased. At both the local and global levels, the protection and promotion of human rights have been caught up in this globalization process. The global economy and the forces of globalization have become prominent characteristics of the current paradigm of world

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2 The legal literature is divided between two terms: Transnational Corporations and Multinational Corporations. Even though both the terms convey same meaning and used interchangeably by common man still various thinkers as well as organisations used these terms in a very restricted meaning.,
politics. In this context, the political spotlight has eventually rested on the balancing claims and criticisms of the TNCs.\(^3\)

The world’s largest TNCs are more powerful and influential than many States has been a cliché since the 1960s.\(^4\) The TNCs have a direct impact on the economic, political, and social landscapes of the countries in which they operate, their activities have considerable effect on individuals and human rights, both positively and negatively. Steven R. Ratner, who sees noticeable limits to holding states solely accountable for human rights violations in modern international affairs, asserts that “corporations may have as much or more power over individuals as governments.” Corporations control a great amount of capital, generating about one-fifth of the world’s wealth. Only six nations (the United States, Germany, Japan, United Kingdom, Italy, and France) have tax revenues larger than the nine largest TNCs’ sales.\(^5\)

According to Prof. Upendra Baxi, globalization directly hits at the traditional notion of state sovereignty; “the project of globalization . . . lies in “rolling back the state””. It has, undoubtedly, not only influenced the content, nature, and realization of human rights but also the mechanism for their enforcement. It has the potential not only to change the nature of human rights but also provide impetus to the evolution of new rights. This being the case, one should ask a more fundamental question first: what is the nature of globalization, both as a concept and as a process? Is it pro/anti human rights, or a neutral phenomenon?\(^6\)

The complex relationship TNCs entertain vis-a-vis human rights in the countries in which they develop their activities is hardly surprising. TNCs are simply agents of economic globalization. They have the potential to be important actors in development, not only in that they may contribute to the expansion of exchanges and therefore to economic growth, but also in that they may help fulfil a form of development oriented

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\(^5\) Supra note 3, at 971.

towards the expansion of human capabilities, of which human rights are both a main ingredient and a precondition.⁷

No doubt TNCs have emerged as key players in shaping the international legislative and political environment. They overpower people, markets, governments, and international institutions and thus operate in positions of increasing political authority. To large extent the findings are true and most of the small States are not in a position to oppose the corporations due to many reasons mainly economical, technological etc. It is more appropriate to say that the TNCs are working as quasi-government rather than as sovereign. Because even after entering into every aspect of individual’s life, they are more concerned about the profit making rather than ruling as a government. It is evident from the fact that after the end of colonialism, there is no quoted instance where any of the TNCs had either tried to capture state power or to purchase the State as a whole.⁸

Consequently, the relationships between States and TNCs are not affecting the identity of state; the increasing power of TNCs does not mean the inevitable decline of the power of countries. Owing to the multiple sources of power, there is now a deepened interaction between countries and TNCs. Countries have to negotiate with TNCs creating a type of ‘triangular diplomacy’. Moreover, countries and TNCs power often vary over time, issues and cases. Hence, the researcher has highlighted in his research that the country-TNC relationship is a complex one that has undefined results. This complex relationship becomes more complex when the countries are divided into many groups with different interests. In this regard the international bodies United Nations, ILO had taken initiative to protect human rights in the corporate world.

Initially, International law only recognized states as the primary subjects but later on individuals are also recognised as subjects of international law. This was first acknowledged in the Jurisdiction of the Courts of Danzig case. Since the World War -II, the position of the individual as a subject of international law has been firmly established.⁹ There is, in fact, ample evidence that TNCs do possess international rights and duties, and, with respect to their rights, the capacity to enforce them. TNCs have traditionally been

⁸ For details see: Chapter 2
⁹ For details see: Chapter 3.
given rights under foreign investment law, particularly in relation to expropriation,
compensation, and non-discriminatory national treatment relative to domestic firms.\textsuperscript{10}

Now the question need to be addressed are “Does a company’s responsibility extend beyond the workplace? Is responsibility limited to clear issues such as workers’ rights and the non-use of child labor? Should large companies use their influence to reform oppressive laws or government practices? Should companies apply the same standards in such areas as health and safety in the workplace wherever they operate, or is it sufficient to comply with national law? Is there a point at which a government’s human rights record is so poor that foreign companies should not invest in the country concerned?”\textsuperscript{11} The debate on the responsibilities of corporations is no longer restricted to the respect of legally binding human rights norms alone. Business will increasingly have to go beyond them and actively contribute to the realization of human rights. Without answering these questions, businesses and human rights organizations will increasingly come into conflict. Such conflicts risk is costly for the company, both in terms of its reputation and the success of future operations abroad.\textsuperscript{12}

After World War II the United Nations took forefront to protect human rights both in affirmative and negative sense. For this purpose the International bill of Human Rights including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) was the most positive initiative. There were other international instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the UN Declaration on the Elimination of Violence Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees, the Convention on the


\textsuperscript{12} Ibid.
Prevention and Punishment of the Crime of Genocide (Genocide Convention), and several regional instruments were adopted to protect human rights.13

Most of the adopted human rights documents are based on a well established principle within the human rights field that the State has not only a duty to refrain from perpetrating human rights abuses against individuals, but also an affirmative duty to promote or ensure respect for the human rights of its citizens. These instruments doesn’t expressly mention the word ‘states’ but takes into consideration the word ‘person’ or ‘individual’ which is interpreted in wider sense and includes non-state entities. This affirmative duty includes protection against human rights abuses that might be committed by non-state entities. Furthermore, under various human rights instruments non-State entities themselves appear to have duties with respect to human rights. TNCs are not expressly covered under international instrument for compliance of human rights obligation but impliedly covered under the non-state entities.14

These increasing instances of violation of human rights in the name of corporate profitability and the failure to make these TNCs liable put the pressure on the international bodies to develop specific guidelines to address the issue of human rights violation and atrocities. The important codes or guidelines agreed by most of the stake holders were the OCED Guidelines for Multinational Enterprises, 1976; the ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy, 1977; the Global Compact, 1999; and the U.N. Norms on the responsibility for Transnational Corporations and other Business Enterprises with Regard to Human Rights, 2003. These guidelines laid down the basic framework for the increasing accountability of TNCs for the compliance of Human Rights.15

Despite the development of these voluntary mechanisms and the support that the Norms received, the non-binding nature of these soft law instruments allow TNCs to escape from legal responsibility. TNCs continue to commit egregious human rights violations.16 Ruggie’s report, Business and Human Rights: Towards Operationalizing the

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13 For details see: Chapter 3.
14 Ibid.
15 For details see: Chapter 4.
“Protect, Respect and Remedy” Framework, and as shown in the case studies, victims face significant barriers when attempting to file complaints in their own countries.17 A lack of resources in legal systems, corruption and delays make redress difficult. A decision in a community’s own country may not address policies of parent TNCs. In his Framework report, Ruggie notes that the fact that “a parent company and its subsidiaries continue to be construed as distinct legal entities” creates a considerable barrier to ensuring TNCs respect human rights. Despite TNCs power, wealth and rights, TNCs lack the international legal personality for complaints to be made against them. States are the primary actors in international or transnational law.

Along with International Human Rights instrument and regulations social auditing is also emerging as a tool for ensuring of human rights in TNCs. The Western institutions have taken a step ahead to control the abuses of TNCs by developing an independent monitoring mechanism known as “Social Audits”. The term ‘social audit’ is often used to encompass a wide range of approaches to measuring, assessing, and reporting on corporate social, environmental, and ethical performance. Social auditing is not only about adding to what is already on our plates, it’s about taking a more organized and high impact approach to meet the business objectives that we already have. The Social Auditor will work on the components of a company’s Social Policy (Ethics, Labor, Environmental, Community, Human Rights, etc.), and for each subject, he/she will analyze the expectations of all stakeholders.

With the impact and impingement of corporate sector activities on human rights and to enforce the UN Human Rights Norms some sort of independent (social) auditing systems have become manifest especially in relation to the labor force. Such systems invariably include company-based monitoring programmes, global corporate auditing services, industry based initiatives, NGO programmes, and accreditation and certification systems. These seems to go along with existing national inspection programmes so as to respond to some of the weaknesses that have come to the fore in the working of national regulations. However, the core for them is the inspection of company’s social policies and standards carried out by MNEs, NGOs, commercial auditing firms, academia and trade unions.

Presently, most of the developing countries are facing another vital issue regarding social auditing is: where would the standards for social auditing come from? Admittedly the practice of social auditing as compared to financial auditing is still at an early stage of development. Several major international projects, such as Global Reporting Initiative and (Account Ability) AA1000 standards, are underway to develop generally accepted principles, standards, and reporting formats for all companies, as well as professional standards for social auditors.

However, most innovative models for corporate social reporting are developing in Europe, some of them have taken a lead at international level like the U.K. based Institute for Social and Ethical Accountability (ISEA) which promotes the practice of SEAAR (social and ethical accounting, auditing and reporting). ISEA has created AA1000 Framework in 1999, an international membership organization, which provides a comprehensive management framework for social and ethical accounting, auditing and reporting. The framework provides both a set of guiding principles and processes that corporation and other organizations can follow to measure, manage and communicate performance.

In India, the Tata Iron and Steel Company in 1979 was one of the first in the world to commission a social audit, carried out by a three person committee (a judge and two professors). The audit was made public. Since its foundation in the 1800s Tata has had a reputation for social responsibility, and its rural development projects reach thousands of villages throughout India, including isolated tribal communities.

There are several instances of human rights violation by TNCs i.e. In Nigeria, a massacre of some eighty people occurred at Umuechem November 1990 after Shell had called in the Mobile Police Force, a paramilitary force, to protect its installations and personnel. Another case is against Rio Tinto Corporation for violating human rights especially, their claim alleged crime against humanity, war crimes, murder, violation of the rights to life and health, racial discrimination, cruel inhuman and degrading treatment, violation of international environmental rights and a consistent pattern of gross violations of human rights. In Doe v. Unocal the villagers of the Tenasserim region of Myanmar, who alleged that the defendant Unocal, a Californian oil company, directly or indirectly

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18 For details see: Chapter 6.3
19 For details see: Chapter 6.3
subjected the villages to, forced labour, murder, rape, and torture.\textsuperscript{20} In another important case of Holocaust Litigation against Swiss Bank the violation alleges were the systematic state-sponsored persecution and genocide of various ethnic, religious and political groups during World War II by Nazi Germany and its collaborators. About 6 million Jews were killed and the total death toll of the Nazi government atrocities (including Slavic people, homosexuals, Sinti and Roma, political opposition) is estimated to be well at around 21 million. The other cases which also alleged the human rights violation were Thor Chemicals Holdings Ltd., Sosa v. Alvarez-Machai, Connelly v. RTZ, Lubbe & Others v. Cape Pl, Beanal v. Freeport-McMoran, Inc etc.

With Special reference to India the Bhopal Gas disaster is one of the shocking tragedy which resulted into death of 20,000 people, imposing various degrees of suffering and disability on nearly a quarter of a million human beings and creating extensive environmental damage\textsuperscript{21}, another example is Nestle’s Indian Subsidiary, Nestle India Ltd., the company initiated campaigns to boycott ‘Nestle’ infant milk, because of Nestle’s unethical promotion of infant formula as a substitute for breastfeed. It was alleged that company was violating of the baby food act’s advertising and package labelling restriction and same was upheld after 17 years of filling the case on 17 March 2012.\textsuperscript{22} Plachimada can be cited as a latest example of corporate aggression over natural resources and the consequent denial of the rights of the people. The deterioration of groundwater in quality and quantity and the consequential public health problems and the destruction of the agricultural economy are the main problems identified in Plachimada.\textsuperscript{23}

In the mean time the claimants had started approaching the Courts of the Home country in the MNCs under ATCA like Government of India approached US Courts against Union Carbide Corporation, claim was filed by 21 individuals of who lived on the island of Bougainville, which belongs to PNG against the Rio Tinto Corporation, claimants from Myanmar filed suit against Unocal a Californian oil company etc. These claims were filed against TNCs on the ground of violation of human rights by these corporations in one way or the other. The number of claims which are filed is increasing

\textsuperscript{20} For details see: Chapter 6.3
\textsuperscript{21} For details see: Chapter 6.3
\textsuperscript{22} For details see: Chapter 5.9
\textsuperscript{23} For details see: Chapter 5.9
due to awareness among people and support by NGOs. But the success rates of these claims are negligible due to number of reasons.24

Bringing a claim TNCs under the ATCA has never been a simple process for plaintiffs. Judges have taken different views regarding the applicability of ATCA to hold transnational corporations liable for violating human rights, and there has been no consistency on this particular issue. Rather than discussing all possible substantive and procedural obstacles.25 The scope and jurisdiction of courts under ATCA too limited and covers violations of civil and political rights and of international humanitarian law but doesn’t take into consideration the environmental, labour, and health issues.26

The claim under ATCA can only be taken into consideration when some human rights violations by private actors require governmental action. This requirement is considered as another essential burden for victims when they seek redress under US jurisdiction. Another hurdle for claiming the Claim under ATCA is the forum non conveniens (FNC) doctrine, a court may dismiss a case after examining whether a defendant’s motion to dismiss satisfies two conditions. First, an adequate alternate forum, where the case could be brought, must exist.27 An independent and functioning judicial system would sufficiently constitute an adequate forum. However, the mere availability of judiciary mechanism at the alternate forum is insufficient to grant a dismissal; the court will consider whether that forum is able to adjudicate the subject matter of the case.28 Second, public and private interests must seriously be considered.29 Another limitation for the claiming a claim under ATCA is the political question doctrine which restricts the justifiability of questions which are political in nature i.e. mainly in cases where government foreign policy is there. The two main hurdles which appear before claimant in filing a claim under home country are: one is the procedural obstacles faced by foreign claimant in establishing jurisdiction and then claiming the compensation for violation of

24 For details see: Chapter 6.3
26 For details see: Chapter 6.4
27 JA Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law, 214 (2006).
29 Supra note 27.
human rights so most of claims are unsuccessful. Secondly where there is a little hope for successful claims the parties went for settlement before the compensation is awarded.

7.1 Suggestions

Along with the international regulation, there are national laws which, also exist regarding the duties of the TNCs. The Constitution of India gives some of the fundamental rights to corporate citizens as well, of course, subject to reasonable restrictions. The Constitution imposes certain fundamental duties as well. Besides, the legal system including labour law, environmental law, tort law and consumer protection law also impose obligations on providers of goods and services. All these along with what is called social responsibility of corporations constitute the human rights standards applicable to the private corporate sector. However, these laws are also not proved very effective in dealing with the human rights abuses by the TNCs, for example, the Bhopal gas tragedy. The researcher has highlighted the problems faced for compliance of human rights in TNCs. The researcher is putting forth few solutions and suggestions to the above discussed issues:

- There are mainly two problems faced by the foreign claimant for filing litigation in home countries of TNCs First, the number of venues for victim of corporate-related human rights violations to seek remedies is very limited. Till date, civil courts of home countries have been one of the most prospective forums in holding TNCs accountable for violating human rights abroad. Yet, not all courts are amenable to adjudicate transnational claims grounded on international human rights norms. Second, although initiating transnational human rights litigations in a majority of TNCs’ home countries has been possible, the cases are handled through similar procedural law as applied to other civil cases. Despite the distinct characteristic of human rights claims, courts apply general civil procedural law and doctrines. Consequently, only a small number of cases can hurdle these obstacles. For this reason, a significant legal breakthrough to overcome these problems is needed or otherwise, victims will continuously face obstacles when seeking remedies in foreign jurisdictions. To overcome the above issues, Aceves proposes that states must cooperate to establish a convention on civil litigation for human rights cases.

30 Supra note 25.
• The main purpose of this convention is to impose on states the obligation to ‘adopt national legislation to authorize civil suits for human rights violation’ and this convention must contain rules on court jurisdiction and enforcement of rulings. In addition to this proposal, Mostajelan finds that in order to guarantee civil remedy for victims of human rights violations, states’ action is essentially required. He further believes that states should enforce ‘public international law within their courts through more lenient jurisdictional requirements’.  

• Unfortunately, although both scholars have explained the significance of their proposals, the factors that may drive states to enter into cooperation in order to guarantee civil actions against TNCs remain unclear. One of the possible frameworks to facilitate home and host state cooperation is to establish a multilateral convention on civil litigation for human rights cases. However, negotiating an international agreement aimed at creating uniformity of rules in court jurisdiction across many different countries is not an easy task. Although achieving cooperation through a multilateral agreement is difficult, there is still possibility to reach consensus through another instrument. One of the most possible options is by establishing inter-state cooperation through bilateral agreements. Although no bilateral agreement on civil litigation for human rights cases has been signed yet, a bilateral treaty related to transnational civil litigation is not a new concept. In bankruptcy disputes, for instance, the US and British courts have concluded an order and protocol which regulates the roles of courts in both countries when resolving a parallel bankruptcy case.

• This example shows that, to a certain extent, courts in two different countries may possibly reach an agreement on procedural matters in transnational civil litigation. However, because most human rights disputes in civil courts involve both substantial and procedural law issues, the form of cooperation should be more than a court-to-court understanding. Therefore, this kind of bilateral agreement must be concluded at the inter-governmental level. The researcher is of the opinion that though the suggestion given by the author is prudent but it is only successful in an

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33 Supra note 25.
35 Supra note 25.
agreement between the TNCs from developed countries are negotiating where both have equal bargaining power i.e. both TNCs need to be from developed countries like in above referred example of bankruptcy case between UK and US. As far as agreements between the TNCS and the developing and under developed countries are concerned TNCS will always have an upper hand as the bargaining is unequal. Least developed countries are dependent on the TNCs due to their priorities of investment for economic development of the country, technical know how and job opportunities to the people of host country. As far India is concerned due to market availability and growth rate the India is at a reasonable position to bargain with TNC.

- TNCs wield an immense amount of power. They have the right to make complaints against states for breach of contract, despite the reason for the breach, yet they can evade responsibility for human rights and environmental standards in foreign countries. Traditional international law only recognizes states as international actors.  

 However, the researcher agrees with some authors that this traditional view fails to reflect the complexity and transnational nature of international relations and the current global economy. International lawyers and members of academia have extensively explored this issue. With international legal personality, complaints at regional human rights courts can be made against TNCs who violate international human rights standards as explored below. The researcher further urge the UN and other international actors to assign TNCs international legal personality so that regional and other human rights institutions and courts can ensure that they respect human rights where states fail to or do not have the capacity to do so.

- It is essential both for the purposes of normative and practical reasons to confer a recognition of legal personality upon corporations for the purposes of International Criminal Court (ICC) jurisdiction. Such recognition of corporate personality is jurisprudentially consistent with the trends in domestic and international law which

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36 Supra note 16.

are the primary sources of principle for international criminal crime. In an increasingly globalised world it is becoming more and more difficult to impose criminal sanctions on transnational corporate human rights abuses. This is due to a multitude of factors, including the transnational nature of corporate activity, which allows corporations to locate and structure themselves so as to take advantage of disparate human rights standards; the domestic disparities in enforcement mechanisms; procedural difficulties; decline of state power; and the global focus on economics resulting in an overall lack of political will to prioritise human rights protection and ensure corporate accountability.  

- Nevertheless, there has been a growing trend in both civil and common law jurisdictions to recognise corporations as having legal personality and thereby to holding them criminally accountable for misconduct. This trend is mirrored in international law, in particular human rights law, which increasingly confers rights and duties upon the corporate actor thereby making corporations subjects of international law. Whilst international criminal law to date has failed to recognise corporations as legal persons, there is a strong argument that this should, and will be, subject to change in the future so that corporations can be held directly liable under ICC jurisdiction for human rights abuses that they commit. The 2009 review of the Rome Statute will provide an excellent opportunity for the international community to reconsider such an extension of jurisdiction.

- Extending the ICC’s jurisdiction to ‘legal persons’ is only the first step towards using it as a forum for attaching liability to corporations for transnational wrongs. Provided that a multitude of persons comprise a corporation, the parties must also determine how to attribute liability to a corporation. That is, they must determine which natural person’s actions can be attributable as an act of the corporation. One solution would be to use the ‘directing mind’ theory. Under this theory, only criminal acts by individuals, who are delegated the governing executive authority of the corporation, or who have the power to act in the name of the corporation, are attributable to the corporation if they act within the scope of their authority and in

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39 Ibid.
the interest of the corporation. This exempts a corporation from liability for any acts committed by lower level employees, which restricts its susceptibility to criminal liability for petty acts while ensuring that the corporation is still accountable for acts on a larger scale, the normal realm for human rights violations. In addition, this solution does not require that an individual employee be found guilty for the condemned act. Under the first proposal for extension of the ICC’s jurisdiction over legal persons, this had been a required element. To properly encapsulate corporate liability under the ICC, jurisdiction over legal persons, this had been a required element.

- To extend the corporate liability under the ICC, the definition of crimes should also be expanded to include environmental damage. Thus, where the corporation’s resultant act leads to widespread and significant environmental damage that affects the life and/or well being of plant, animal, or human health, the commission of a crime should be established.

- Finally, the penalties for guilty persons also need to be modified in order to appreciate the distinction between a natural and a legal person. Currently, the ICC’s penalty options are either imprisonment or fines. However, imprisonment is not a viable penalty for a corporation unless the directing mind of that corporation is also separately found guilty. Moreover, whereas a monetary fine may result in hardship for a natural person, it may be an insignificant penalty for a wealthy corporation. As a result, penalties for ‘guilty’ corporations should include substantial monetary fines that are based on a percentage of the corporation’s pre-tax profits or its gross revenue, and, for the most heinous of offenses, dissolution of the corporation.

- Extending the jurisdiction of the ICC to legal persons is a complex procedure that will undoubtedly be met with opposition from business entities. Moreover, given the divergent views of the ICC’s current members and its already failed attempt at extending the jurisdiction to legal persons, future negotiations on this matter are sure to be fraught with difficulty. Nevertheless, success in this realm is possible, as ICC

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43 Ibid.
members have already demonstrated from their ability to cooperate and compromise with the Rome Statute. Furthermore, given that an extension of ICC jurisdiction could achieve a milestone in the area of corporate accountability, it may be worth the likely problem-plagued process.44

- Export credit or investment insurance agencies (ECAs) provide TNCs with loans, insurance and risk protection. In Ruggie’s Framework report, he suggests that “on policy grounds alone, a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts. This would enable ECAs to flag up where serious human rights concerns would require greater oversight - and possibly indicate where State support should not proceed or continue.”45 ECA-Watch, Halifax Initiative Coalition and ESCR-Net prepared a report entitled, “The Legal Obligations with Respect to Human Rights and Export Credit Agencies”. The report stated, “The need to focus attention on ECAs and human rights is underscored by the significant contribution that ECAs make to international trade and investment flows.”46 In a meeting between John Ruggie and Global Witness on home states and human rights violations, participants concluded that “Export Credit Agencies require adequate human rights due diligence before providing loans to companies operating in conflict zones” and that they should “ensure that investments comply with human rights standards.”47 ECAs can play an important role to protect human rights and ensure that these became a part of contract with the TNCs.

- Regional human rights courts only hear complaints against states. None of the regional courts currently take complaints against TNCs. Although states should be the primary duty bearers for human rights, we urge the regional human rights courts to hear complaints against TNCs from individuals, communities and non-governmental organizations.48 The European Court of Human Rights (ECHR) hears

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44 Ibid.
cases concerning civil and political rights from the European Convention. In the case of SERAC v. Nigeria Implications for TNCs the majority of the allegations put forward against the oil company was the environmental degradation, health problems from contamination of environment, disposing toxic wastes, contamination of water, soil and air and employing legal and military powers of the state.

- The African Commission on Human and people’s Rights relied on its earlier decision of the Inter-American Court of Human Rights in Velasquez Ridgriguez v. Honduras as well European Court of Human Rights in X and Y v. Netherlands The commission held that government have the duty to protect their citizens through appropriate legislation and effective enforcement and also to protect them from damaging acts that may be perpetrated by the private parties. The commission restricted the responsibility of the Nigerian Government and said nothing about the TNCs. The decision was criticized for the non-accountability of non-state actor. According to Oloka Onyango, this omission becomes more glaring because the criminal law or regulatory mechanism of the host state was inadequate to deal with the problem. He concludes that notwithstanding with the first line responsibility obligation placed on the states, the commission could have examined the issue of the direct liability of the oil company more extensively. The Regional Commission have the potential to protect human rights but need is to broaden the scope.

- Another important mechanism can be setting up company-run grievance and redress mechanisms that allow local citizens to complain about a project’s social and environmental impacts. It offers a potential avenue to resolve disputes before they escalate into full-blown conflict. In certain sectors – in particular oil, gas and mining – the management level of transnational corporations has therefore increasingly recognised the business case for their establishment. At the same time project


52 91 ECHR (1985)(ser. A) at 32.


54 Ibid.

related complaints mechanisms have become a formal eligibility requirement for different types of project finance. If a company seeks funding from an international or regional development bank or Equator principle bank, they will often be required to establish some kind of local grievance mechanism. For example, since 2006 the International Finance Corporation, the private sector investment arm of the World Bank Group, requires clients that receive project finance to “set up and administer mechanisms or procedures to address project-related grievances or complaints from people in the affected communities”.  

- Corporate grievance and redress mechanisms provide communities with channels of communication to make their concerns known to the company as they arise, and to varying degrees provide for formalised procedures to settle these disputes. This may include a telephone hotline and a network of community liaison officers. A more elaborate mechanism will have an internal company procedure for logging and addressing the complaints, with dedicated staff and often a stated time frame to resolve the issue. There may be a special committee or arbitration panel to deal with particularly complex issues and an opportunity for third party mediation. The complainant may sign a formal statement when the grievance is resolved to their satisfaction. The agitations by the Anti-Nylon 6,6 Citizens’ Action Committee, which consisted of a coalition of environmental groups, trade unions, cultural associations, and citizens who issued the ‘Ponda Declaration’ reaffirming their firm rejection of DuPont’s nylon factory on the ground of environment protection. While the protest was in progress the incidents of violence were reported. In case there had been grievance redressal mechanism the NGOs and Local people had an option to make their grievances against DuPont’s nylon factory and the situation can be avoided. The similar case was with US based Enron Corporation in Maharrastra which can also be avoided.  

- The international mining company Anglo American initially introduced guidance on the establishment and operation of stakeholder complaint and grievance procedures  

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58 Supra note 56.  
59 For details see: Chapter 5.9.
in 2007 as part of their Socio Economic Assessment Toolbox (SEAT). With the beginning of 2011 a company-wide system to record and handle complaints has been put in place at all Anglo American project sites (70 to 80) worldwide. Based on an existing software package, the corporation has developed an action management tool to capture and reflect social stakeholder concerns. Complaints and grievances are recorded and classified according to type and severity of the incident and gradually processed through the system. This includes the allocation of tasks, approximation of timelines, reminders to responsible staff and possibly referral to a review committee and third party mediation. Evaluation and monitoring is part of the computerised system which allows headquarters to follow the different steps of an investigation and compile empirical data on incidents and outcomes of complaints.60

- At the corporate level Anglo American operates the “SpeakUp” whistle-blowing programme with regard to its offices in the United Kingdom, Luxembourg and South Africa. Under the programme employees, suppliers, communities or others can draw attention to any conduct that violates the ethical principles contained in Anglo American’s Good Citizenship Business Principles or other relevant policies. This could, for example, include actions that result in health and safety hazards or damage to the environment, criminal offences or unethical accounting practices. Complaints can be submitted to a third party provider (Tip-offs Anonymous) by phone, email or post in different languages. An anonymous version of the complaint is channeled through the central assurance function to the relevant company of the Anglo American Group for evaluation and possible investigation. The complaints can result in recommendations to management. They are often filed by one employee against another, and the SpeakUp programme has been particularly successful in controlling corruption.61

- This kind of grievance mechanism at the corporate level will help in self-regulation of TNCs as far human rights compliance is concerned. In India considering the socio-economic conditions the researcher is of the opinion the Ministry of corporate Affairs can play a positive role in setting up the grievances redressal mechanism. This corporate level suggestion can also be implemented at the National level. The Government can set up a Special Grievance Redressal Mechanism which can be

60 Supra note 56.

61 Ibid.
monitored by the Ministry of Corporate Affairs. The area for filing a complaint can be limited only to human rights violation including environmental hazards also.

- Besides having a Special Grievance Redressal Mechanism the researcher also suggests that there must be a separate Dispute Resolving Mechanism. On January 13 this year, the Group of Ministers on Bhopal (GoMB) decided that the Government of India (GoI) should not revise the figures of deaths and injury caused by the December 1984 Union Carbide disaster (1). The critical document in which this revision was considered is the curative petition filed by the Union of India in the Supreme Court for additional compensation to the victims of the disaster in Bhopal from Union Carbide and its current owner, Dow Chemical Company, USA. Almost after three decades we are still not clear on the number of victims and how can we expect that all the victims are compensated. The researcher is suggests that there is a need for establishing a separate Dispute Resolving body to take up the cases against TNCs seriously and speedily. While awarding the compensation a board is need to constitute which can suggest an appropriate compensation to the victims.

- Recently, the Companies Act, 2013 has introduced a small measure that has the potential to change the way business and society engage with each other. Section 135 of the Companies Act, 2013 says:

- The board of directors must create a special Corporate Social Responsibility Committee, which will devise, recommend, and monitor CSR activities for the corporation.

- The company must adopt a CSR policy formulated by the CSR Committee and that policy must be disclosed or posted on the company’s website. The law states that companies should give preference to CSR spending to local areas where the company operates.

- The company must spend at least two percent of its average net profits made in the preceding three financial years (the “Two-Percent Formula”) on government-approved categories such as education, environmental sustainability, or fighting hunger, among others.

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- CSR activities developed and implemented during the financial year by the company must be detailed in the annual board report. If the company is unable to spend the required amount on CSR, the company must explain why in its board report or be subject to liability. Otherwise, they would face action, including penalty.

- The new law also makes it mandatory for companies that one-third of their board comprises independent directors to ensure transparency. Also, at least one of the board members should be a woman.

- Section 135 enforces the claim of human rights compliance through corporate social responsibility. The researcher suggests that the information regarding the expenditure obligation on the company to spend at least two percent of its average net profits made in the preceding three financial years (the “Two-Percent Formula”) on government-approved categories such as education, environmental sustainability, or fighting hunger, among others can be made under the purview of Right to information Act, 2005. This will be a positive step to ensure the accountability and transparency.

- Business in the information age is experiencing a complete transformation. The revolution is two-fold. First, the use of Internet and Intranet has created a new way of making and selling products. Second, corporate policies toward a whole range of stakeholders (employees, consumers, suppliers, investors, community, and society) have become an essential element of the company’s long-term growth. Social Auditing is emerging as one of the most important criteria to ensure human rights compliance in TNCs. Gap, Nike, Benneton and Wal-Mart and more recently Zara are the name of only few companies from the whole list who are accused of following the culture of manufacturing the products through sweat shops. Further more consumer boycotts and emerging role of NGOs to protect the basic labour standards in Asian and other under developed or developing countries forced the company to adopt the policy of social auditing in one way or the other. The social auditing has emerged as an important technique to build brand reputation in the international market. The Ministry of Corporate Affairs has authorised the Indian Institute of Corporate Affairs (IICA) to address the issue. The IICA appointed a Guidelines Drafting Committee (GDC) to draft Guidelines with distinctively

‘Indian’ approaches, which enable businesses to balance and work through the many unique requirements of the law of the land. Through an extensive consultative process, the GDC drafted “National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business” (hereinafter the ‘Guidelines’).

- The Guidelines are applicable on all business of all size in India including TNCs and especially Indian TNCs planning to invest or already operating in other parts of the world will follow these guidelines even there. It urges businesses to embrace the “triple-bottom-line” approach whereby its financial performance can be harmonized with the expectations of society, the environment and the many stakeholders it interfaces with in a sustainable manner. The drafters prepared a table which indicates corresponding existing law against the specific principle. The researcher has observed that against each voluntary principle there exists number of remedies/actions for violation under different laws. For example, against Principle 5 which deals with Promotion of human rights, there are 31 corresponding law, the provisions of which directly address the above referred issue. The need of the hour is to strengthen the implementation mechanism with accountability of the concerned officials. The guidelines are comprehensive enough to ensure human rights compliance in the TNCs but the basic question remains stand still i.e. how to ensure implementation. Enacting guidelines or developing social auditing techniques will not serve any purpose on the papers unless we lay down a comprehensive implantation mechanism. The researcher is of the opinion that this is the most sensitive issue which need political will, society participation and above all TNCs responsible attitude to ensure positive result. The researcher would like to conclude his research work with the words of Peter Hansen, former Executive Director of the U.N. Center on Transnational Corporations (CTC) in 1989:

We’re still living at the stage of the law of the jungle... There [are] no globally agreed upon rules of what’s right and what's wrong for transnational corporations, no sense of global responsibility to match the global reach of corporations.

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