CHAPTER 1
INTRODUCTION

If the [multinational enterprise] poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the people affected by it.

D.F. Vagts1

Sklair believed that globalization was moving ‘transnational corporations’ (TNC) into broader international roles, whereby corporations’ states of origin became less important than international agreements developed through the World Trade Organization and other international institutions. Emerging from these multinational corporations was a transnational capitalist class, whose loyalties and interests, while still rooted in their corporations, was increasingly international in scope.3 Transnational corporations (TNCs) are responsible for one fourth of the gross world product; the annual flow of foreign direct investment (FDI) they activate is, depending on the ups and downs of global economy, between 1300 and 2000 billion dollars. The United States is the greatest FDI source in the world - about 20% - and it is its largest recipient as well. However, the European Union as a whole has a lead over the US. In 2012, with assets worth almost 700000 million dollars across the world - almost half invested in the US - , the largest TNC was General Electric; GE was followed by Volkswagen (409000 millions). Shell, with 467000, was first in sales; followed by Exxon, with 420000 millions. Wal-Mart had the largest amount of employees: 2200 millions all over the world; followed by the Taiwanese company Hon Hai with over 1200 million. If we combine TNCs annual sales with Gross Domestic Products (GDP) in a

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. Transnational Corporations means corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates. Whereas a multinational corporation is an enterprise which owns or controls production or service facilities outside the country in which it is based. The UN Economic and Social Council have embraced the term ‘transnational corporation’. The OECD and the ILO on the other hand, continue to employ the term ‘multinational enterprise’. In this work, the researcher would like to use the term ‘Transnational Corporations’ while analyzing the various codes of conduct on corporations.
single ranking, Shell - with sales almost equivalent to Argentina’s or Norway’s GDP and larger than Austria’s, South Africa’s, Thailand’s or Colombia’s GDP (just as Exxon’s or Walmart’s sales) - would be holding the 25th position.4

The World Trade Organization (WTO) has recently published its 2013 World Trade Report: Factors Shaping the Future of World Trade (2013 WTR), offering an assessment of the changing balance of power in the multilateral trading system which also identifies the pivotal role of transnational corporations as key drivers of globalisation, their role in global supply chains of production and the links between those supply chains and trade in goods and services.5

The above referred facts again reiterate the fact of the dynamic and important role of transnational Corporation in the world economy but flip side of the coin has another angle also. The Occupy Movement has developed a mantra that addresses the great inequality of wealth and power between the world’s wealthiest 1 percent and the rest of us, the other 99 percent. While the 99 percent mantra undoubtedly serves as a motivational tool for open involvement, there is little understanding as to who comprises the 1 percent and how they maintain power in the world.6 Estimates are that the total world’s wealth is close to $200 trillion, with the US and Europe holding approximately 63 percent. To be among the wealthiest half of the world, an adult needs only $4,000 in assets once debts have been subtracted. An adult requires more than $72,000 to belong to the top 10 percent of global wealth holders, and more than $588,000 to be a member of the top 1 percent. As of 2010, the top 1 percent of the wealthiest people in the world had hidden away between $21 trillion to $32 trillion in secret tax exempt bank accounts spread all over the world.7 Meanwhile, the poorest half of the global population together possesses less than 2 percent of global wealth.8

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The World Bank reports that, in 2008, 1.29 billion people were living in extreme poverty, on less than $1.25 a day, and 1.2 billion more were living on less than $2.00 a day.9 Starvation.net reports that 35,000 people, mostly young children, die every day from starvation in the world.10 The numbers of unnecessary deaths have exceeded 300 million people over the past forty years. Farmers around the world grow more than enough food to feed the entire world adequately. Global grain production yielded a record 2.3 billion tons in 2007, up 4 percent from the year before - yet, billions of people go hungry every day. Grain.org describes the core reasons for ongoing hunger in a recent article, “Corporations Are Still Making a Killing from Hunger”: while farmers grow enough food to feed the world, commodity speculators and huge grain traders like Cargill control global food prices and distribution.11 Addressing the power of the global 1 percent - identifying who they are and what their goals are - are clearly life and death questions.12

So how does the transnational corporate class (TCC) maintain wealth concentration and power in the world? The wealthiest 1 percent of the world’s population represents approximately forty million adults. These forty million people are the richest segment of the first tier populations in the core countries and intermittently in other regions. Most of this 1 percent have professional jobs with security and tenure working for or associated with established institutions. Approximately ten million of these individuals have assets in excess of one million dollars, and approximately 100,000 have financials assets worth over thirty million dollars. Immediately below the 1 percent in the first tier are working people with regular employment in major corporations, government, self-owned businesses, and various institutions of the world. This first tier constitutes about 30–40 percent of the employed in the core developed countries, and some 30 percent in the second tier economies and down to 20 percent in the periphery economies (sometimes referred to as the 3rd world). The second tier of global workers represents growing armies of casual labor: the global factory workers, street workers, and day laborers intermittently employed with increasingly less support from government and social welfare

12 Supra note 5.
organizations. These workers, mostly concentrated in the mega cities, constitute some 30–40 percent of the workers in the core industrialized economies and some 20 percent in the second tier and peripheral economies. This leaves a third tier of destitute people worldwide ranging from 30 percent of adults in the core and secondary economies to fully 50 percent of the people in peripheral countries who have extremely limited income opportunities and struggle to survive on a few dollars a day. These are the 2.5 billion people who live on less than two dollars a day, die by the tens of thousands every day from malnutrition and easily curable illnesses, and who have probably never even heard a dial tone.\(^\text{13}\)

TNCs are active in most of the dynamic sectors of national economies. They bring new jobs, technology, and capital, and are capable of exerting a positive influence in fostering development, by improving living and working conditions. At the same time, however, companies may violate human rights by employing child labourers, discriminating against certain groups of employees, such as union members and women, attempting to repress independent trade unions and discourage the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad dissemination of appropriate technology and intellectual property. Corporations also dump toxic waste and their production processes may have consequences for the lives and livelihoods of neighbouring communities.\(^\text{14}\)

The problem is not that all TNCs consistently engage in serious human rights abuses. The problem is that almost three decades after Professor Vagts made his point that TNCs still largely escape international legal scrutiny. The temptation to boost profits by conspiring in human rights abuses with the host State may therefore prove irresistible. A TNC typically constituted of a parent enterprise and a number of foreign affiliates. Because prescriptive jurisdiction is primarily exercised on the basis of territoriality it follows that a TNC is not governed by a single legal system. The parent company is subject to the laws of the home State while its foreign affiliates are subject to the laws of

\(^{13}\) William Robinson and Jerry Harris, “Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class”, *Science and Society*, No. 1, 64 (Spring 2000).

the various host States. It is still not widely accepted that unlike an individual, a TNC has any obligations under international law.\textsuperscript{15}

When governments transgress human rights norms, they can be criticised for their violations. When non-state actors do not comply with should be criticised for ‘abusing’ the rights of individuals rather than for committing ‘violations’. The term ‘human rights violations’ should be limited to misconduct by governments, so as to avoid giving greater recognition and undue status to non-State entities.\textsuperscript{16} So, the abuses can be divided into two broad categories: those committed in collusion with the home State and those committed in collusion with the host State. The former category now seems to belong to a bygone era. It includes the assistance by United Fruit in the Coup against the government of Guatemala in 1954, the involvement of ITT in the overthrow of the government of Salvador Allende in Chile in 1973 and the role of Elf Aquitaine in the overthrow of the government of Congo Brazzaville in 1997. These abuses, as well as lesser forms of interference into the internal affairs of the host State, are of course part of a long standing tradition going back to the British and Dutch East India Companies.\textsuperscript{17}

These days, TNCs is much more likely to collude with the host State than with the home State. This is because host States now tend to take a very different attitude to TNCs. They are competing for their favours and they are actually begging them to come and invest in their territories.\textsuperscript{18} That’s why when faced with the prospect of losing the economic benefits these businesses bring, governments often are cowed into ignoring the human rights abuses these business commit when they employ child labour, discriminate against certain groups of employees, fail to provide safe working conditions, dump toxic wastes, etc.\textsuperscript{19}

TNCs continuously violate second and third-generation rights to maximise the profits. The Bhopal environmental disaster in India; maquiladoras (export-oriented factories) in Mexico, Honduras, and El Salvador; and Nike sweatshops in Indonesia and

\textsuperscript{17} Supra note 14, at 554.
\textsuperscript{18} Ibid.
Pakistan are prime examples of human rights “violations.”

Unocal Corporation, which became a subsidiary of Chevron, is an oil and gas company based in California with operations around the world. In December 2004, the company settled a lawsuit filed by 15 Burmese villagers, the villagers alleged Unocal's complicity in a range of human rights violations in Burma, including rape, summary execution, torture, forced labor and forced migration. Dow Chemical has been destroying lives and poisoning the planet for decades. The company is best known for the ravages and health disaster for millions of Vietnamese and U.S. Veterans caused by its lethal Vietnam War defoliant, Agent Orange. Dow also developed and perfected Napalm, a brutal chemical weapon that burned many innocents to death in Vietnam and other wars.

There are various international human rights instruments i.e. Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), 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 Prevention and Punishment of the Crime of Genocide (Genocide Convention), and several regional instruments which talks about the responsibilities of non-state entities for the protection of human rights. The International instrument for the protection of human rights doesn’t make the TNCs directly responsible.

Besides these instruments there are several international regulations which has emerged for better humane conditions of working in the TNCs. Examples are the OCED – Declaration on International Investments and Multinational Enterprises, 1976 and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social


22 Ibid.

23 <http://www.oecd.org/document/24/0,3746,en_2649_34887_1875736_1_1_1_1_0,00.html> Accessed on September 18, 2012.
Policy of 1977\textsuperscript{24}, International Convention on Civil Liability for Oil Pollution Damage\textsuperscript{25} and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment\textsuperscript{26} directly impose liability on legal persons including corporations. Furthermore, the UN’s Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights not only to bind states, but also to place obligations on transnational corporations and other business enterprises. The Norms are, however, unclear as to how corporations could be held directly liable under international law for any breaches of these obligations, beyond implying that such a possibility exists.

To handle the situation, 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.

Several major international projects, such as the Global Reporting Initiative (GRI) 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 AA 1000


\textsuperscript{26} The treaty was opened for signature on 21 June 1993 and till date only 9 state parties signed it. No State has ratified it yet and hence it has not come into force. <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=150&CM=&DF=&CL=ENG> Accessed on September 20, 2012.
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.

Few companies have commissioned an independent social audit, and even fewer have made them public. 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. It is pertinent to mention here that recently more than 1,000 businesses, including major global corporations (more than 61,000), have issued social reports of one type or another, though most have not been externally verified by an independent ‘Social Auditor’.

Thus, the present research work takes into consideration the continuous violations of human rights in TNCs which has been a result of various factors like Jurisdiction issues, Typical character of TNCs i.e. Corporation is operative in two countries host and home and which help TNCs to escape legal liability as they are governed by dual legal system, Attitudinal difference of host country due to their priorities of investment for economic development of the country, judicial approaches of various developed States in deciding cases of gross violation of human rights, independent monitoring mechanisms of social performance of TNC which can help the TNCs in building reputations along with earning profits like CSR. In this work, the researcher has attempted to find a solution to the above said problem and highlighted the importance of Social Auditing system which can prove to be a successful method if implemented properly.

1.1 Object of Research

In India, where private sector is growing by manifold even dominating the public field in scope and various other aspects, it is not affordable to deal with the social auditing in a casual approach. Despite the efforts made by the government agencies, NGOs, trade unions etc. the social auditing in the corporate sector has proved to be mere a paper work than a reality in the absence of a focused control mechanism.
For instance, the PLACHIMADA CASE, involving the Perumatty Panchayat in Kerala and the Hindustan Coca Cola Corporation, is often cited as a prime example of corporate aggression over natural resources and the consequent denial of human rights of the people, now awaiting hearing in the Supreme Court will provide greater insights into the issues and concerns involved in the Study. The scope of present research work is to explore - the implementation of corporate human rights norms and standards. In the research work the researcher has attempted to study the strategies adopted by the corporate world to enforce human rights and instruments adapted to measure compliance with international standards. The research work further took into consideration the effective sanctions to ensure compliance and the role of state and civil society to promote compliance within inhibiting economic freedom and market operations.

1.2 Research Hypothesis

The hypothesis underlying the present research work is that there is a drawback with the present legal mechanism at national as well as international level against the TNCs as their activities either of development or of human rights abuses are not directly covered by any of the provisions. These corporations are promoting the idea of development at the cost of human rights. In such a scenario, this work will try to find out the probabilities to test Social Auditing as an instrument that can be employed for human rights compliance in transnational corporations.

1.3 Research Methodology

The present research work includes both the descriptive and analytical study. The researcher has taken into consideration both primary and secondary sources. The primary sources included study of various international human rights instruments, regional instruments and regulations adopted at international level to govern the better working conditions in TNCs. The researcher further took into considerations legislative provisions governing claims, government reports and various judgments of higher judiciary. The secondary source has also been relied in the present research work which includes case studies, journals, articles, various codes of the companies as well as codes of the independent institutions regarding social auditing, books, newspapers and websites etc. The researcher have also analysed the functioning of various control mechanism developed and adopted by the corporations so as to achieve the true object of research.

1.4 Plan of Study
The present research work has been presented schematically by dividing it into Seven chapters detailed as under:

Chapter-1: Introduces the topic of research highlighting the emerging role of TNCs in the world economy and increasing human right violation. The chapter further discusses the objectives of research, research hypothesis and the research methodology adopted the present research work.

Chapter-2: Explains the meaning and definition of the term TNCs and also elaborate the origin and development, i.e. how these corporations became a world power in themselves. The researcher further deals with the nature and theories of the TNCs and provides an illustrated version of the various arguments in favour of various theories. Keeping in view the impact of the TNCs in all the spheres of the life, an attempt is made to answer a question i.e. Are TNCs sovereign?

Chapter-3: Titled ‘Human Rights Obligation of Transnational Corporation’ discuses the legal personality and legal status of TNCs in international and national arena. The chapter further highlights theories of Human Rights i.e., “Engines of Development” and “the Hymer Thesis” or “Tools of Exploitation/oppression and its impact on Transnational Corporations. Various International and regional instruments on Human Rights has also been discussed along with its indirect applicability on TNCs.

Chapter-4: discuss the various efforts made by the various inter-governmental organisations like ILO, UN, OECD to enforce the human rights obligations on TNCs through regulations. All these regulations were of voluntary nature, even than these organisations are trying their best to enforce these regulations till present.

Chapter-5: The researcher has made an attempt to suggest or rather revive the concept of social auditing of the social performance of the TNCs as an instrument to enforce the human rights obligations on TNCs. The chapter explains the various benefits along with the standards techniques of social auditing which are useful and practical for TNCs.

Chapter - 6: This chapter deals with the judicial response to the litigations filled in various courts of different Home States of the TNCs for their alleged violation of human rights, degradation of environment and so on.

Chapter - 7: Finally based upon the research, the conclusion has been drawn and few suggestions have been given for implementation of Human rights in Transnational Corporations.