CHAPTER 3
HUMAN RIGHTS OBLIGATIONS OF TRANSNATIONAL CORPORATIONS

In the struggle for the rights of every human being, humanity, though at first fragmented into tribes, kingdoms and many other social groups, and later formed into nations and empires, was conscious from its darkest and earliest beginnings of a brotherhood founded on religious and moral concepts rather than on material and economic aspirations.

Rene Cassin

In the Trail Smelter case, United States v. Canada, the Court held that:

Under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence.

This case was heard close to a century ago, yet little has developed in terms if state’s obligations or responsibility for transnational effects of their actions. This is true for international law in general and for international human rights law in specific. The role of State in protecting and promoting human rights of individuals inside the territorial boundary is specifically governed by the domestic laws. But at the same time, the States have obligations relating to the human rights effects of their external activities, such as trade, development cooperation, participation in international organizations and security activities.  

The question before the researcher is whether TNCs have human rights obligations and, if so, how these obligations can be enforced, challenges traditional concepts of international law. So, in order to determine the obligations of TNCs for human rights violations, there are number of issues to be answered like: the legal status of TNCs under international law, do they have a ‘personality’, if so, than are they liable for civil wrongs.

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1 Michael Faure and Andri Wibisana (eds.) Regulating Disasters, Climate Change and Environmental Harm, 56 (2013).
as well as criminal acts or omission. Later on, even if it is proved that the TNCs have a legal personality as held by international courts, tribunals as well as domestic courts in number of cases, another issues which need to be addressed is why TNCs are responsible for violations of human rights, which is purely a domain of State and can be found so in most of the international documents.

All these issues can be answered only by making an analysis of the various provisions of the international human rights laws which laid down obligations on the part of TNCs in a direct manner. Besides this various approach towards obligations can also be discussed. In this chapter, an attempt is made to answer the above mentioned issues. TNCs has emerged as important economic institutions which not only controls the economy but also partially controlling government policies. But to determine the question whether TNCs have human right responsibilities of not, firstly the researcher had examined the status of TNCs under international law.

3.1 Legal Status of Transnational Corporations

The traditionally preeminent position of the nation-state has played an important role in keeping the international legal system viable. From its inception, international law focused upon the sovereign territorial entity, giving natural persons and other entities a peripheral role. The birth of modern international law at the signing of the Treaty of Westphalia was the product of a power struggle pitting the nascent state system against the Church and the Holy Roman Emperor. Public international law was developed in order to legitimate and support the new system. Since that time, national governments have held most of the political, economic, and military power, thereby making them the natural foci of international law.4

Under international law the primary subjects are States. States have full and original international personality, meaning that personality does not need to be conferred on these entities. It is interesting to observe that before the rise of the positivistic doctrine in the 19th century, there was no insistence that States were the only subjects of international law. For example, the large corporations of the 17th century such as the English East India Company (EIC) and the Dutch United East India Company (VOC)

clearly operated at the international level occupied land, wage wars and conclude treaties. However, in the 19th century legal scholars from the positivistic school defended the assumption that only sovereign States could be considered as subjects of international law. All other entities were labelled objects of international law meaning that they had no direct rights and duties and, logically, no means of invoking any rights. This followed from the idea that international law by its nature only addressed sovereign States. At that time, international law was concerned mainly with State issues, such as the delimitation of the jurisdiction of States, the immunities of States, their diplomatic representatives and their property and the law of war.

In the 20th century this strict subject-object dichotomy came under pressure. The types of entities with legal personality have diversified. Several practical developments demonstrated and the need to enlarge the number of subjects of international law and prompted States to endow other entities with legal personality. The first example of such kind was the creation of The Free City of Danzig. This protectorate was created to solve conflicting interests between Poland and Germany. The territory was placed under the protection of the League of Nations. The Permanent Court of International Justice (PCIJ) recognised that The Free City of Danzig has international personality, except in so far as treaty obligations created special relations in regard to the League and to Poland. In the case concerning the Jurisdiction of the Courts of Danzig, the PCIJ affirmed that practical needs can override theoretical considerations in regard to international legal personality. States can grant entities certain rights and duties making them subjects of international law, if they feel the practical need to do so.

The traditional dichotomy between subjects and objects of international law was further weakened with the recognition that international organisations can posses

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7 The Free City of Danzig was created in Articles 100-108 of the Treaty of Versailles. Besides protectorates, under certain circumstances ‘State-like’ entities such as condominiums and internationalized territories are also considered to be legal subjects.
9 The case concerned the question whether an agreement between Poland and Danzig, regulating the conditions of employment of Danzig railway officials who had passed into the service of the Polish Administration, created rights and obligations for individuals or merely for States. The Permanent Court held that “it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definitive rules creating individuals rights and obligations enforceable by the national courts”. For details see: Jurisdiction of the Court of Danzig, Advisory Opinion, P.C.I.J., Series B, No. 15, 295 (1928).
international legal personality. The treaty establishing an international organisation can contain provisions explicitly granting international legal personality to the organisation. If this is not the case the existence of de facto legal personality can be deduced from the powers and operations of the organisation.\textsuperscript{10} This occurred in the \textit{Reparation for Injuries Suffered in the Service of the United Nations} case. The International Court of Justice (ICJ) concluded that, in case the United Nations, has legal personality as:\textsuperscript{11}

\begin{quote}
[T]he Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.
\end{quote}

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. In 1945 the United Nations Charter expressly recognised that the individual has fundamental rights. Moreover, the fact that international law imposes duties and liabilities upon individuals as upon States was acknowledged during the trials before the criminal tribunals in Nuremberg and Tokyo. With the establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda and the permanent International Criminal Court (ICC), the obligations of the individual under international criminal law have become irrefutable. With the rise of the human rights doctrine in the postwar era, the attention to the rights of the individual increased. The acknowledgement of the fact that individuals have rights was taken to imply that they should have the means of effectuating these rights. For this reason, supervisory organs, among which is the European Court of Human Rights in Strasbourg, were created where individuals can bring claims against States to effectuate their rights. As a result of these developments, individuals increasingly participate in the international legal system and in today’s theory of international law, are considered as subjects of international law.\textsuperscript{12}

Traditional international law has been characterised as a system of law of co-existence, consisting of a set of rules of abstention, of adjustment and delimitation

between different national sovereignties. It was the prevailing mode of international law in the period before the World War II. Subsequently, international law gradually took on a different character in that it simultaneously became a legal system of corporation. The latter marked the expansion of international law from an essentially negative code of rules of abstention and delimitation to positive rules of cooperation in various fields such as peace and security, international economic relations and the promotion and protection of human rights. Thus the international law of cooperation not only became to cover more areas of international relations - it has expanded horizontally. At the same time international law has expanded vertically, because as a result of the increasingly interdependent character of international relations it has to regulate the areas it covers in a more detailed or penetrating manner. This horizontal and vertical expansion has quite dramatically narrowed the freedom of action of States and thus reined in their sovereignty.13

TNCs traditionally have not been recognized as ‘subjects’ of international law.14 The creation or adaptation of international regulatory regimes that impose human rights responsibilities upon corporations therefore appears to require a radical departure from the structure of international legal orthodoxy, which views non-State actors as mere objects of international law. Before such human rights duties can be imposed on TNCs, they must be recognized in international law as subjects of, or at least ‘participants in,’ international law, capable of bearing international legal duties. In other words, they must possess international legal personality. Since the end of World War - II, international instruments or other legal initiatives have conferred international legal personality on a number of new non-State actors.15

In every legal system, certain entities are regarded as possessing rights and duties enforceable at law. The recognition of those entities as ‘legal persons’ is itself determined by law, a tautology that is reinforced in international law by the centrality of states not

merely to the form but also to the substance of its norms. The practice and consent of states remains axiomatic to the concept of international law, and through the protection of territorial integrity and sovereign immunity states are its primary beneficiaries. This is replicated in the institutions of international order: Only states are recognized as members of the United Nations; only states may bring contentious claims before the International Court of Justice.

International law, especially in the last two decades or so, has been far greater participant by non-state entities in the processes that lead to its development. This has been true especially on issues that constrain state behaviour, such as human rights and the environment; the Rome Statute that established the International Criminal Court, for example, was in large part the work of non-governmental organisations. But an increase in participation is not the same as a transformation in the conception of personality. In part this depends on where one sets one’s boundaries. Does personality depend on having the capacity to enforce rights? Or is it possible to assert personality merely for the purpose of having rights enforced against an entity - responsibility without rights, as it were? The latter is probably what we mean contemplate including transnational corporations into the corpus of international law. By way of contrast, however, the inclusion of individuals generally has been on the basis that though human may now have rights under international law, for the most part it is only states that have duties.

This inconsistency is an example of a frequent contradiction in international law. Borrowing the terminology of the international relations scholars, such contradictions arise when international law attempts to use a realist foundation to pursue an idealist agenda.

National law usually applies to corporations in the country in which they operate (as we saw may be exceptions regarding EPZs). National law may, however, prove inadequate where the local authorities are unable or unwilling to penalize foreign investors for fear of losing them to less demanding sites for investment. Historically, foreign (or home) governments have had an interest in ensuring the fair treatment of ‘their’ multinational when these multinational operate abroad. These governments may use their

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16 Supra note 8, at 57.
19 Supra note 17, at 309-10.
foreign policy to bring diplomatic pressure to bear on the host countries to respect the autonomy and competitiveness of multinationals. From the perspectives of international law, this practice developed in the context of the international law of diplomatic protection for aliens abroad, and the attendant secondary rules of state responsibility which came to regulate this area. With regards to state responsibility, rules were developed in international law which set out when one state could claim that another state’s treatment of the first state’s company represented an internationally wrongful act giving rise to responsibility on the part of the second state. Such claims were usually brought by developed countries against developing countries in order to protect the former’s companies from nationalization and discrimination under the law of the latter. By contrast, developing countries sought to limit through law the extent to which multinationals might act in ways which they considered as constituting an interference in their internal affairs.

In a study prepared for the UN General Assembly on the ‘Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order’, Georges Abi-Saab suggested that international law had to develop to create a duty on states to cooperate to control transnational corporations in this context:

The charter of Economic Rights and Duties, coming twelve years after resolution 1803, adds another provision (Article 2, paragraph 2 (b)) in this respect dealing with a particular form of private foreign investment which drew much attention in the meantime, namely that of the transnational corporation. This provision, apart from affirming the legal power of the State to control and regulate activities of these entities with a view to ensuring their compliance with its laws and economic objective and their non-intervention in its internal affairs (which is nothing but the reiteration of the power described above), prescribes a duty on all States to cooperate in rendering this control effective. Indeed as the activities of transnational corporations straddle several States, their effective control necessitates the co-operations of those States. But this is a different (positive) type of obligation than the ones usually attached to sovereign equality, and which are usually obligations of abstention or non-intervention with the exercise of the rights or powers of others.

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Although inter-state efforts to adopt a UN Code of Conduct for transnational corporations later ground to a halt, the point remains that states will inevitably have to engage in cooperation to resolve issues relating to transnational corporations. The revised OECD Guidelines, discussed above, represent an important example of such cooperation. The fact that this text is not adopted in the form of an international treaty does not mean that there are no obligations on states with regard to corporate activity under international law. The existing public and private international law applies.23

So, states may be, first, internationally responsible for the acts of entities which, even if they are not state organs, are actually empowered by the law of that state to exercise elements of governmental authority, and are acting in that capacity. Second, where corporations are directed or controlled by a state in carrying out their conduct, the state will be internationally responsible for their acts. Third, states are responsible for omissions which leave individuals devoid of human rights protection from non-state actors; the scope of these positive obligations depends on the relevant international human rights obligation. Most of the focus in this last situation has been on the responsibilities of the state where the corporation is operating and where the harm occurs.24 Janet Dine, however, suggests that even the home state if a parent corporation (the state where the parent corporation is incorporated or has its headquarters) has a duty to ensure the protection of human rights through regulation of the way the parent exercises control over the subsidiary.25

Even though Allison D. Garrett is absolutely true, keeping in view the history of corporations, when he writes that ‘currently, corporations are viewed as legal persons, and have been regarded as such for almost 200 years’26 but Nicola Jagers also reminds us that TNCs traditionally have not been recognized as “subjects” of international law.27 Thus, the creation or adaption of international regulatory regimes that impose human rights responsibilities upon TNCs therefore appears to require a radical departure from the structure of international legal orthodoxy, which views non-state actors as mere objects of

23 Supra note 21, at 239.
24 Ibid.
26 As legal persons, corporations are entitled to some constitutional protections. They have the right to hold property, to contract, and to sue and be sued as a juridical entity distinct from their shareholders, directors and employees. For details see: Allison D. Garrett, “The Corporation as Sovereign”, Maine Law Review, Vol. 60, No. 1, 130-164, at 134 (2008).
27 Supra note 14, at 262.
international law. As Fried Van Hoof writes, “State are the full and original subjects of international law, while non-State entities have limited and derivative personality.” The main question which is highlighted in this research is: Whether TNCs can be held accountable on the international level therefore first necessitates an examination of the concept of legal personality?

3.1.1 Legal Personality of Transnational Corporations under International Law

According to Natural Entity theory, the corporation is neither a legal fiction created by the state, nor a contract between individuals, but a natural person with a pre-legal existence. This theory played an important conceptual role in the ‘personification’ of corporations - arguably also the ‘personification of capital’: Neocleous has argued that between 1844 and 1914 the corporate form was established as ‘the legal subjectivity of capital’ and that this legal subject ‘took to the stage as a fully-fledged persona as capitalist states were at pains to clarify in the late nineteenth century.’ Even O’Connell, in 1971, clearly outlined the deficiencies of the traditional approach with respect to legal capacity and legal personality as:

Capacity implies personality, but always it is capacity to do those particular acts. Therefore, ‘personality’ as a term is only shorthand for the proposition that an entity is endowed by international law with legal capacity. But entity A may have the capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z, but not act X, and entity C to perform all three.

However, in 1949, the International Court of Justice (hereinafter ICJ) expressed that legal personality is a legal fiction, a legal tool that serves practical purposes. In Reparations for Injuries Suffered in the Service of the United Nations (Reparations Case) the ICJ confirmed that states could confer international legal personality on

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28 Supra note 15, at 945.
29 Supra note 13, at 53.
30 Otto Von Gierke is the best know advocate who rejected the Fiction Theory and focused on the Natural Entity Theory. Significantly, Gierke’s theory was decisive in the development of state-independent corporate personality in America in the nineteenth century when the legal basis for corporations changed. Indeed, it was in the United States in the nineteenth century that corporations were conceptualised in the way we understand them today. For details see: F. Hallis, Corporate Personality, 138 (1930).
international organizations such as the UN. However, there is evidence that TNC have had also a international legal personality and have participated in the international legal system for some time. Examples of such participation include application of public international law to contracts with state entities and participation in dispute settlement forums established either by treaty or intergovernmental organizations.\textsuperscript{33} International legal personality entails two things: being capable of possessing international rights and duties and the capacity to maintain these rights by bringing international claims.\textsuperscript{34}

International legal personality can be obtained in several different ways. For, example, legal personality can be the result of a combination of treaty provisions and recognition by other international persons. It is important to keep in mind that having legal personality does not mean the same thing in all cases. The rights and duties can differ depending on the subject. As was pointed out by the I.C.J. in the \textit{Reparations for Injuries} case:\textsuperscript{35}

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community. Throughout history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international place by certain entities which are not States.

Where entities have not been granted legal personality by treaty provisions or by explicit recognition by other parties, the best way to ascertain whether an entity does or does not have legal personality is to find out if it in fact possesses any rights or duties under international law. This last mentioned method of acquiring legal personality opens possibilities regarding the present topic: TNCs. The extent to which TNCs already possess an international legal status may be ascertained by enquiring whether TNCs have any existing rights or duties under international law.\textsuperscript{36}

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 given rights under foreign investment law, particularly in relation to

\begin{itemize}
  \item \textsuperscript{33} \textit{Supra} note 4, at 763.
  \item \textsuperscript{34} \textit{Supra} note 32, at 174.
  \item \textsuperscript{35} \textit{Id.}, at 178.
  \item \textsuperscript{36} \textit{Supra} note 14, at 264.
\end{itemize}
expropriation, compensation, and non-discriminatory national treatment relative to domestic firms.\textsuperscript{37} After World War II, decisions of the International Court of Justice as well as the international criminal tribunals in many cases raised many hue and cry among the scholars as well as the supporters of the TNCs. The supporter pleaded that states are the only subjects of international law by ignoring the developments over the last 70 years or so that have seen non-state parties grow in their roles and responsibilities on the global stage, albeit usually mediated through the direct international responsibilities of states’ parties. As Nicola Jägers reminds us, ‘legal personality is not a static concept: it is flexible and can be conferred and then later withdrawn.’\textsuperscript{38} The complexity lies in that there is no central body that determines whether an entity has international legal personality. It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality.\textsuperscript{39}

During the 1970s the emphasis shifted, due to pressure from the recently decolonised States and several sensational cases of abuse of corporate power,\textsuperscript{40} towards the duties of the TNCs, which resulted in various international Codes of Conduct for TNCs. Examples are the \textit{OCED - Declaration on International Investments and Multinational Enterprises,}\textsuperscript{41} 1976 and the \textit{ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977}\textsuperscript{42}. TNCs also have direct duties under some multilateral conventions. For example, both the \textit{International Convention on Civil Liability for Oil Pollution Damage}\textsuperscript{43} and the \textit{Convention on Civil


\textsuperscript{38} \textit{Supra note} 14, at 262.

\textsuperscript{39} \textit{Ibid}.

\textsuperscript{40} A well known case is the involvement of the American TNC ‘International Telephone and Telegraph Corporation’ (ITT) in the coup against president Salvador Allende in Chile in 1973. Together with the CIA this company played a part in overthrowing the democratically elected government and helping Pinochet to power.

\textsuperscript{41} \textlangle http://www.oecd.org/document/24/0,3746,en_2649_34887_1875736_1_1_1_1,00.html\textrangle Accessed on February 23, 2012.


Liability for Damage Resulting from Activities Dangerous to the Environment\textsuperscript{44} directly impose liability on legal persons including corporations. However, during the 1990s, a return to the emphasis on the rights of TNCs can be detected as parts of the efforts to promote free trade by means of globalization, liberalization, privatization and the more recently in country like India a more liberal policy for foreign direct investment.\textsuperscript{45}

Furthermore, the UN’s Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter the ‘Norms’) purport not only to bind states, but also to place obligations on transnational corporations and other business enterprises within their respective spheres of activity and influence, … to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law. 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. In this regard, the likelihood is that the liability of corporations will come indirectly through the direct liability that the Norms clearly intend to place on states.\textsuperscript{46}

TNCs are also empowered to enforce their rights.\textsuperscript{47} Various international instruments can be found where TNCs are accorded with some form of international personality. In 1981 the Iran-United States Claims Tribunal was created as part of the settlement of the Tehran hostage crisis. Before this tribunal companies have legal standing under certain conditions. And under North American Free Trade Agreement (NAFTA), TNCs are able to seek recompense, spectacularly, from foreign governments for breach of their right to unhindered, cross-border trade through the Agreement’s private dispute-settlement mechanism.\textsuperscript{48} Another example is the United Nations Compensation

\textsuperscript{44} 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 February 23, 2012.

\textsuperscript{45} Supra note 14, at 264.


\textsuperscript{47} Supra note 14, at 265.

\textsuperscript{48} Implementation of the NAFTA began on January 1, 1994. This agreement removed most barriers to trade and investment among the United States, Canada, and Mexico. Under the NAFTA, all non-tariff barriers to agricultural trade between the United States and Mexico were eliminated. In addition, many tariffs were eliminated immediately, with others being phased out over periods of 5 to 15 years. This allowed for an orderly adjustment to free trade with Mexico, with full implementation beginning January 1, 2008. <http://www.fas.usda.gov/itp/policy/nafta/nafta.asp> Accessed on February 24, 2012.
Commission⁴⁹ and the Seabed Dispute Chamber⁵⁰. Evidently, therefore, as even this brief note makes clear, it is possible to invest in TNCs sufficient international legal personality to bear obligations, as much as to exercise their rights.⁵¹

A very innovative point which clarifies the issue of the legal status of TNCs has been put forward by Wolfgang Friedmann, as far back as 1964 and again repeated by Rosalyn Higgins. She states that the concept of legal personality is an intellectual prison and “the whole notion of subjects and objects has no credible reality and […] no functional purpose.”⁵² International law is formed by the needs of the international community. In her opinion it would therefore be better to speak of participants instead of subjects.⁵³

3.1.2 Legal Personality of Transnational Corporations under Indian Law

The term ‘person’ or ‘personality’⁵⁴ has been used in many different senses from times immemorial. In the philosophy and moral sense the term has been used to mean the rational substratum or quality of human being. In anthropological and biological sense the term ‘person’ has been used to mean as one of the species. In law the word ‘person’ is given a wide meaning. It means not only human beings but also associations as well. Law personifies some real things and treats it as a legal person. Corporations, companies, trade unions, and friendly societies, institutions like universities, hospitals, objects like an idol, holy book Guru Granth Sahib⁵⁵ are some examples of artificial personalities recognised by law in the modern age.⁵⁶

As Roscoe Pounds stated, “In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the

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⁵¹ Supra note 12, at 34-35.


⁵³ Supra note 14, at 267.

⁵⁴ The term ‘personality’ should be distinguished from humanity. Humanity means only human beings but personality includes inanimate object also. Personality is wider than humanity. Sometimes both coincide and sometimes they do not.


constitution of Antoninus Pius the slave was not a person. He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such, like animals, could be the object of rights of property."57 He further stated that "In the French colonies, before slavery was there abolished, slaves were put in the class of legal persons by the statute of April 23, 1833 and obtained a somewhat extended juridical capacity by a statute of 1845. In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights."58

According to Salmond, "A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination. Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations."59

Paton assigns rights and duties to legal persons while stating that "It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units—all entities recognised by the law as capable of being parties to a legal relationship. ... Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities."60

In Corpus Juris Secundum (CJS) legal personality is defined as "A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. According to the CJS definition it is stated that the word person, in its primary sense, means natural

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58 Id., at 193.
59 P.J. Fitzgerald (ed.) *Salmond on Jurisprudence*, 305 (12th ed., 1968). He further three special cases of legal personality: The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members; the second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself; and The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses a charitable fund, for example or a trust estate.
person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons.\(^{61}\) It further define artificial person as “Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.”\(^{62}\) Another source defined the term ‘person’ as, “We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.”\(^{63}\)

In 1819, John Marshall, J., in Dartmouth College case held that\(^{64}\)

A corporation is an artificial being, intangible and existing only in contemplation of the law. Being, a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important ones being, immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual.

Thus, it is well settled and confirmed by the authorities on jurisprudence and courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. Therefore, institutions like corporations and companies were created, to help the society in achieving the desired result. The Constitution of State, Municipal Corporation, Company, any entity, living, inanimate, objects etc. are all creations of the law and these Juristic Persons arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.\(^{65}\)

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a domestic law. In India, a corporation/company can be registered under the Companies Act, 1956 or the Societies Registration Act, 1860. Such a company will be a juristic person for all legal purpose in India. The Apex Court of the


country has reiterated the same view regarding this issue from time to time in many cases and a few of the landmarks judgments are discussed as under.

In *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, the Supreme Court has held that:66

The Corporation in law is equal to a natural person and has a legal entity of its own. The entity of the Corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the Corporation. This position has been well established ever since the decision in the case of *Salomon v. Salomon and Co.* was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the Corporation or a Company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the Corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

In another landmark case *Som Prakash Rekhi v. Union of India & Anr.*, the Supreme Court held that a legal person is any subject matter other than a human being to which the law attributes personality. It was further observed that:67

Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person.

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66 (1964) 6 SCR 885, para 24.
Indeed, a legal person is any subject-matter other than a human being to which the law attributes personality. “This extension, for good and sufficient reasons, of the conception of personality... is one of the most noteworthy feats of the legal imagination.” Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law.

The Apex Court in *Samatha v. State of A.P.*, further laid down that:68

The word ‘Person’ in the interplay of juristic thought is either natural or artificial. Natural persons are human being while artificial persons are corporation. Corporations are either corporations aggregate or corporation sole. In *English Law* by Kenneth Smith and Denis Keenan (7ed.) p. 127, it is stated that “[L]egal personality is not restriction to human beings. In fact various bodies and associations of persons can by forming a corporation to carry out their functions, create an organisation with a range of rights and duties not dissimilar to many of those possessed by human beings. In English law such corporations are formed either by Charter, statute or registration under the Companies Act; there is also the common law concept of the corporation sole.”

In *Shriomani Gurdwara Prabandhak Committee v. Som Nath Dass & Ors.*, the Supreme Court once again held that Guru Granth Sahib is a juristic person after taking into consideration the concept of legal/juristic person in detail. The court reiterated that:69

The very words “Juristic Person” connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a Person in the various countries we find surprisingly it has projected differently at different times.

68 (1997) 8 SCC 191 at 233 para 52.
Another important question which came up before the Supreme Court of India besides that corporations are legal person was that whether a company, as a legal person, can enjoy the fundamental rights granted to the citizens of India under Part III of the Indian Constitution or in other words is company a citizen? The Supreme Court in a nine judges bench observed in State Trading Corporation of India Ltd. v. CTO,70 that “corporations cannot be regarded as citizen for the purpose of enforcing rights under Article 19 (1)(f) and (g),” of the Constitution.

In R.C. Cooper v. Union of India,71 the Supreme Court further observed that how rights of the citizen differs from the corporations when it comes to filling writ for the protection of the fundamental rights. The court observed the following points that a Company is not a ‘citizen’ and, therefore, cannot maintain a writ petition for enforcement of fundamental freedoms under Article 19 which are conferred on ‘citizens’ alone; the rights of a company and the rights of its shareholders are not co-extensive; and generally writ is filed by a company along with a shareholder, who is an Indian citizen, so that the petition is maintainable.

The Apex Court reiterated the same view in Bennet Coleman & Co. v. Union of India,72 that it is now clear that the fundamental rights of citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholder’s rights are equally and necessarily affected if the rights of the company are affected.

The Indian law through judicial intervention recognize and upheld the concept of legal personality imposed upon on TNC and it further differentiated the fields of applicability when the question of fundamental rights come in.

3.2 Impact of Transnational Corporations on Human Rights: Various Theories

Of all human rights failures today, those in economic and social areas affect by far the larger number and are the most widespread across the world’s nations and larger numbers of people.

70 (1964) 4 SCR 99 para 62. However, K.C. Das Gupta, J., had given a dissenting opinion and said that the Company is entitled to the fundamental right under Article 19 (1)(f) and (g) of the Constitution of India as a citizen of India.


72 AIR 1973 SC 106. Also see: Delhi Cloth and General Mills Ltd. v. Union of India, AIR 1983 SC 937.
Human Development Report 2000

Transnational corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates - 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 towards the expansion of human capabilities, of which human rights are both a main ingredient and a precondition. In the words of Kathleen, it is a “tenet of faith among politicians, financiers, and academicians” that “economic development enhances human rights conditions.”

At the same time, the potential impact of TNCs on human rights in the developing countries is overlooked in the globalized economy. The TNCs or ‘leviathans’ or ‘hydra-headed monsters’ occasionally commit serious human rights violations or are complicit in such violations, and, despite their obligations under the international human rights law to protect human rights of people under their jurisdiction, States hosting their investments appear too often unwilling or incapable to do so.

As transnational corporations gain greater influence over the global market, and as the world becomes more highly invested in a global market, the relationship between TNCs and human rights practices becomes increasingly important, which further raises question that ‘Are TNCs simply agents of ‘economic globalization’?’ Economic globalization as such, however, is neither positive nor negative to human rights: whichever impact it has on their realization depends on the forms it takes and the kind of governance.

79 The very definition of economic globalization as the ‘integration of national economies into international economies through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology’ illustrates the essential function TNCs have to fulfil in this process, and this process is crucial to the economic growth and therefore also to the development of less industrialized countries.
it is guided by. Whereas the political factors address the questions of regulating the behaviour of TNCs. The politics of rights, legal protection of rights, and most philosophical treatments of human rights posit nations as the primary actors. All international documents on human rights limit liability for violations to ‘state parties’. Like politicians, human rights philosophers also commonly argue that rights obligations fall only upon governments. In this part, only two theories regarding the economic impact of TNCs on human rights in the third world countries are discussed.

3.2.1 Theories of Human Rights and Development

Two school of thoughts are readily identifiable when it comes to theories of TNCs, development and rights in the third world or in other words, to describe the TNCs activities in the developing world i.e., “Engines of Development” and “the Hymer Thesis” or “Tools of Exploitation / oppression”. One view is generally pro-TNCs and highlights the advantages provided for the developing States. William Meyer propagated this theory and referred it as “engines of development” school. The other view is more critical or anti-TNCs which stresses the negative impact of TNCs, Meyer called it “the Hymer Thesis”. According to Bjorn Letnes, “the former applies statistical analyses at the national level and finds positive correlations between foreign direct investment and second generation economic and social rights, while the latter employs country or corporate case studies to illustrates numerous examples of the human rights’ violations of corporations.” So, both views were developed to identify the economic impact of TNCs.

3.2.1.1 The Engines of Development Theory

The “engines of development thesis” dates back to the post World War II - era belief that economic development automatically would generate improved human rights practice. The tradition of emphasizing the positive impact of TNCs - a tradition that also

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80 Supra note 78, at 404.
81 It is known as the Hymer Thesis because it was heavily influenced during its early development by the work of economist Stephen Hymer. Central elements of the Hymer thesis are congruent with, at times almost indistinguishable from, those of dependency theorists. In 1970s, the dependency theory was at its peak and the two views regarding pro-TNCs and anti-TNCs were debated at that time as they are debated today.
82 Bjorn Letnes and Sally Wheeler used these terms respectively for anti-TNC theory of human right and development.
84 The Alliance for Progress of the 1960s, the Reagan-Bush Carribbean Basin Initiative, the Baker Plan, the Brady Plan, President Reagan’s bilateral investment treaties, and NAFTA all included provisions to open the third world to greater US investment and a larger MNC presence. Washington often has

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dominates international agencies like the World Bank and the International Monetary
Fund – has its roots in neo-liberal theory in general and modernization theory in
particular. The central argument is aptly formulated by Meyer. According to him, “the
pro-(TNC) view holds that transnationals operating in the third world directly promote
economic and social rights, and indirectly support civil and political rights. If there is a
positive linkage between economic development and human rights, then to the extent that
multinational promote development, they must also enhance human rights.” Economic
development is enhanced by the transfer of capital requiring the development of a more
robust domestic finance regime and commercial law, making the host economy more
efficient and the fertilization of host economies with technical know-how. The arrival of
FDI or colonization of supply chain partnership brings employees benefits such as health
care and training.

The possible connection between TNCs and civil or political rights is much less
direct. Early theories of development advocated infusions of foreign investment and
foreign business into developing countries as a way to promote the expansion of a
politically stable, urban middle class. The new middle class would in turn enhance
stability and political tolerance in the larger society. Hence, civil and political freedoms
(for example, democracy) would expand as third world nations modernized. As Sally
observed, “the essence of Meyer’s argument is that different levels of analysis are used by
the two sides, allowing each one to assert the correctness of their position. This side of the
argument is looking at the rise in literacy rates and the drop in infant mortality for
example.”

However, in 1999, Jackie Smith and others, while rejecting the analysis of Meyer
pointed out that he failed to point out that “analyses of third-world development programs
carried out in the postwar period have documented several trends that cast serious doubt
on the “engines of development” model as an accurate reflection of reality. First, rapid
economic growth has not led to serious reductions in unemployment. Secondly, rapid

proposed an open environment for direct foreign investment by MNCs as a tool to expand
development, increase welfare, and promote democracy in the third world, all the same time. For
details see: William H. Meyer Infra note 84, at 377.
85 Supra note 83, at 261.
87 Supra note 83, at 267-70.
growth has been associated with widening gaps in the incomes of rich and poor both within and between countries. Thirdly, the growth witnessed in the last few decades has proven inadequate for providing the basic needs of growing numbers of the world's poor.  

3.2.1.2 The Hymer Thesis

Although Stephen Hymer does not use the language of human rights, his work on the organizational structure of (transnational) corporations elaborates how TNCs directly contribute to violations of human rights in developing countries. Hymer begins with two laws of economic development: the law of increasing size and the law of uneven development. In an often-quoted passage, Hymer describes the first law: Since the beginning of the Industrial Revolution, there has been a tendency for the representative firm to increase in size from the workshop to the factory to the national corporation to the multi-divisional corporation to the (transnational) corporation. Hymer also argues that the first law leads directly to the second law, entailing “the tendency of the system to produce poverty as well as wealth, underdevelopment as well as development.” This is due to the very structure of the TNC itself. 

The organizational structure of TNCs allegedly creates uneven or dual development. The explanation that the ultimate source of this pattern is to be found within the very structure of the TNC itself is Hymer’s key contribution to theories of dual development. “It is not technology which creates inequality; rather it is organization. . . .”

91 Drawing on the work of Alfred Chandler and Fritz Redlich, Hymer identifies three levels of TNC organization. Level III, the lowest level of the MNC, is concerned with day-to-day operations. Level II coordinates managers at Level III. Level I, top management, sets goals and planning for the entire firm, “strategy rather than tactics.” This is the level at which one would find French’s corporate internal decision structures. Furthermore, location theory “suggests that Level III activities would spread themselves over the globe according to the pull of manpower, markets and raw materials. . . . Level II activities . . . tend to concentrate in large cities [near Level III] . . . Level I activities, the general offices, tend to be even more concentrated than Level II activities, for they must be located close to the capital market, the media, and the government.” Hymer offers the United States, specially New York City, as an example of a Level I location. In regard to an international pattern of dual development, Hymer’s work on TNCs is consistent with dependency theory. Using the dependency theory categories of center and periphery, one would say that Level III is in the rural periphery of third world nations; Level II is in the urban center of these peripheral third world nations; and Level I is located in the industrialized centres of the West. For details see: Stephen Hymer, “The Multinational Corporations and the Law of Uneven Development”, George Modelski (ed.) Transnational Corporations and World Order, 386 (1979). Also see: Alfred D. Chandler and Fritz Redlich, “Recent Development in American Business Administration and Their Conceptualization”, Bus. Hist. Rev., 103 (Spring, 1961).
because “specialization by nationality can be expected within the (transnational) corporation hierarchy” it creates “a division of labor based on nationality” at the global level. James Caporaso’s work would be a more recent example of research that reveals the international structures of corporate/capitalist divisions of labor.  

Hymer's thesis leads to the conclusion that corporate investment demands repressive government as it contributes to widening income gaps and systematically concentrates poverty among third world workers. Also, Herrmann's analysis of the logic behind transnational corporate investment suggests that the relationship between human rights and TNCs is negative. Government interest in promoting international investment is likely to lead it to offer concessions that are detrimental to public coffers, environmental health, and labour and participation rights. Corporations operate according to economic cost-benefit analysis, and therefore, human rights are only likely to play a role when the industry's consumers are highly informed and mobilized around human rights concerns.  

Bjorn Letnes and Sally Wheller used the expression “tools of exploitation” and “tools of oppression” for anti-TNCs approach. Sally argued that anti-TNC supporters are able to point to documented examples of human rights abuses by TNC such as the provision of low-waged, low-skill labour, child labour, unsafe working conditions, the outlawing of unionization, and general environmental degradation caused by the location of TNC. The bringing of employment to areas where there previously was no employment is not per se a good thing if the quality of that working environment is such that it is replete with human rights abuses.

3.2.2 A Response and Counter-Response to Theories

Jackie Smith not only criticized Meyer analysis of the presence of the TNCs and human right practices within the developing countries or in other words third world countries. They observed that “Even a cursory overview of recent major events related to transnational corporate activity and human rights suggests that any relationship between these two would be negative, or nonexistent at best. For instance, uprisings in Nigeria's Ogoniland protesting environmental destruction by Shell Oil, a British TNC, have led to widespread and violent repression of the Ogoni minority and to the execution of Ogoni leader Ken Saro-Wiwa.... Another example is the ongoing case in US courts between

92 Supra note 90, at 92.
93 Supra note 89, at 212.
94 Supra note 88, at 430.
Texaco, the US-based oil transnational, and indigenous peoples in Ecuador. This case centers around Texaco's alleged responsibility for polluting indigenous land and poisoning water sources during its years of operation there between 1967 and 1990. The fact that these cases exist suggests that TNCs are not always beneficial to human rights.95

Jackie concluded that there is hardly any relationship between the levels of direct foreign investment in a country and its human rights record. The findings illustrate the problems with quantifying human rights, and they also suggest that multiple measures of human rights practices and more inclusive measures of TNC investment should be employed in future research. The relationship between human rights practice and the economic decisions of national and global actors is more complex than either the engines of development or the Hymer thesis would suggest. The current neoliberal trend in the global economic order makes research examining the relationship between TNCs and human rights even more crucial. Theories about transnational corporate structures and the world economy suggest that the logic underlying international investment is either unrelated or antithetical to positive human rights records. These theories merit attention as they draw less upon economists’ assumptions that the benefits of capital accumulation will “trickle down,” and more upon understandings of power, organizational dynamics within transnational corporations, and historical evidence of global economic distribution.96

In the same journal, William Meyer replied to Jackie Smith et.al., opined that the later did not ‘falsified’ his results. Moreover, at international level, the evidence linking TNCs to human rights is mixed. One study shows positive correlations. A second study using different measures of human rights shows negative correlation. To adjudicate between the two studies, and to overcome the aggregation problem, one might go to another level of analysis. According to Winston, the “fundamental problem with Meyer’s approach [or Smith’s approach] is that Meyer’s model [or Smith’s model] cannot distinguish between TNCs that do, in fact, promote human rights and those which in fact do not.” Meyer concluded his response to Jackie by stating that “tests to establish the validity and applicability of theories as broad as the Hymer thesis, or the engines of development view, cannot be decided by one or two journals articles. Testing must continue at many different levels of analysis, seeking out evidence that both confirms and

95 Supra note 89, at 208-09.
96 Id., at 219.
informs the same theory. One must be aware of both the good that (TNCs) do, and the bad, if one hopes to make them better."  

However, TNCs does much to muddy the waters of this debate by engaging in the practice of 'greenwashing'\(^98\). ‘Greenwashing’ refers to the emergence of an unofficial competition in social responsibility agendas.\(^99\) In addition to competing in areas such as products development, production costs and ultimately price, corporations compete over their social awareness and responsiveness by making low-cost but high-impact interventions in society. Greenwashing is often used as a way for TNCs to draw attention away from environment damage or as a method of disguising other activities which are the antithesis of responsible behaviour or observance of human rights standards.\(^100\)

3.3 Transnational Corporations and International Human Rights Instruments

International concern for human rights is not an entirely new subject. Concepts of human rights can be traced to antiquity – i.e., the Ten Commandments, the Code of Hammurabi’s\(^101\) approach to law as a means of preventing the strong from oppressing the weak, and the Rights of Athenian Citizens. Early efforts often came in response to atrocities of war and refugee problems. Religious, moral and philosophical origins can be identified not only in biblical and classical history but also in Buddhism, Confucianism, Hinduism, Judaism, Shinto, and other faiths. Rights concepts also emerged in national documents such as the Magna Carta\(^102\) of 1215, the Petition of Rights, 1628; the Habeas Corpus Act, 1679. Following the revolution of 1688 in England, Parliament enacted the

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\(^98\) Supra note 88, at 431.


\(^100\) Supra note 88, at 431-32.

\(^101\) In the winter of 1901-02, the French excavators of Susa in Iran discovered a stele of black diorite some 7 feet (a meter) high, bearing at the top a sculpture showing a Mesopotamian king receiving the insignia of his office from a God. This discovery caused an immediate sensation because the inscription contained the first collection of laws known to antedate those of the Bible. It is now known that this Code of Hammurabi, as it came to be called, is not the earliest such document, but it is still the best preserved and most extensive of its kind known from the ancient Middle East. For details see: Encyclopedia Americana, Vol. 19, 750-52 (1999).

\(^102\) Its famous clause 39 stating: No freeman shall be taken or imprisoned or banished in any way destroyed, nor will we go upon him, nor send him, except by the lawful judgment of his peers or by the law of the land has been termed as the symbol of individual liberty for centuries to come. For details see: D.P. Khanna, Reforming Human Rights, 38 (2001).
Declaration of the Rights of Man (1689) to protect citizens from violations by the monarchy.  

With the rise of nation States in the 17th century, however, classical international law rejected the notion of human rights and favoured State sovereignty. Beginning in 1648, with the treaty of Westphalia, States would agree to protect some individual rights; but the agreements typically reflected the view that individuals were objects of international law whose rights existed as a byproduct of States' sovereignty.

Development in the 18th and 19th centuries incremental steps to recognise individual rights and diminish the importance of sovereignty. They included, for instance, diplomatic efforts to protect rights of aliens abroad. Early enforcement of aliens’ rights took the form of reprisal a citizen with a grievance against a foreigner could seize the foreigner’s goods. Reprisals in the 19th century were gradually replaced by negotiations between governments of aggrieved individuals and of the territory where the wrongs occurred. A State’s right to intervene on citizens’ behalf rested on two principles the rights of aliens to be treated in accordance with ‘international standards of justice’ and to be treated equally with nationals of the country wherein they resided.

In addition, 19th century efforts by non-state actors (that is, the first non-governmental organisations, such as the Anti-Slavery Society) to abolish the slave trade and to protect workers’ rights through unions evidenced a growing international concern for human rights and one of the earliest applications of human rights norms to non-State actors, for example, slave traders. The slave trade was first condemned by treaty in the Additional Articles to the Paris Peace Treaty of 1814 between France and Britain. In 1885 the General Act of the Berlin Conference on Central Africa affirmed that ‘trading in slaves is forbidden in conformity with the principles of international law.’

However, the general notion of the law of state responsibility has long held that when a citizen of one state is mistreated by an act or omission attributed to another state, the claim of the injured citizen who has exhausted local remedies in the mistreating state can be and often is espoused by the state of nationality, which itself is deemed to be

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105 Supra note 100.
106 Supra note 100, at 177.
injured under international law. Such claims generally have been settled by negotiation or by submission of the matter to an international claims commission or arbitral tribunal. In contrast, a state’s treatment of its own national escaped international scrutiny, with limited exceptions, until the latter half of the twentieth century. The atrocities perpetrated during the World War - II brought about a fundamental change in the law.

The modern human rights movement began during World War II. The war represented the ultimate extension of State sovereignty concepts that had dominated international relations for three centuries. The war demonstrated that unfettered national sovereignty could not continue to exist without untold hardships and, ultimately, the danger of total destruction of human society. After the war political leaders and scholars continued to look to the protection of human right as both an end and a means of helping to ensure international peace and security. The victors responded to the war and the Holocaust by forming the United Nations (UN). Soon thereafter, intergovernmental organisations in Europe and the USA also established their standards for the protection and promotion of human rights.107

Presently, concern for the promotion and protection of human rights is woven throughout the United Nations Charter, beginning with the preamble which ‘reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human right person, in the equal rights of men and women and of nations large and small’.108 One of the basic purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms, and to achieve these purposes, the Charter imposes obligations on the Organization and all member states. Article 55 calls on the United Nations to promote ‘universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion’.109

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. This affirmative duty includes protection against human rights abuses that might be committed by non-state

107 Id., at 178.
entities. Furthermore, under various human rights instruments non-State entities themselves appear to have duties with respect to human rights.\textsuperscript{110}

These instruments include the 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.\textsuperscript{111}

3.3.1 Universal Declaration of Human Rights

The UDHR speaks principally to governments. The Preamble proclaims that the\textsuperscript{112}

\begin{quote}
Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.
\end{quote}

The UDHR, however, arguably was intended to apply to individuals and groups also. The preamble further provides:\textsuperscript{113}

\begin{quote}[T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction. [Emphasis added]
\end{quote}

The Preamble to the UDHR refers to certain ‘equal and inalienable rights of all members of the human family.’ The UDHR does not clearly identify who bears

\textsuperscript{110} Supra note 100, at 178-79.


\textsuperscript{113} Ibid.
responsibility for respecting and protecting these rights. For example, according to Article 3, ‘everyone has the right to life, liberty and security of person.’ Article 5 asserts that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Furthermore, Article 7 proclaims that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law.’\textsuperscript{114}

Article 1, apparently recognising that certain principles should apply to individual relationships, proclaims that ‘all human beings (...) should act towards one another in a spirit of brotherhood’. It contains an explicit reference to the concept of equality in a separate provision. Furthermore, Article 28 does not refer to the State or State action when it asserts that ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’\textsuperscript{115}

The UDHR is the only document of the International Bill of Rights that explicitly deals with the right to property in its Article 17. Strictly speaking, Article 17 does not create a ‘right’ to property as such but merely addresses restrictions on property ownership. While it is not clear who bears the responsibility, the language of this provision is broad and comprehensive. However, the right is not absolute one as persons can be deprived of their property under certain circumstances, although this may not be done arbitrarily. The \textit{travaux preparatoires} indicate that the term ‘arbitrarily’ prohibits unreasonable interference by States. However, in practice corporations are often the violators of the right to property in collusion with the State. Kunneman describes several examples of large scale deprivation of property by TNCs in the 1990s.\textsuperscript{116}

If the social aspects of the right to property are stressed, then it is clear that corporations do play a role. Howard and Donnelly have interpreted the right to property in terms of subsistence. According to them the right to property entails that,\textsuperscript{117}

\begin{quote}
no individual or family should be deprived, either by private citizens, corporate entities, or the State, of the property that he or she, or the
\end{quote}

\textsuperscript{114} \textit{Ibid.}
\textsuperscript{115} \textit{Ibid.}
household unit may own or control in order to produce food or an individual or household income.

If the provision is interpreted in the light of a subsistence right, it can arguably be concluded that Article 17, in certain circumstances, can be applicable to corporations. A corporations that deprives an individual of his or her means of existence by taking away property violates the interest that the provision on the right to property aims to protect.118

Article 29 also recognises non-State duties when it affirms that ‘everyone has duties to the community …’ In addition, Article 30 deals with any potential conflict between two rights in the UDHR, which suggests that groups and individuals have human rights obligations:119

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Hence, although not its principal thrust or expressly but it appears that non-State entities have human rights duties under the UDHR.120

3.3.2 International Covenant on Civil and Political Rights / International Covenant on Economic, Social and Cultural Rights

The ICCPR, while focusing principally on governments, also discuss obligations of non-State entities.121 The Covenant is a multilateral treaty in which, as asserted in Article 2(1),122

[E]ach State Party (...) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

Hence, the principle duties under the Covenant are upon governments to avoid violating human rights and to ensure that individuals and other non-State entities do not abuse human rights. In addition, however, the preamble proclaims that ‘the individual, having duties to other individuals and to the community to which he belongs, is under a

118 Supra note 12, at 62.
120 Supra note 100, at 180.
122 Id., at 173.
responsibility to strive for the promotion and observance of the right recognized in the present Covenant ...' Hence, individuals, as well as States, must not deny or abuse the human rights of others.\textsuperscript{123}

Whenever a question arises regarding the human rights obligations of TNCs, the main argument remains that the TNCs should be guided by the principle of non-discrimination throughout their operations irrespective of the place of operations i.e. State. In the ICCPR and ICESCR\textsuperscript{124} the most important articles regarding the promotion of equality are the provisions on the prohibition of discrimination.\textsuperscript{125} They do not explicitly refer to discrimination between private individuals as such, but the wording of the general articles on discrimination, Article 2(2) ICESCR and Article 3 ICCPR, is sometimes taken to imply that the prohibition of discrimination is not restricted to public bodies. The fact that States should 'guarantee' the exercise of rights without discrimination suggests that the obligation extends beyond public bodies. In 1989, the Human Rights Committee states that it wishes to be informed “if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the communities, or by private persons or bodies.”\textsuperscript{126}

The concept of equality and non-discrimination can also be found in various other substantive articles of the Covenants. For example, the principle of non-discrimination is set forth in Article 20(2) ICCPR which deals with war propaganda and in Article 7 ICESCR on the enjoyment of just and favourable conditions of work. The work of the supervisory bodies on these substantive article confirms that equality and the prohibition of discrimination also cover private activities. The applicability of the prohibition of discrimination to corporations has been affirmed in various legally non-binding documents.\textsuperscript{127} For example, the Copenhagen Declaration on Social Development and Programme of Action\textsuperscript{128} sets forth in paragraph 45:

\textsuperscript{123} Ibid.
\textsuperscript{124} <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> Accessed on May 13, 2011.
\textsuperscript{125} Article 2[1], 3[4[1], 20[2] and 26 ICCPR and Article 2[2-3], 3 and 7 ICESCR. In the UDHR the prohibition of discrimination can be found in Article 2.
\textsuperscript{127} Supra note 12, at 51.
Particular efforts by the public and private sectors are required in all spheres of employment policy to ensure gender equality, equal opportunity and non-discrimination on the basis of race/ethnic group, religion, age, health and disability, and with full respect for applicable international instruments.

And the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policies of the International Labour Organization (ILO), according to Article 22, [transnational corporation] should be guided by the principle of non-discrimination throughout their operations.129

Furthermore, Article 6 of the ICCPR deals with the right to life. Even though the wording of the article does not appear, *prima facie*, that protection extends beyond a public violation of this right but keeping in view the fundamental importance of the right and the way in which TNCs infringe this right either by supporting government in violating the right or by doing so itself during operation particularly in developing countries, highlight the need to include private actors within the scope of Article 6. A number of examples can be quoted where the TNCs violated the right to life like in India the Bhopal gas disaster in 1984 when toxic gas leaked from a Union Carbide plant killing over 2000 people and injuring over 200,000.130

Many of the rights enunciated in the covenant mirror the formulation in the UDHR in not clearly identifying who bears responsibility for respecting and protecting these rights. For example, according to Article 7 of the Covenant, ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Similarly, Article 5(1) repeats the substance of Article 30 of the UDHR:131

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

129 As a general principle it is stated in Article 8 of the ILO Tripartite Declaration the “All Parties concerned by this Declaration should respect (...) the Universal Declaration of Human Rights and the Corresponding International Covenants (...). As all Parties includes employers this is a confirmation of the horizontal effect of human rights in general.

130 *Supra* note 12, at 53.

A dynamic interpretation of these provisions requires that the word ‘degrading’ should be interpreted as also covering degrading situations, which might be the result of unjust corporate practices. TNCs activities can pose a serious threat to the dignity and the physical and mental integrity of the individual. First and foremost this will arise from direct in indirect support for government policies. The right not to be tortured is frequently violated by public authorities, such as the police. TNCs may become involved due to the fact that they, for example, pay or otherwise support State security forces that commit these violations.\textsuperscript{132}

Nicola Jagers identified the right to privacy as another right which can be applicable in the legal relations of TNCs. Nowadays, TNCs especially pose a threat by disregarding personal data in their data banks or by spying on their employees. The private threat to Article 17 ICCPR has been recognized in General Comment No. 16 (32) where the HRC argues: “in [our] view (...) this right is required to be guaranteed against all such interference and attacks whether they emanate from State authorities or from natural or legal persons.”\textsuperscript{133}

The protection of Children is also provided for in Article 24 ICCPR. This provision is of particular importance in the light of the widespread use of child labour. The provisions protecting the rights of children can also be considered to have horizontal effect. The State must prevent interference by its own agents but also by private parties. Regarding the provision in the ICESCR, Craven observes: “there is a clear recognition here that the responsibility of the State goes beyond the actions of itself or its agents, to positive protection of the individual from third party violations.”\textsuperscript{134}

The relevance of the provisions protecting the rights of children for corporations is manifest. Corporations, especially in the fashion and apparel industries, frequently work with manufacturers and sub-contractors in so-called low-labour-cost countries. In these countries the use of children in the production process is rather common. Finally, Article 3 of the International Convention on the Rights of the Child (ICRC) should be mentioned. This article reads:\textsuperscript{135}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{132} Supra note 12, at 55.
  \item \textsuperscript{133} UN Doc. A/43/40, Annex, 181-183 (1988); UN Doc. CCPR/C/21/Rev.1, para 1, 19-21, (March 23, 1988).
  \item \textsuperscript{134} Matthew Carven, \textit{The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development}, 112 (1995).
  \item \textsuperscript{135} Supra note 12, at 60.
\end{itemize}
\end{footnotesize}
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

It can be stated that the right to protection of children can be applicable to the legal relations of corporations.

Further, TNCs can pose a very serious threat to minorities. A restrictive interpretation of the right to protection for minorities, an exclusively State-oriented interpretation, would deprive this provision of its object and purpose. The impact of TNCs on the right to protection of minorities is recognized by the Committee on Economic, Social and Cultural Rights. Even though the State is held accountable, the fact that the committee make explicit reference to the relationship between corporations and this right can be interpreted as an acknowledgement of the effect of this provision between private parties. Again, the activities of mining companies are particularly relevant. For example, the cases brought by indigenous tribes against oil corporations in Nigeria, the Amazon region and in Papua New Guinea demonstrate the impact of corporate activities on the right to freely dispose of natural wealth and the protection of minorities.\textsuperscript{136}

3.3.3 Convention on the Elimination of Discrimination Against Women and the UN Declaration on the Elimination of Violence Against Women

The Convention on the Elimination of Discrimination Against Women (CEDAW)\textsuperscript{137} and the UN Declaration on the Elimination of Violence Against Women, 1993\textsuperscript{138} also another important human rights instruments that require governments to protect individuals from the Conduct of non-State entities. Article 2(b) and (e) of the Women’s Convention provide that States must undertake to ‘adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women’ and to ‘take all appropriate measures to elimination discrimination against women by any person, organization or enterprise.’ Article 11(1) obligates States to ‘take all appropriate measures to eliminate discrimination against women in the field of employment’, while Article 13 proclaims that States ‘shall take all appropriate measures to

\textsuperscript{136} Id., at 68.
eliminate discrimination against women in other areas of economic and social life ...’ the Committee on the Elimination of Discrimination against Women noted that

[U]nder general international law and specific human rights covenants, States [that have ratified] may (…) be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Similarly, the Declaration on Elimination of Violence Against Women includes all public and private acts of abuse within the definition of ‘violence against women’, which the Declaration requires States to prevent or adequately punish.

3.3.4 International Convention on the Elimination of All Forms of Racial Discrimination

The Race Convention speaks on the issue of State responsibility for human rights protection. Article 2(1)(b) proclaims, ‘each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations …’ The Race Convention further obligates States to condemn and prohibit racial segregation (Article 3) and provide to

[P]rohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and shall recognize [such activity] as an offence punishable by law … (Article 4).

Article 6 provides that ‘State Parties shall assure to everyone within their jurisdiction effective protection and remedies (…) against any acts of racial discrimination which violates his human rights …’.

3.3.5 Convention Relating to the Status of Refugees and its Protocol

The Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees deal with the international protection of refugees, charging the High Contracting Parties with certain responsibilities. Neither instrument explicitly mentions who or what are considered agents of persecution for purposes of defining ‘refugee’. The office of the UN High Commissioner for Refugees (UNHCR), however,
suggests that agents of persecution can be State or non-State actors. In its Handbook on Procedures and Criteria for Determining Refugee Status, the UNHCR states\footnote{143}, where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

### 3.3.6 Convention on the Prevention and Punishment of the Crime of Genocide

The Genocide Convention\footnote{144} confirms that genocide (i.e. 'acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group') is a crime under international law that the Contracting Parties 'undertake to prevent and to punish'. The word 'person' is used throughout the Genocide Convention, suggesting that the Genocide Convention applies not only to governments, but also to individual. Article IV explicitly provides that 'persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'\footnote{145}

Furthermore, Article V obligates the parties (i.e. governments) to enact legislation to give effect the Genocide Convention, particularly to provide 'effective penalties for persons guilty of genocide ...' Hence, under the Genocide Convention both non-State entities and governments have duties to refrain from committing crimes of genocide. Beyond that duty, governments also must protect against the genocidal acts of non-State entities by preventing and punishing such acts.\footnote{146}

### 3.3.7 Regional Instruments

Several regional human rights instruments also address the issue of individual responsibility. The African [Banjul] Charter on Human Rights and Peoples’ Rights\footnote{147} affirms the duties of individuals with respect to human rights. It states in the preamble, ‘that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone ...’ Chapter II, entitled ‘Duties’, provides in Article 27 that ‘[e]very

\footnotesize

\begin{itemize}
  \item \footnote{145} Ibid.
  \item \footnote{146} Id., at 2.
\end{itemize}
individual shall have duties towards his family and society, the State (…) and the international community’, and that the ‘rights and freedoms of each individual shall be exercised with due regard to the rights of others …’ Article 28 further states that

[...]every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29 states that the individual has additional duties to preserve and strengthen the family and the national community.

The American Convention on Human Rights (American Convention) sets out three distinct obligations of State Parties in Article 1, which obligates them to respect and ensure respect for the rights guaranteed. Under this provision, States must (i) abstain from violating human rights; (ii) prevent violations by State entities and abuses by non-State abuses of human rights. The Inter-American Court of Human Rights\(^\text{148}\) relied on these principles of the American Convention in two cases brought by the families of disappeared persons against the Government of Honduras. In observing that the American Convention sets out affirmative duties to prevent and remedy human rights violations, the Court suggested that State responsibility extends to omissions by State actors. The Court held that while a State is not directly responsible for a human rights abuse committed by an individual, it becomes responsible when it demonstrates a lack of due diligence to prevent the abuse or to respond to it as required by the American Convention. In addition, the Court declared that if a State fails adequately to investigate human rights abuses by non-State entities, the State is responsible for the abuses under the American Convention.\(^\text{149}\)

The American Declaration of the Rights and Duties of Man, 1998\(^\text{150}\) (American Declaration), as its name suggests, contains clear language as to both the rights and also the duties of individuals. The American Declaration proclaims that ‘[t]he international protection of the rights of man should be the principal guide of an evolving American law’, suggesting that the States in the Western Hemisphere bear responsibility for protecting the ‘rights of man’. The preamble proclaims that


all men are born free and equal, in dignity and in rights, and being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

Chapter One of the American Declaration enumerates the rights of individuals, Chapter Two discusses individual duties, including the duty to conduct oneself ‘in relation to others that each and every one may fully form and develop his personality.’ Other duties listed include duties to support and protect one’s minor children, to acquire at least an elementary education, to vote, to obey the law, to work, and to pay taxes.

The European Convention for the Protection of Human Rights and Fundamental Freedom (European Convention), like other human right instruments, focuses mainly on the States’ duty not to interfere through their own agents with the individual’s exercise of fundamental freedoms. Certain parts of the European Convention also imply a positive duty for States ‘to put in place a legal, judicial and administrative framework effectively protecting against violence, including violence committed by non-State actors.’ Analysing the European Convention covers not only human rights violations by States, but also the actions of private bodies and individuals. For example, Article 1 of the European Convention requires States to ‘secure recognition to everyone within their jurisdiction’ the rights and freedoms guaranteed in the European Convention. Article 2 proclaims that ‘[e]veryone’s one right to life shall be protected by law.’ Using the term ‘privatization of human rights’, Clapham posits that governments are obliged to take appropriate preventive and punitive measures to protect people against private abuses of their guaranteed human rights. He argues that the question is no longer whether the European Convention applies to the private sphere, but rather, which rights apply and to what extent. 151

The international instruments on human rights i.e., UDHR, ICCPR, ICESR, Race Convention etc., talks about the protection of human rights and the obligation is imposed upon states but includes impliedly the non-state entities i.e., individuals or TNCs. The international instruments on human rights does not expressly binds TNCs for implementation of human rights but impliedly falls under the head of non-state entities. The same principle is followed in Regional instruments for protection of human rights i.e., African Charter on Human Rights and Peoples Right, the Inter-American Convention on Human Rights, the European Conventions on the Protection of Human Rights and Fundamental Freedom. The International Convention and Regional Instrument doesn’t

expressly mention the word ‘State’ for enforcement of human rights but uses the word ‘Person’ or ‘Individual’ which is interpreted in wider sense and takes into consideration the implied duty of TNCs towards protection of human rights.

To sum up, the international instruments on human rights fail to provide protection to the increasing cases of human rights violation. There was a constant pressure of NGOs, social workers, political authorities, labour organization into develop specific guidelines or code of ethics specially for TNCs. As a result of the same, several international regulation i.e., OCED Guidelines for Multinational Enterprises, ILO Tripartite Declaration of Principles concerning MNEs, UN Global Compact, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises were adopted for compliance of human rights in TNCs.

3.4 Liabilities of Transnational Corporations under Indian Law

3.4.1 Civil Liability

In the field of tort the governing principle is that a master will be liable for the torts of his servants if they occur in the course of the servant’s employment and in the case of agents, if they are within the scope of the agent’s authority. In this respect the courts cannot permit the defence of ultra vires. If that defence were to prevail “no company could ever be sued if the directors of the company after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd.”

Another author, Clive M Schmitthoff has also reiterated that “It is believed that in these circumstances the company is liable for the torts of its agents or servants, even though these torts are ultra vires its objects. Obiter dicta in American decisions and eminent writers can be quoted in support of this view. It is thought that this view is in harmony with the scanty modern indications of English judicial opinion on this issue.”

The Supreme Court in M.C. Mehta v. Union of India, held the following regarding the liability to pay compensation for tortious liability where:

an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of

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155 Id., para 31 at 421.
such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in *Rylands v. Fletcher* \(^\text{156}\).

It further held that\(^\text{157}\)

we would like to point out that the measures of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused by an account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

In another landmark case *Charan Lal Sahu v. Union of India*,\(^\text{158}\) the Supreme Court observed on the issue that what should be the law to deal with transnational corporations to protect the human rights of the people while besides following the principle of absolute liability. The Court emphasised that the Bhopal Gas Leak disaster and its aftermath emphasise the need for laying down certain norms and standards that the government to follow before granting permission or licences for the running of industries dealing with material which are of dangerous potentialities. K.N. Singh, J. while concurring held that the fundamental rights: \(^\text{159}\)

must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by Cls. 9 and 13 of U.N. Code of Conduct of Transnational Corporations. The evolving standards of international obligations need to be respected, maintain dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and

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\(^{156}\) *The Rule of Rylands v. Fletcher* (1868) LR 3 HL 330 : 19 LT 220.

\(^{157}\) (1987)1 SCC 395 at 421, para 32.

\(^{158}\) AIR 1990 SC 1480. The Union of India under the Bhopal Gas Leak Disaster Act, 1985 took upon itself the right to sue for compensation on behalf of affected parties and filled a suit in the New York District Court for realization of compensation. Judge Keenan by his order dated 12th May 1986, dismissed the petition on the ground of *forum non conveniens*. The main question in the present case before the Court was: Is the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 is constitutionally valid?

\(^{159}\) AIR 1990 SC 1480 at 1551, para 137.
standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent Corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation.

The Court further held that in cases where the assets of subsidiary of transnational corporations are inadequate to satisfy the claims arising out of disaster then it become necessary to evolve,

\[160\] either by international consensus or by unilateral legislation, steps to overcome these handicaps and to ensure (i) that foreign corporations seeking to establish an industry here, agree to submit to the jurisdiction of the Courts in India in respect of actions for tortious acts in this country; (ii) that the liability of such a corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country, but that the victims are able to reach out to the assets of such concerns anywhere in the world; (iii) that any decree obtained in Indian Courts in compliance with due process of law is capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles, in those countries.

The Bhopal gas disaster led to many litigations in the Supreme Court under various provisions of law including tortious liability of Union Carbide Corporation of India. In another case of Union Carbide Corporation v. Union of India\[161\], the settlement recorded by the Supreme Court in Bhopal Gas Disaster case was challenged on the grounds that it is void under O. 23, R. 3-B of the Civil Procedure Code, 1908 under which the recording of the settlement must be preceded by notice to the persons interested in the suit, which the

\[160\] AIR 1990 SC 1480 at 1563, para 146.
\[161\] AIR 1992 SC 248.
Court did not do. The Court dismissed the petition while upholding its five judges bench decision in the case of Charan Lal Sahu. The majority view held that:  

While we do not intend to comment on the merits of the claims and of the defences, factual and legal, arising in the suits, it is fair to recognise that the suit involves complex questions as to the basis of UCC’s liability and assessment of the quantum of compensation in a mass tort action.

The Court further held to:  

ensure that in the – perhaps unlike – event of the settlement-fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after funds is exhausted are not left to fend themselves. ... If should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any.

The judgment of the Supreme Court in the case of Union Carbide Corporation was criticized at large even by jurists outside India for settlement at such a fewer amount keeping in view the effect of disaster on the coming generations.

3.4.2 Criminal Liability

They (corporations) cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls.

Sir Edward Coke

"The company is intangible; it exists only in contemplation of law; it has no physical body... As Lord Chancellor Selborne once said, "It is a mere abstraction of law"." Hence, the company can file a criminal complaint but it must be represented by a natural person. A company cannot personally commit any crime. It cannot even authorise any crime because its authority always remains circumscribed by the objects clause of its memorandum and that clause cannot contain anything unlawful. Therefore the question

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163 AIR 1992 SC 248 at 308, para 98.
often arises is as to the extent to a corporation can be held liable for any crime committed by those who are working for it.¹⁶⁶

As Kenny observes: “Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. “Can you hang its common seal?” asked an advocate in James KK’s days (8St.Tr.1138).” “Thus the fact that a corporation cannot be hanged or imprisoned sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine.”¹⁶⁷

In *Halsbury’s Laws of England*, the law on the point has been stated as under:¹⁶⁸

A corporation may not be found guilty of criminal offences, such as treason or murder, for which death or imprisonment is the only penalty, nor may it be indicted for offences which cannot be vicariously committed, such as perjury or bigamy. Subject to these exceptions, a Corporation may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will of the Corporation and control what it does. The acts and state of mind of such persons are, in law, the acts and state of mind of the Corporation itself. A Corporation may not be convicted for the criminal acts of its inferior employees or agents unless the offence is one for which an employer or principal may be vicariously liable. Whenever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a Corporation may be indicted, whether or not the statute refers in terms to Corporations.

Further, it deals with the capacity of a Corporation to commit a crime. It has been stated that in general a Corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those including those require *mens rea*. Criminal liability of a Corporation arises where an offence is committed in the course of the Corporation’s business by a person in control of

its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the Corporation. So, the position in England is that Corporation are liable for criminal prosecution even where the offence requires a criminal intent.\(^{169}\)

Again in 19\textit{ Corpus Juris Secundum}, para 1363 it has been observed as under:\(^{170}\)

\begin{quote}
A corporation may be criminally liable for crimes which involve a specific element of intent as well for those which do not, and, although some crimes require such a personal, malicious intent, that a corporation is considered incapable of committing them, nevertheless, under the proper circumstances the criminal intent of its agent may be imputed to it so as to render it liable, the requisite of such imputation being essentially the same as those required to impute malice to corporations in civil actions.
\end{quote}

The question of criminal liability of a juristic person has troubled Legislatures and Judges for long. Though, initially, it was supposed that a Corporation could not be held liable criminally for offences where mens rea was requisite, the current judicial thinking appears to be that the mens rea of the person in-charge of the affairs of the Corporation, the ‘alter ego’, is liable to be extrapolated to the Corporation, enabling even an artificial person to be prosecuted for such an offence.\(^{171}\) The companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary \textit{mens rea} for the commission of criminal offences. The legal position in the United States and England, Canada, France and Germany and India has now crystallized to leave no manner of doubt that a corporation would be liable for crimes of intent.

In the year 1909, the United States Supreme Court in \textit{New York Central & Hudson River Railroad Co. v. United States} stated the principle thus:\(^{172}\)

\begin{quote}
It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offences, of
\end{quote}

\(^{169}\)\textit{Halsbury’s Laws of England}, Vol. 11(1), para 35. Also see: \textit{Assistant Commissioner, Assessment-II v. Velliappa Textiles Ltd. AIR 2004 SC 86 at 104, para 51.}  


\(^{171}\) \textit{Esso Vs. Udharam Bhagwandas Japanwalla}, (1975) 45 Com Cases 16 (Born - DB).  

\(^{172}\) 53 L Ed 613 at 622.
which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offences might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that inter-State commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

The aforesaid view is reiterated in the 19 American Jurisprudence 2d para 1434 in the following words: 173

Lord Holt is reported to have said (Anonymous, 12 Mod 559, 88 Eng Reprint 1164) that ‘a corporation is not indictable, but the particular members of it are’. On the strength of this statement it was said by the early writers that a corporation is not indictable at common law, and this view was taken by the courts in some of the earlier cases. The broad general rule is now well established, however, that a corporation may be criminally liable. This rule applies as well to acts of misfeasance as to those of nonfeasance, and it is immaterial that the Act constituting the offence was ultra vires. It has been held that a de facto corporation may be held criminally liable.

As in case of torts the general rule prevails that a corporation may be criminally liable for the acts of an officer or agent, assumed to be done by

173 Iridium India Telecom Ltd. v. Motorola Inc. (2011) 1 SCC 74 at 97, para 56.
him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation. A specific prohibition made by the corporation to its agents against violation of the law is no defence. The rule has been laid down, however, that corporations are liable, civilly or criminally, only for the acts of their agents who are authorized to act for them in the particular matter out of which the unlawful conduct with which they are charged grows or in the business to which it relates.

It is also appropriate to make reference to a decision of the United States Supreme Court. The judgment was rendered in United States vs. Union Supply Company by Justice Holmes. There was an indictment of a corporation for willfully violating the sixth section of the Act of Congress of 1902 and any person who willfully violates any of the provisions of this Section shall, for each such offence, be liable to be punished with fine not less than fifty dollars and not exceeding five hundred dollars, and imprisonment for not less than 30 days, nor more than six months. It is interesting to note that for the offence under Section 5, the Court had discretionary power to punish by either fine or imprisonment, whereas under Section 6, both punishments were to be imposed in all cases. The plea of the company was rejected and it was held:174

It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape.

The Courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the

company / body corporate, i.e., the person or group of person that guide the business of the company, would be imputed to the corporation. It may be appropriate at this stage to notice the observations made by the MacNaughten, J. in the case of Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.:\(^{175}\)

A body corporate is a 'person' to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention -- indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

The principle has been reiterated by Lord Denning in the case of H.L. Bolton (Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd. in the following words:\(^{176}\)

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in Lennard's Carrying Co. Ltd. v.

\(^{175}\) 1944 KB 146. (1944) 1 All ER 119 (DC). Also see: Iridium India Telecom Ltd. v. Motorola Inc. (2011) 1 SCC 74 at 98, para 60.

\(^{176}\) (1956) 3 All ER 624 (CA). Also see: Iridium India Telecom Ltd. v. Motorola Inc. (2011) 1 SCC 74 at 99, para 61.
Asiatic Petroleum Co. Ltd.\textsuperscript{177} (AC at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty.

The aforesaid principle has been firmly established in England since the decision of House of Lords in 

\textit{Tesco Supermarkets Ltd. v. Nattrass}. In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law:\textsuperscript{178}

\begin{quote}
I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company’s servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.
\end{quote}

Hence when the question is of attributing the act or state of mind of an individual to a company, different rules would have to be invoked in different circumstances depending upon a number of factors.\textsuperscript{179} It has been opined in \textit{Attorney General's Reference} that on a charge of manslaughter by gross negligence, a non-human defendant, such as a corporation, could not be convicted in the absence of evidence establishing the

\textsuperscript{177} (1914-15) All ER Rep 280 (HL). Also see: \textit{Iridium India Telecom Ltd. v. Motorola Inc.} (2011) 1 SCC 74 at 99, para 61.

\textsuperscript{178} (1971) 2 All ER 127. Also see: \textit{Iridium India Telecom Ltd. v. Motorola Inc.} (2011) 1 SCC 74 at 99, para 62.

guilt of an identified human individual for the same crime. As a matter of general
observation, the court said: \(^{180}\)

> Large companies should be as susceptible to prosecution for
> manslaughter as one-man companies. Where the ingredients of a common
> law offence were identical to those of a statutory offence, there was no
> justification for drawing a distinction as to liability between the two and
> the public interest required the more emphatic denunciation of a company
> involved in a conviction for manslaughter.

The decision of Canadian Courts regarding the criminal liability of Corporations
have developed in a way very analogous to the English case law and indeed in some
instances based on it. The Courts have used ‘alter ego’ doctrine to attribute
mens rea
offences to Corporation and this doctrine was finally established by a decision of the
Canadian Supreme Court in Canadian Dredge and Dock Company v. \(R \) \(^{181}\) that not only the
Board of Directors would be seen as the directing mind of a company but also the
Managing Director or any other person to whom authority has been delegated by the
Board and it suffices that the acts has been committed by a person on behalf of and within
the capacity of Corporation.

Under the Regime of the 1992 French Code Penal and General part of the Code
lists in detail all the possible sanctions that can be applied to Corporations. Corporations
can be fined to five times the maximum for individual offenders. For repeated offence the
maximum is 10 times. Besides fines, numerous other types of sanctions are possible:
dissolution of the Corporation, disqualification from carrying on specific economic
activities, closing down plants that have been used to commit the offence charged,
publication of the judgement. Corporations can even be temporarily placed under judicial
supervision. It is generally accepted that the amount of the fine should be such as to
encompass the proceeds from crime and needs to have a deterrent effect as to hold
otherwise would create a de facto incentive for crime. Under the German law heavy fines
are provided for corporate crimes and there is a specific provision that the amount of fine
should be increased if they are less than the ill-gotten gains. \(^{182}\)

\(^{180}\) (No. 2 of 1999) \textit{Times}, February 29, 2000 (CA). Also see: \textit{Supra} note 165, at 373-74.
\(^{181}\) (1985) 11 RCSC 662. Also see: Assistant Commissioner, Assessment-II v. Velliappa Textiles Ltd. \textit{AIR}
2004 SC 86 at 102, para 52.
\(^{182}\) Guy Stessens, "Corporate Criminal Liability: A Comparative Perspective", \textit{International and
So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of the Supreme Court in the case of Standard Chartered Bank Vs. Directorate of Enforcement[183] in which it overruled its earlier decision in the case of Assistant Commissioner, Assessment-II v. Velliappa Textiles Ltd.[184] On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows:[185]

There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

This Court also rejected the submission that a company could avoid criminal prosecution in cases where custodial sentence is mandatory. K.G. Balakrishnan, J. (as His Lordship then was), speaking for the majority, summarized the law thus;[186]

As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The

[184] AIR 2004 SC 86.
[186] Id., at 549, para 31.
corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (sic and fine). We overrule the views expressed by the majority in Velliappa Textiles on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before an appropriate Bench.\(^\text{187}\)

The Supreme Court has reiterated the above mentioned decision in the case of \(\text{Madhumilan Syntex Ltd. v. Union of India}\) and held that\(^\text{188}\)

It is no doubt true that Company is not a natural person but ‘legal’ or ‘juristic’ person. That, however, does not mean that Company is not liable to prosecution under the Act. ‘Corporate criminal liability’ is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in \(\text{Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors.}\). In \(\text{Standard Chartered Bank}\), it was contended on behalf of the Company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine etc.

In \(\text{Iridium India Telecom Ltd. v. Motorola Inc.}\)\(^\text{189}\), the Supreme Court reiterated its earlier decision of Standard Chartered Bank and held that the observations made by the

\(^{187}\) \((2005)\ 4\ SCC\ 530\ at\ 550,\ para\ 32.\)

\(^{188}\) \(\text{Madhumilan Syntex Ltd. v. Union of India AIR 2007 SC 1481 at 1486, para 24.}\)
constitutional bench in the latter case “leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is that of imprisonment and fine.”

As far as criminal liability is concerned, the Indian law has followed the same principles as laid down in the English law but for civil liability the parameters of compensation are far less then determined by English and American court in their countries.

\[189\] (2011) 1 SCC 74 at 101, para 66.