CHAPTER 3

TRANSNATIONAL CORPORATE CRIMES – MEANING, CONCEPT AND SCOPE

BACKGROUND:

The twentieth century has seen and experienced swift growth of huge corporations operating across borders. The enormous and varied capital resources of these corporations enable them to adopt and to change technology on a massive scale\(^77\). In doing so, they have contributed enormously to the industrial and commercial development of the western world as also of the developing nations.

Simultaneously, with the rise of the power of the corporations there has evolved an equally great potential for significant social harm, a potential that has actually turned into hard reality. The TNC’s have often exercised undue political influence on domestic and foreign governments. They have significantly changed the earth’s ecological balance due to rapid urbanization and industrialisation. The list does not end here. Human rights violations\(^78\), corporate corruption, money laundering and human trafficking are some of the other serious offences which the corporations have been accused of committing much too often. Before proceeding any further, it must be clarified here that the corporate crimes being referred to here denotes crimes committed by a Corporation i.e. where the culpability can be attributed to the brain of the corporation, and not individual cases of


\(^78\) The list under HR violations itself is too long to be exhaustively detailed. For example, sterilization due to use of chemicals, financing of armed groups which use child soldiers for internal conflicts, buying diamonds (known as conflict diamonds) from armed groups who are known to indulge in murder, repression and rape of local population.
criminal wrongs such as embezzlement, or criminal breach or insider trading which is basically an individual act of criminal wrong though committed within the setting of a corporation. Such crimes which are committed within a corporate setting by individual employees are more appropriately termed as White collar crime and the victim in such crimes is usually the Corporation itself. Since this research is directed towards ‘entity liability’ as opposed to ‘individual liability’, use of the term ‘corporate crime’ is reserved for culpability of the corporate structure.

Why do humans commit crimes, is a subject which has been extensively researched and many theories have been put forth in this regard. The philosophical study in this regard is aided by the fact that a lot has been discovered about human psychology and hence, the knowledge acquired there under can be effectively applied in criminal philosophy to understand the underlying reason of human criminal behaviour. For example greed, vengeance or revenge, jealousy are some of the most common human emotions which drive men to commit crime i.e. mens rea or particular intention. Sometimes, crimes are committed out of sheer camaraderie without any personal interest. Still further, crimes at times are committed without any motive. However, the same knowledge about human psychology proves to be inadequate when we try to understand the reason behind aberrant corporate behaviour. One might argue that criminal corporate behaviour is actually nothing but the collective criminality/culpability of humans i.e. those who are in the decision making seat, the management or the majority shareholder.

Easy though it may seem to apply the concept of collective criminality to corporations, a detailed perusal of the same would reveal that corporate criminality goes beyond a group of people who decide to
commit a criminal wrong. When a group decides to commit a wrong, they are either driven by the desire for personal profit or achieving a personal objective which might be colored with numerous individual perceptions, not driven by monetary gains. In other words, when some persons combine their efforts to commit a wrong, they either do it in furtherance of their individual gain or objective, or to support the objective of a partner in crime but it will never be for the benefit (or perceived benefit) of an unknown person. This fact distinguishes collective criminality from corporate criminality. When Corporations commit criminal wrongs, it is not clear who benefits from those? They are not doing it for a definite group alone e.g. the management, or the majority shareholder but the ends of such wrongs are growth of the Corporation in which each individual shareholder as well as management is a beneficiary. However, the shareholders cannot be said to be sharing the culpable minds of the actual perpetrators who themselves have shareholder benefit as the least consideration. Their objective, in addition to personal gains, is growth of the profits of the Corporation which is a faceless entity. Erich Goode 79 describes corporate crime whereby executives and officers engage in illegal actions intend to further the interest of that corporation – actions which thereby become actions taken on behalf of the corporation. Because individuals in an organisation act within a corporate social structure, often the organisational and/or industry climate plays a role in whether an actor commits a crime on behalf of the organisation. Goode posits that corporate crime is a form of deviant behaviour when actions include the harm of people, sanctions against the actor and/or company, and the discrediting of the corporate actor. In sum, corporate crime is an important form of organisational deviance.

3.1 DISTINCT LEGAL PERSONALITY

The issue of whether a Corporation or a Company is a distinct legal person has been well established long back through a line of celebrated cases. An 1886 decision of the United States Supreme Court, in *Santa Clara County v. Southern Pacific Railroad* 118 U.S.394 (1886), has been cited by various courts in the US as precedent to maintain that a corporation can be defined legally as a 'person', as described in the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment stipulates that,

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In English law, this was matched by the decision in *Salomon V. Salomon & Co* [1897] AC 22. In India, a lesser highlighted case established the distinct legal identity of a Company in the case of in *Re. Kandoli Tea Estate (1886 ILR 13 Cal 43)*. The case was decided much prior to *Saloman’s* case which is considered to be the landmark case in relation to the issue of distinct legal personality of a Company. In Australian law, under the *Corporations Act 2001 (Cth)*, a corporation is legally a 'person'.

However, can it be said that Corporations have a mind of their own, minus the management or the decision makers? Certainly not. And yet the immediate beneficiary of a corporate criminal wrong is the Corporation itself. This juxtaposition gives rise to the most famous

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80 http://indiankanoon.org/doc/353507/ accessed on 4.5.2012 – the issue was regarding the payment of stamp duty on transfer of a tea garden by 8 persons to the Kandoli Tea Estate company of which were the shareholders. The Court held that the Company was a separate entity and the transfer was a conveyance between two different persons.
dilemma in modern criminal law – who should be liable in case of criminal wrong committed by a corporation? Whether it should be the Corporation alone or the actual perpetrators who took the decision and executed it? It makes sense to punish those individuals who, acting behind the corporate veil, actually pulled the strings which led to the commission of the crime/s. But it is equally logical to punish the corporation itself for the simple reason that the law recognises it as a person, even if a juristic person but nevertheless an entity which is capable of holding rights, discharging duties and enforcing its rights, much like a natural person. The other end of this argument is equally interesting and intriguing as well. When the Corporation is vested with legal personality, why not make the Corporation alone punishable? The brain or the management should not be punishable because they act on behalf of the shareholders who are the real owners or principal and they must share the culpability, if any is to be imposed on natural persons especially when the shareholders acquiesce in the appointment of the management i.e. directors who are appointed in the AGM (Annual General Meeting) or where the appointment of Directors is ratified in the AGM. In other words, management is just an agent of the owners or the body of shareholders in which case they i.e. management, are not the Principal and hence liability cannot be fastened on them.

The argument against making the management liable is a weak one in view of the fact that they practically operate as Principals and hardly as agents of the shareholders. The extent of power vested in them is wide enough for them to misuse it for committing a criminal wrong. In any case the general body of shareholders would never authorise the management to commit a crime. However, the argument which goes against making the Management alone liable in such a case is that the Corporation, though an inorganic entity, yet for every criminal wrong
that brings in profits for the shareholders, the Corporation itself grows in terms of capital value, market capitalization, resources, brand power and of course the ability to influence national economies and sometimes, international economy as well.

Strange though it may sound, but the fact is that simply by punishing the natural persons who either by virtue of being the controlling shareholder81 or the management, the power of the Corporation to commit yet another crime is not diminished. In other words, the might of the Corporation itself needs to be whittled down because only punishing the natural persons would mean that someone else can take their place and continue with illegal practices. Unless and until the ‘medium’ of committing the crime itself i.e. the corporation, is not restricted, the commission of corporate wrongs will not cease or diminish. The only way to prevent the Corporation from perpetuating wrongs is to hit at its economic power which will reduce its ability to commit the crime itself. There can be no better deterrent for a Corporation than to strike at the very basis of its existence i.e. profit making. Dealing with corporate crime thus involves a two pronged approach which includes punishing not just the decision makers but also the institutional system which provides them with the conducive setting to commit the crime.

However, given the complex corporate structure especially the web of holding and subsidiary companies in case of a MNC/ TNC, it is very difficult to pinpoint the responsibility of official/s who can actually be said to possess the culpable mind. A parent company is accountable for the torts of a subsidiary by a duty of care that it owes to the victims of the subsidiary’s negligence. This direct or indirect liability of

81 In certain situations the largest shareholder may not be a natural person but a further corporate entity like an institutional investor with a separate body of general shareholders.
the parent can pertain to liability to an employee or consumer or the environment. Liability mainly relies upon the application of traditional corporate law principles to the corporate group. These doctrines are: the separate entity principle, the limited liability principle and the liability of parent corporations for obligations of their subsidiaries. Direct liability, by preserving the corporate separation doctrine, requires tangible participation by the parent company in the act forming the tort. Indirect liability is discerned from the parent's initiation of the subsidiary's acts, in that the subsidiary implements instructions and is associated as the 'agent' or 'alter ego' of the parent. For example in US, a foreign parent company that possessed 'minimum contacts' was subject to the jurisdiction of local courts. ‘Minimum contacts’ established the business presence of the parent company through the activities and existence of connecting factors. The mere fact that the parent company was the sole shareholder in the subsidiary company was an insufficient nexus. A further factor should be established between the parent and the forum to convey a 'continuous and systematic general business’ presence. The parent company might then be made liable for the torts of a subsidiary under veil lifting principles or by a direct responsibility for its related actions. In re. Amoco Cadiz, the United States District Court for the Northern District of Illinois imposed direct liability upon a parent company for the negligence of two subsidiary companies that caused oil pollution in French waters. The Amaco Cadiz was a ship that was grounded due to the failure of its hydraulic steering gear. The parent company was Standard Oil Company and the subsidiaries were Amoco Transport Company (ATC) and Amoco International Oil Company (AIOC). AIOC approved the design and construction of the Amaco Cadiz and was owned by the Transport. The Court fixed liability of the AIOC on the ground that it had the responsibility for training of the crew, oversee
the design and construction of ship, and for equipping the ship with a redundant steering or substitute in the event that the steering system failed. Similarly, ATC also had the responsibility for ensuring training of the crew and to ensure that the ship was sea worthy. Further, ATC had acquired previous knowledge that the Amoco Cadiz was not sea worthy for its final voyage. The evidence included ATC’s own ship inspectors report regarding the state of the vessel. The Court extended the duty of awareness and due diligence to define the liability of parent Standard Oil Company. The basis of its conclusion was that subsidiaries were wholly owned by the parent company and subject to such control that they were mere instrumentalities of Standard oil Company\textsuperscript{82}.

In making an important decision, there can be any number of company functionaries involved, right from the majority shareholder to the Directors and even the Manager. It is never an individual decision even though the suggestion might flow from one individual but given the formal structure of a corporation, it is impossible to impute a particular individual with the origin of the thought or suggestion which led to the commission of crime. Even if that is done, it will not be sufficient for the purposes of criminal law because under penal law, all those who actually or passively participated in the planning and execution of the crime, have to be punished. An individual with a guilty mind alone sans any culpable act cannot be punished and it is clear that in a corporate structure an individual cannot commit crime alone. There will always be a body of officials or persons who will be responsible for commission of the crime.

\textsuperscript{82} Binda Sahni, “Interpretation of the Corporate Personality of Transnational Corporations”; \textit{Widener Law Journal}, vol. 15, 2005
Then there is the major issue of jurisdiction. The complexity of corporate structure briefly mentioned in the preceding para adds to the confusion of forum where the corporate crime has to be prosecuted. In case of a holding company, which is usually the situation in case of a subsidiary of an MNC, the preliminary issue to be decided is whether the seat of the Company is in the country of crime or not. It is not necessary for a Company to be incorporated under the corporate laws of a country for actually doing business there. Joint Ventures with existing national companies and Foreign Direct Investment in a new or existing venture is usually the preferred mode instead of actual incorporation. This trend becomes pronounced in case two countries have a Double Taxation Avoidance Treaty (DTTA) as is the case with India and Mauritius. Not only are the exemption clauses used for legitimate tax avoidance but also for shielding the companies from jurisdiction of national courts where the crime is committed. In DTTA’s, Companies are incorporated in one of the contracting countries where the tax structure is lax. Such companies then operate from outside the jurisdiction of the other contracting country where the main business is actually carried out i.e. the country which provided tax exemption. The legal status of such companies, in terms of jurisdiction, is then used as a shield to prevent the jurisdiction of national courts where the crime is alleged to have been committed.

The next hurdle is of crime investigation and evidence collection. In order to establish the guilty mind behind a crime where in a subsidiary of an MNC is involved, the investigators and prosecutors

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83 The treaty is under review to plug the loopholes which are misused by companies.
84 In fact this precedes the jurisdictional issue above but the problems here are not being highlighted in a sequential order i.e. as they arise in a criminal investigation and prosecution.
can face a tough time in evidence gathering simply because the de-facto control of a subsidiary company is usually seated in a different national jurisdiction. Crime investigation in a different national jurisdiction to establish the human complicity is a herculean task. Investigators have to deal with a host of local procedural requirements before they can seek discovery and inspection. Such authorisation by local authorities itself is prone to challenge in municipal courts of that foreign country, further delaying the whole process.

There is yet another impediment which will be discussed in detail in later chapters but is being briefly mentioned here. Many countries don’t classify corporate wrongdoings as crimes. This was infact the major reason for which the Rome Statute did not incorporate legal persons within the definition of ‘individual’ while defining the scope of International Criminal Court. Lack of harmonisation in criminal laws of different nations is a major stumbling block in effective crime investigation and prosecution of corporations.

Another practical aspect which needs highlighting is that a corporate crime is never committed by an individual. There can be any number of people involved in the decision that furthered the commission of crime. For example, under the Indian penal laws dealing with corporate culpability, the following persons can be held liable for a crime committed by a company – every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company. In addition liability is also placed on Director, Manager, Secretary or any other officer/s should it be proved that such an act was committed with his connivance or he had knowledge.

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85 The language has been reproduced from the Negotiable Instruments Act 1881. This language is common to all Indian statutes which provide for corporate culpability.
of the same\textsuperscript{86}. For Investigators to prove, that all or any of such officials had knowledge or did not have knowledge is a difficult task especially when the investigation has to be carried out in different national jurisdictions. The Indian laws at least, therefore, put Corporation in the position of an independent criminal i.e. criminal in its own status apart from the human agency which actually commits the crime. The language used in Indian laws for offences by Companies thus supports the contention that a corporation is pretty much capable of being prosecuted in its own capacity. However, the said language also indicates that the law recognises the fact that a corporation can not commit a crime independent its human agency. Nevertheless, it does put a corporation in the position of an independent criminal.

Keeping in view the above aspects, there is a reasonable ground to make the Corporation alone liable instead of fastening the liability on its officers/ management i.e. some form of human agency. So all that will be required to be proved is the factum of commission of crime by the Corporation sans the requirement of proving as to who took the decision and who executed it, making the whole process of investigation and prosecution a lot easier. But herein lies the biggest dilemma of criminal philosophy - how can you attribute a guilty mind to a corporate structure which is lifeless on its own. It is easy to confer legal personality on an entity but impossible to ascribe a legal mind to it so as to say that such mind will be deemed to be taking all decisions of the Corporation and hence, liability can be put on the Corporation itself for a wrong doing.

\textsuperscript{86} Conversely, if he can prove that the crime alleged to have been committed was done without his knowledge or he had taken steps to prevent the occurrence of the same or that he could not possibly have the knowledge of the commission of the crime, he can be absolved/escape from the liability
Celia Wells\textsuperscript{87} observes that despite a long history of endowing certain organizations with legal personality, there has been an increasingly lively debate as to its theoretical basis. Are corporations merely, and nothing more than, collections of individuals, as the ‘nominalist’ view would hold, or does the corporation have an existence and meaning as well as legal personality of its own, as the ‘realist’ view contends? Particularly in relation to criminal law, with its reliance on moral fault, there is still a struggle between the nominalists and the realists, a struggle which affects the rules by which responsibility is attributed. Since, in the nominalist view, the corporation does not exist apart from its members, any blameworthiness or responsibility can only derive from the culpability of an individual employee. That still leaves to be decided whether the corporation will be responsible for all of its employees or only for some of them. For the realist, on the other hand, the corporation does represent something beyond the individuals comprising it and this opens up completely different avenues for attribution.

\textbf{3.1.1 Liability – Whether of Corporations or functionaries?}

In regard to the dilemma of whether the Corporation or the human agency controlling the same should be liable, a decision of the Supreme Court of India makes a very interesting reading. The issue in the said case was regarding the liability of the State to pay a part of the compensation, assessed by the Motor Accident Cases Tribunal in case of death of a person due to plying of illegal vehicles on the highways/roads. The Tribunal held the State liable to pay 30% of the

\textsuperscript{87} Celia Wells, “Criminal Responsibility of Legal Persons in Common Law Jurisdictions”; Excerpt from the paper prepared for OECD Anti Corruption Unit, dt. 4.10.2000.
assessed compensation\textsuperscript{88}. The State went in appeal before the High Court which upheld the decision of the Tribunal but fastened the liability personally on the District Transport Officer to pay 30\% of the compensation\textsuperscript{89}. The said Officer filed a special leave to appeal before the Supreme Court of India challenging the imposition of liability on him to pay as an officer of the State Government. Interestingly, the Supreme Court reversed the decision of the High Court and held that the liability of the State to bear compensation has to be borne by the State itself and it cannot be passed on to its officers.

The aforesaid decision of the Supreme Court recognises the responsibility of the State as an entity to ensure implementation of law. If we were to draw an analogy from this decision, it can be submitted that as in the case of a State, which is a perpetual sovereign body, whose officers cannot be made liable for the responsibility that law puts on the State itself, much in the same manner a Corporation cannot escape the liability, whether civil or criminal, for a wrongful act which the law enjoins it not to do. However, this judgment does fail to appreciate that State, sans its functionaries, is not capable of doing any act. If the State is deemed to be doing a wrongful act, it is the act of its officers/officials which is also blameworthy. In regard specifically to the abovementioned case, the District Transport Officer is the officer responsible for ensuring implementation of laws of the State and if he fails in his duty to do so, why should the State alone suffer? Going a bit further, one may ask

\textsuperscript{88} The reasoning given by the Tribunal was that it was the State’s duty to prevent the plying of illegal vehicles on the roads/ highways and the State having failed in its duty, resulting in plying of such vehicles, it must share the responsibility of paying the compensation along with the actual defaulter.

\textsuperscript{89} The High Court held that it was the duty of the District Transport Officer to prevent the plying of illegal vehicles on the road and he having failed to do so, as a functionary of the State, he must be held liable to pay the compensation which State has been held to be responsible for.
as to what is the deterrent to the District Transport Officer so that he is more diligent in his duties for future? The answer is simple – none at all. There is little for the Officer to learn from his negligence and inefficient discharge of duties. It must be appreciated that corporate criminality does take into consideration the blame that has to be taken by the human agency in a corporate structure and distributes the culpability on the basis of degree of complicity.

The aforementioned decision clearly shows that the Indian Courts regard the ‘entity liable’ even for a wrong committed by its officers. This decision is in line with most statutes providing for corporate culpability i.e. offences by the companies where the companies are liable along with natural persons responsible for decision making. Even in statutes providing for entity liability, human agency is a necessary concomitant of corporate wrongdoing. The above referred decision would give strength to the argument that corporations can be prosecuted independent of its human agency. However, this argument is only to substantiate the premise that corporations should be prosecuted in their own status and not to say that entity alone, minus its human agency, should be prosecuted for a corporate crime.

In criminal law, corporate liability governs the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons through which it conducts its operations. It is often regarded as an aspect of criminal vicarious liability, as opposed to a condition in which the offence specifically attaches liability to the corporation as the principal or joint principal with a human agent. Generally, criminal sanctions include prison terms and fines but sometimes community service orders are also passed e.g. the US
A company on its own has no tangible presence; so it can only act through the agency of the natural persons which it employs. Obviously, a company cannot be sent to jail or a correction home. This brings us to the next major issue which is of corporate punishment or sanctions.

### 3.1.2 Effect Of Sanctions On Legal Person

Imposition of a fine on a Corporation also has the consequence of punishing the innocent. When we talk of fines being imposed on a Corporation for criminal wrongdoing, the amount usually runs into millions of dollars (by US law standards) which in turn has an effect on the money available in corporate reserves from which the salaries of the employees as well as the profits to the existing shareholders has to be paid. It is also generally said that huge penal fines result in increased prices of products which ultimately harms the consumers. Thus, upshot of the only available penalty is deflected from the wrongdoer towards the innocent parties who either supply the human resource or the capital that eventually keeps the corporation a going concern.

However, seen from another angle, it seems so objective to inflict a fine on a corporation in lieu of incarceration (in view of its physical inability to serve the punishment) because in literal terms, the Corporation ‘personally’ does nothing except act as a mask for natural persons to take decisions in its name. If those who take culpable decisions have their earnings reduced by way of paying fines for violating law, there can be little criticism for the same. In case of

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90 In case of a deferred prosecution agreement which will be dealt with in detail in succeeding chapters, community service is sometimes ordered.
91 As in the case of a delinquent juvenile or first time offenders who are accused primarily of crimes committed in passion or heat of the moment.
92 This is the basis of principle of Lifting of Corporate Veil
fine there is of course the issue, as raised above, of whether the entire body of stakeholders, which includes the employees as well as the shareholder, should be handed out punishment for the wrong-doing of a few top rung decision makers? One way to handle this issue is by making the persons, held responsible for the offence after a trial, pay the fines from their personal earnings i.e. earned from the Company/Corporation. In other words, there should be no indemnification to such guilty officers/employees by the Corporation. However, this approach would fail where it is not possible to clearly fix liability on specific persons i.e. in case of group liability which is usually the situation in case of corporate culpability. There could also be a situation where a controlling shareholder appoints his Director and the wrongdoing can be traced to him, in part or full. In such a scenario, the Court would only fasten the liability either on the Director or the Corporation but not the shareholder who would go scot free.

Therefore, what follows is that in case of a corporate crime, it would be inequitable to shift the blame entirely either on the corporation or on the officers/Directors of the corporation. As the above referred decision of Supreme Court of India shows that even though the entity (i.e. State) alone has been held liable for ensuring implementation of laws, fair play demanded that the Officer concerned should also have been found guilty in part at least because ultimately the ‘act’ was of the Officer himself as no one forced him to act in a negligent manner. The State comes into the picture because it supplied the necessary authority to the Officer to ‘act’; in the absence of such authority the officer would have no power to act. In much the same manner, in cases of corporate wrongdoing, it is the entity i.e. the Corporation which provides the setting within which its officers/directors get an opportunity to act on its behalf and for its benefit. This ‘act’ may
constitute a corporate crime such as to make the corporation also liable to face prosecution. It is thus fair to distribute the culpability for a criminal wrong on the Corporation as also on its officers who are at the core of wrongful decision-making.

It is now well established under the respondeat superior doctrine that corporations can be held criminally responsible for wrongs committed in their names. The basic idea is that even though corporations are legal fictions, they are treated as “persons” under the law and are thus deemed capable of committing wrongful acts and forming criminal intent. Thus, for example, just as an accused murderer must be shown to have struck the fatal blow with intent to cause the victim’s death, a corporation charged with price fixing must be shown to have acted in concert with another company to engage in anticompetitive conduct for the purpose of restraining trade. In the latter context, the corporation’s criminal wrongdoing is established through the doctrine of respondeat superior—a legal sleight of hand that allows attributing the wrongful acts and intent of the agents who plan and implement the price-fixing scheme to the corporation itself93.

The respondeat superior theory of organizational liability has its origins in the early English and American law of nuisance. Under English law, corporations were not accountable for criminal acts. As Chief Justice Holt wrote in 1701, “A corporation is not indictable but the particular members of it are.” But as corporations became more numerous and increasingly engaged in activities that had widespread effects on the public welfare, the idea that corporations could rightly be held criminally responsible for the consequences of their business

operations came to be seen in a somewhat different light. Corporate business activities polluted rivers with rubbish and dead animal carcasses, operated malodorous slaughterhouses, caused the deterioration of bridges and roads, obstructed public highways with illegal buildings and railroad cars, and endangered public health and welfare in countless other ways. Because these wrongs harmed the public at large, the only procedure the law recognized to vindicate the public's interest in redressing this species of harm was criminal prosecution. For while the civil law allowed individuals to sue for particular injuries they had suffered, they had no legal right sue on behalf of others to remedy the larger harm to the community.\footnote{ibid}

It was in 1909, in the seminal case of \textit{New York Central and Hudson River Railroad Company v. United States}, 212 U.S. 481 (1909), that the United States Supreme Court formally recognized the respondeat superior doctrine in corporate prosecutions. In New York Central, a railroad company was convicted of violating a federal statute that prohibited giving rebates to shippers who paid them to transport their goods. The statute expressly authorized criminal prosecution of corporations and their agents for giving the rebates, which in this case had been paid to sugar refiners to retain the refiners' business. The Supreme Court upheld the company's conviction by borrowing from the civil law doctrine of respondeat superior, which held employers financially responsible for injuries caused by employees who were acting in the course of their employment. Lawyers for the railroad argued that the statute should be declared unconstitutional because to hold the corporation criminally responsible for the illegal acts of the offending employee was, in effect, to punish innocent stockholders for crimes that neither they nor the board of directors had—or indeed
could have—legally authorized. Rejecting that reasoning, the Court wrote:

Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as the things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them it can intend to do it, and can act therein as well viciously as virtuously.

The Court went on to note that corporations can only act through their officers and agents and that it was clearly fair to hold a corporation accountable for wrongs committed by those to whom it had entrusted the authority to act in the matter at hand—here, setting rates for transporting sugar. But the Court also found that as a practical matter, it was necessary to hold the railroad liable for giving illegal rebates because of the increasingly powerful role that corporations had begun to play. As the Court put it: “The great majority of business transactions in modern times are conducted through these bodies, and . . . interstate commerce is almost entirely in their hands. . . . It would be a distinct step backward to hold that Congress cannot control those who are conducting . . . interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the matter.”95

3.2 THEORIES OF CORPORATE LIABILITY

The detailed discussion above lays down the theoretical basis for imputing criminal liability to legal persons. Companies are held liable when the acts and omissions, and the knowledge of the employees can

95 ibid
be attributed to the company. This is usually filtered through *identification*, *directing mind* or *alter ego* test which proves that the employee has sufficient status to be considered as the company when acting.

### 3.2.1 Identification test

This test in effect lays down that instead of visualizing a delinquent officer or officers to be acting as an agent committing wrongdoing on behalf or for the benefit of the corporation, they should be taken to be acting as the company/corporation itself. In other words, there is merger of the identity of the delinquent officer/officers with the corporate identity. It was not until the 1940’s that English law contemplated a form of corporate liability which could apply to serious offences such as fraud, theft and manslaughter. One of the objections to finding corporations liable for such offences was that they required proof of a mental element of intention, recklessness or negligence. For the purposes of corporate liability for this type of offence, courts developed the alter ego or identification theory, under which certain key personnel are said to act as the company rather than on behalf of it (as is the case with vicarious liability). The underlying theory is that company employees can be divided into those who act as ‘hands’ and those who represent the ‘brains’ of the company. The physical body and mind of the delinquent officer is supposed to have been transposed in the corporate legal personality.

In *Tesco Supermarkets Ltd V. Nattrass* [1972] AC 153, Lord Reid said:

> 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

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96 This must be appreciated in the backdrop of the basic corporate law philosophy that all Corporations have a distinct legal personality.

97 *Supra* Note 57
is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.

However, this approach has been criticised because it restricts corporate liability to the acts of directors and a few high-level managers. This unfairly favours corporations because they will escape criminal liability for the acts of the employees who manage the day-to-day activities of the corporations. The basic problem with this ‘test’ is that since the identity of delinquent officer/officers merge with the corporate identity, the corporation itself has a very valid defense that it had no mind of its own and the actus-reus as well as the mens-rea is that of the delinquent officer/s alone and not of the corporation. Though the ‘Identity Test’ has been criticised as above, in my opinion, the test laid down by Lord Reid was basically a practical approach for supplying mens-rea to a corporation which has always been the most potent of all defenses taken by the corporations while trying to escape criminal liability.

3.2.2 Aggregation test

The Aggregation test\(^{98}\) rests on a simple premise which runs as follows. In case of a legal person, which practically can neither act on its own nor think, the actus-reus as well as mens-rea can be supplied to it by assuming that the ‘physical acts’ and ‘thoughts’ of natural persons working for such a legal person can be aggregated and attributed to the Corporation itself. In other words, a legal person or Corporation is nothing more than the natural persons that collectively compose and run it; and so by simple logic, their acts collectively (together with their intentions) can reasonably be said to be of the ‘Body’ of which they are individual components or smaller units. In many large organizations, task specialization means that even

\(^{98}\) Followed in the United States
amongst officers senior enough to count for alter ego purposes, one individual director will not have access to all the information on which to base a finding of knowledge or negligence\(^99\). By “aggregating” the acts and omissions of two or more natural persons acting as the corporation, the *actus reus* and *mens rea* can be constructed out of the conduct and knowledge of several individuals. This is termed the *Doctrine of Collective Knowledge*. In *United States V. Bank of New England* (1987) 821 F2d 844 the charge of willfully failing to file reports relating to currency transactions was proved because the bank’s knowledge was the totality of what all of the employees knew within the scope of their authority. The Courts Of Appeals confirmed a collective knowledge doctrine as appropriate because corporations would compartmentalise knowledge and subdivide duties and avoid liability.

Aggregation has been applied in Australian courts, but is rejected in England. In *R V. Australasian Films Ltd*\(^100\) the High Court of Australia noted: ‘*where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principal. No mens-reo being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation.*’ In *Tiger Nominees Pty Ltd V. State Pollution Control Commission*\(^101\), NSW Supreme Court, Gleeson CJ (Mohoney JA and Campbell J agreeing) said: ‘*it is necessary that the relevant statutory offence be of such a nature that it is capable of commission vicariously*’. This was ultimately interpreted by Ipp JA in *Presidential Security Services of Australia Pty Ltd v Brilley*\(^102\) as authority for the proposition

\(^{99}\) *Supra* Note 57  
\(^{100}\) (1921) 29 CLR 195 at 217  
\(^{101}\) (1992) 25 NSWLR 715 at 718–19; 75 LGRA 71; 58 A CrimR 428  
\(^{102}\) (2008) 73 NSWLR 241; 67 ACSR 692; [2008] NSWCA 204; BC200807974 (Presidential Security)
that a corporation, as a principal, cannot be held liable for the acts of its agent for non-strict liability offences requiring mens-rea. It can only be held liable by the rules of attribution. That is, attributing the mind and will of the natural person to the company.

3.2.3 Blameworthiness Test

Gobert argues that if a corporation fails to take precautions or to show due diligence to avoid commission of a criminal offence, the same is a result not of a guilty mind which the Corporate law theorists continuously try to supply to a Corporation by legal fiction but from its culture which is demonstrated through its policies, practices, and procedures. The Blameworthy test thus argues that corporations should not be treated in the same way as natural persons (i.e. looking for a "guilty" mind) but advocates that a different approach should under-prop the liability of fictitious persons. This theory puts the blame more on impersonal factors like the corporate structure and its procedures of modern corporations which are decentralized and hence, crime is less to do with the misconduct by or incompetence of individuals but more to do with systems that fail to address problems of monitoring and controlling risk103.

In my understanding, the Blameworthiness Test although tries to adopt a different approach to impute liability for criminal wrongs to a legal person but in effect comes around the underlying premise that ultimately it is the human resource which is to take the blame. This test tries to brush away the mens-rea factor by putting the responsibility on corporate structure and its policies but fails to

consider the crucial aspect that at the end of the argument, it is the human agency, whether directors or controlling officers, who not only design such corporate systems but also continuously develop it. The systems do not run on their own or in vacuum devoid of any human intervention but are manned, monitored, supervised, modified and/or improved by the natural persons working in a corporate structure. Thus, even if the preliminary liability is to be put on the defects in a corporate structure, it cannot be ignored that the eventual responsibility will percolate down to the natural persons who run such a system or structure. The corollary is that mens-rea factor is impossible to be divorced even when a corporate structure is to be judged for criminal culpability. Thus, there has to be an acceptable or workable principle of imputing the intention to a corporate structure which though is inorganic but vital enough to influence hundreds of lives, both within and outside through its activities.

3.2.4 Benefit Test

A benefit test has been applied in the Federal Court of Australia, the House of Lords and the Supreme Court of Canada. Put simply, the test proposes that where a company gains the benefit of an act, it is considered to be attributed with that act. The benefit test provides that an act that benefits or intends to benefit the company should be attributable to the company irrespective of whether the actor lacks actual authority for that act. The question whether the ‘mind and will’ of a company acts as the company depends on whether the company receives a benefit from the act. In *Beach Petroleum NL and Claremont Petroleum NL v. Malcolm Keith Johnson and Others* (1993) 115 ALR 411, Justice Von Doussa referred to the ‘mind and will’ theory and its application in *Canadian Dredge & Dock Co. V. The Queen* (1985) 1 SCR 662 and found that an act in part unfavourable to the interests of the company but which nonetheless achieves a benefit for the
company leaves the company liable for those acts. Thus in Canadian Dredge the Supreme Court of Canada upheld criminal convictions of the companies because the companies gained a benefit from the fraudulent scheme, such as contracts and subcontracts.\(^{104}\)

This test, though seemingly simple, rests on the premise of attributing *mens-rea* of the natural persons acting for the corporation to the corporation itself. In other words, this Test takes forward the theory that the *mens-rea* of a Corporation is ultimately to be filtered from the sum total of mens-rea of the natural persons working for it. In a sense, it is a modification of the Aggregation theory. The importance of Benefits test, in my understanding is that a Corporation is created and developed for a solitary purpose – growth, in terms of finances, products and outreach. In other words, Corporation exists only to benefit itself though it might incidentally benefit others also. Hence, any wrong committed in the course of an act which is for the benefit of a corporation and hence serves the purpose for which a corporation exists, has to be attributed to the corporation only. However, this approach does not take into account a very important aspect which is whether the corporation took any steps to pre-empt or stall any wrongful gain during the course of its actions? If the Corporation did take any such steps in the form of organisational policies and procedures, the same can be a good defense for the Corporation, if a prosecution ensues. In this context, the Blameworthiness test assumes some significance since that approach puts a premium on the organisational policies and procedures.

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There cannot be one fit all theory which explains all aspects of corporate culpability. The issue is complex which means that a number of approaches will have to be considered and a common ground found from amongst them. Which theory, whether alone or in conjunction with another, will be able to explain whether or not a corporation is guilty, will ultimately depend on the facts of the case in hand.

3.3 CORPORATE CRIMES AND WHITE COLLAR CRIMES

However, at this stage it would be relevant to draw a distinction between the Corporate Crimes and White Collar crimes. This distinction is important for the purpose of the present research. White collar crimes mean crimes committed within an organisational structure and denote a class of crimes as opposed to conventional crimes. Corporate crimes, on the other hand, refers to those crimes with which the Corporation itself can be charged with, in addition to the natural persons (whether its own officers or outside the corporate structure) who are actually accused of committing it. To explain it further, when dealing with corporate crimes, we presume that the Corporation is also a partner-in-crime and hence, an accused. However, when discussing white collar crimes, we refer to those crimes which are committed by natural persons making use of either the organisational processes/structure by manipulating its weaknesses and/or through the use of technology. It was important to highlight this difference here because of the Benefit Theory test, which has been briefly discussed above. Thus a white collar crime results from the desire for a personal gain from the corporate structure (e.g. insider trading) whereas a corporate crime is driven by the desire to benefit the Corporation itself with the hope that a part of that benefit will automatically filter down to those who run its affairs. Still further,
a corporate crime can very well be a conventional crime also e.g. corporate manslaughter. Thus, whereas White Collar crime denotes a class of crime, Corporate crime refers to the *attribution aspect of a crime*. Corporate crime overlaps with white-collar crime because the majority of individuals who may act as or represent the interests of the corporation are white-collar professionals; and with organized crime because criminals may set up corporations either for the purposes of crime or as vehicles for laundering the proceeds of crime. This is done usually by running Front Companies or Sham Companies which apparently do legitimate business but in reality indulge in either money laundering or facilitate the criminal activities by disguising the same as legitimate business through the Front Companies.

At this stage, in order to effectively bring out the difference between corporate crime, white collar crime and the overlapping aspect of these two issues, it would be worthwhile to undertake brief descriptive case studies. The case study is in relation to 3 of the recent white collar/corporate crimes which have prompted the national governments as also the international community to strengthen the regulatory measures so as to check the growing corporate malpractices. The first study relates to the recent Money laundering charges against HSBC to which the Bank pleaded guilty and settled for a DPA (Deferred Prosecution Agreement) with US Government. The second case relates to the infamous Insider Trading charges against Mr. Raj Gupta (Mr. Raj Gupta has been convicted and he has now filed an appeal against his conviction), again in the USA. The third study is concerning the Satyam Accounting Fraud which hit the headlines in 2009. The first of these studies is to highlight the

105 Hong Kong and Shanghai Banking Corporation - the UK based world’s largest Bank
Corporate crime of money laundering i.e. how the HSBC as a Corporation indulged in money laundering despite having knowledge that its systems are being used for money laundering by drug cartels. The second study is purely a brief description of white collar crime to show the fine distinction between white collar crimes and Corporate Crimes. The third study relating to Satyam is significant because the accounting fraud by the CEO of Satyam (Mr. Rajlingam Raju) has shades of white collar crime as well as corporate crime.

3.3.1 Money Laundering Charges against HSBC\(^\text{106}\): HSBC was accused of failing to monitor more than $670 billion in wire transfers and more than $9.4 billion in purchases of U.S. currency from HSBC Mexico, allowing for money laundering, prosecutors said. The bank also violated U.S. economic sanctions against Iran, Libya, Sudan, Burma and Cuba, according to criminal information filed in the case. Lack of proper controls allowed the Sinaloa drug cartel in Mexico and the Norte del Valle cartel in Colombia to move more than $881 million through HSBC’s U.S. unit from 2006 to 2010, the government alleged in the case. The bank also cut resources for its anti-money-laundering programs to “cut costs and increase profits,” the government said in court filings. The whistle blower Everett Stern, during his employment with HSBC as an AML (Anti-Money Laundering officer), found discrepancies and brought them to the attention of his supervisors. Through an Internet search, Stern found a Saudi fruit company was sending millions to a high-ranking figure in the Yemeni wing of the Muslim Brotherhood. Stern also uncovered that HSBC was allowing millions of dollars to be moved from the Karaiba chain of supermarkets in Africa to a firm called Tajco, a company that had

\(^{106}\) The case is *U.S. V. HSBC Bank USA NA*, 12-cr-00763, U.S. District Court, Eastern District of New York (Brooklyn).
been singled out by the US Treasury Department as major financiers of the Lebanese Shiite group, Hezbollah. Stern’s supervisors, however, told him to not make waves and keep "clearing the quota of 72 alerts per week". Stern then took his evidence further, notifying appropriate government agencies such as the FBI, CIA and SEC, about violations of US money laundering laws.

Subsequently, after investigations by the US Department of Justice (DOJ), the HSBC was offered a deferred prosecution agreement. Assistant Attorney General Lanny Breuer signed on a settlement deal with the British banking giant HSBC. HSBC Holdings Plc (HSBA)’s entered into a $1.9 billion agreement with the U.S. which was approved by U.S. District Judge John Gleeson in Brooklyn, New York. He signed off on a deferred-prosecution agreement, a critical component of the London-based bank’s settlement. The Bank, agreed to pay a $1.25 billion forfeiture and $665 million in civil penalties under the settlement, prosecutors announced in December. The DPA lets the bank and management avoid further criminal proceedings over the charges. Gleeson said he will continue supervising implementation of the deal, under which the bank agreed not to contest criminal charges of failing to maintain an effective anti-money-laundering program, failing to conduct due diligence, and violating the Trading With the Enemy Act and the International Emergency Economic Powers Act. In his order, Gleeson called the terms of the HSBC agreement, including the forfeiture and the bank’s admission of wrongdoing, “significant”. “Indeed, taking into account the fact that a company cannot be imprisoned, it appears to me that

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107 The DPA is being criticised by the reporter as the ultimate insult to every ordinary person who’s ever had his life altered by a narcotics charge.

108 Under a deferred prosecution agreement, the U.S. allows a target to avoid charges by meeting certain conditions --including the payment of fines or penalties -- and by committing to specific reforms.
much of what might have been accomplished by a criminal conviction has been agreed to in the DPA," Gleeson wrote. Despite the fact that HSBC admitted to laundering billions of dollars for Colombian and Mexican drug cartels (among others) and violating a host of important banking laws (from the Bank Secrecy Act to the Trading With the Enemy Act), Justice Department elected not to pursue criminal prosecutions of the bank, opting instead for a "record" financial settlement of $1.9 billion, which as one analyst noted is about five weeks of income for the bank. Breuer admitted that drug dealers would sometimes come to HSBC's Mexican branches and "deposit hundreds of thousands of dollars in cash, in a single day, into a single account, using boxes designed to fit the precise dimensions of the teller windows". In order to more efficiently move as much illegal money as possible into the "legitimate" banking institution HSBC, drug dealers specifically designed boxes to fit through the bank's teller windows.

The government's rationale in not pursuing criminal prosecutions against the bank was apparently rooted in concerns that putting executives from a "systemically important institution" in jail for drug laundering would threaten the stability of the financial system. The New York Times put it this way: Federal and state authorities have chosen not to indict HSBC, the London-based bank, on charges of vast and prolonged money laundering, for fear that criminal prosecution would topple the bank and, in the process, endanger the financial system.109

109 This apparent reasoning has been severely criticised as follows - It doesn't take a genius to see that the reasoning here is beyond flawed. When you decide not to prosecute bankers for billion-dollar crimes connected to drug-dealing and terrorism (some of HSBC's Saudi and Bangladeshi clients had terrorist ties, according to a Senate investigation), it doesn't protect the
Some of the penalties involved under the DPA seem to be more of a gentle rap rather than actually a punitive action. The following excerpt is from Breuer’s announcement: As a result of the government’s investigation, HSBC has . . . "clawed back"\textsuperscript{110} deferred compensation bonuses given to some of its most senior U.S. anti-money laundering and compliance officers, and agreed to partially defer bonus compensation for its most senior officials during the five-year period of the deferred prosecution agreement.

\textbf{3.3.2. Insider Trading Charges against \textit{Mr. Rajat Gupta}}\textsuperscript{111} - Insider trading is a term that most investors have heard and usually associate with illegal conduct. But the term actually includes both legal and illegal conduct. The legal version is when corporate insiders—officers, directors, and employees—buy and sell stock in their own companies. When corporate insiders trade in their own securities, they must report their trades to the SEC (Securities and Exchange Commission). Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information about the security. Insider trading violations may also include

\textsuperscript{110} Claw Back remedy is a term employed in cases of corporate corruption and it refers to getting back the gifts or kickbacks which were given to officials/officers for indulging in corrupt corporate practices.

\textsuperscript{111} \textit{US V. Gupta}, 11–cr–00907, US District Court, Southern District of New York (Manhattan)
"tipping" such information, securities trading by the person "tipped," and securities trading by those who misappropriate such information.

Mr. Rajat Gupta \(^{112}\) joined McKinsey & Company, the elite management-consulting firm. He rose rapidly through a competitive system, going on to rule boardrooms, chair non-profit boards, and move with CEOs and heads of state from Bill Gates to Bill Clinton. Upon retiring from McKinsey, in 2007 after nine years as its managing director, Mr. Gupta was a sought after figure on corporate and non-profit boards, and joined those of Goldman Sachs, Procter & Gamble, American Airlines, and Harvard Business School. He created the American India Foundation, which brought in millions of dollars in philanthropic contributions from NRIs to development programs across the country. He founded the Indian School of Business and the Public Health Foundation of India. And he ensured McKinsey worked, pro bono, with India's leading NGOs, including Sewa and Pratham, to help them learn from international best practices. But Mr Gupta's philanthropic work did not sway the jury. He has been sentenced to two years in prison for leaking Goldman Sachs boardroom secrets to the hedge fund manager at the centre of the US government's crackdown on insider trading. The judge overseeing the case had warned that "If Mother Teresa was charged with bank robbery, the jury would still have to determine whether or not she committed a bank robbery."

Mr. Gupta's fall from grace began in April 2010, as part of the investigation into Raj Rajaratnam, a Sri Lankan hedge fund manager accused of insider trading. The government accused Mr. Gupta of tipping off Mr. Rajaratnam of Warren Buffet's decision to invest $5

\(^{112}\) Mr. Rajat Gupta is an alumnus of Harvard Business School, and IIT Delhi before that.
billion in Goldman Sachs. Mr. Gupta allegedly learned this information on September 23 in 2008 at a board meeting. His tip allegedly allowed Mr. Rajaratnam to buy the stock before the news was made public the next day. Mr. Rajaratnam made a profit of $800,000 in just 24 hours. The difficulty for the government is that they don't actually have hard evidence of this. They have proof that Mr. Gupta called Mr. Rajaratnam after the board meeting. And they have one tape of a separate conversation between Mr. Gupta and Mr. Rajaratnam where Mr. Gupta summarises the discussion in a Goldman board meeting. But that tape did not lead to any trades being made, nor is it clear that it leaked inside information. And the trade that was made a few minutes after a Goldman board meeting concluded cannot be traced to a recorded conversation between the two men. But the tapes are still very embarrassing for Mr. Gupta. First, they showed that he earlier had conversations with Mr Rajaratnam where confidentiality had been compromised, even if securities laws had not been violated. On July 29 in 2009, Mr. Gupta discussed the offer Goldman Sachs was thinking of making to purchase Wachovia, another American bank, with Mr. Rajaratnam. Second, they showed that Mr. Rajaratnam had bragged to someone else that he had inside knowledge of the Buffett deal from someone on the Goldman board. Third, Mr. Rajaratnam, in a conversation with Mr. Gupta's former partner at McKinsey, Anil Kumar, who pleaded guilty to leaking confidential information to Mr. Rajaratnam in exchange for payments, speculates that Mr. Gupta's motivation was financial greed. Mr. Rajaratnam can be heard on the tapes talking about Rajat Gupta saying, "I think he wants to be in that circle. That’s a billionaire circle, right? Goldman is like the hundreds of millions circle, right? And I think here he sees the opportunity to make $100
million over the next five years or 10 years without doing a lot of work."

Mr. Gupta has been convicted of conspiracy and three counts of securities fraud. A jury acquitted him on two other securities fraud counts. Mr. Gupta, the former Goldman Sachs Group Inc. director was found guilty of passing confidential tips to jailed billionaire hedge-fund manager Mr. Rajaratnam, was ordered to pay $13.9 million in a related US regulatory lawsuit. Gupta, 64, was also permanently barred from acting as an officer or director of a public company and from associating with any broker or investment adviser. Mr. Rajaratnam in June lost an appeal of his 2011 conviction for conspiracy and securities fraud. He was ordered to pay a record $92.8 million penalty in the SEC matter, and to forfeit more than $53.8 million and pay a $10 million fine in the criminal case. Mr. Rajaratnam, 56, is serving an 11-year prison sentence at the Federal Medical Center Devens in Ayer, Massachusetts.

Gupta was also found guilty on 15 June 2012 of divulging confidential information to the Galleon Group LLC co-founder about Berkshire Hathaway Inc.’s $5 billion investment in Goldman Sachs as well as nonpublic details about the bank’s financial results for the second and fourth quarters of 2008. In October, Gupta was sentenced to two years in prison and ordered to pay a $5 million criminal fine. The sanctions imposed send a clear message to board members who are entrusted with protecting the confidences of the companies they serve. George Canellos, co-director of SEC enforcement, said in a statement. “If you abuse your position by sharing confidential company information with friends and business associates in exchange for private gain, you will be prosecuted to the fullest extent by the SEC”. The case against Gupta became a center piece of a broader insider
trading crackdown by the SEC and federal prosecutors in New York. While the investigations mainly targeted hedge funds trading on confidential information, Gupta was the highest-profile corporate figure ensnared in the probe.

3.3.3 The Satyam Accounting Fraud\textsuperscript{113}: Ironically, Satyam means “truth” in the ancient Indian language “Sanskrit”. Satyam won the “Golden Peacock Award” for the best governed company in 2007 and in 2009. From being India’s IT “crown jewel”, the outsourcing firm Satyam Computers has become embroiled in the nation’s biggest corporate scam in living memory. Mr. Ramalinga Raju (Chairman and Founder of Satyam; henceforth called “Raju”), who has been arrested and has confessed to a $1.47 billion (or Rs. 7800 crore) fraud, admitted that he had made up profits for years. According to reports, Raju and his brother, B. Rama Raju, who was the Managing Director, “hid the deception from the company’s board, senior managers, and auditors”. The case of Satyam’s accounting fraud has been dubbed as “India’s Enron”. In order to evaluate and understand the severity of Satyam’s fraud, it is important to understand factors that contributed to the “unethical” decisions made by the company’s executives.

Satyam Computer Services Limited was formed in 1987 in Hyderabad (India) by Mr. Ramalinga Raju and grew rapidly as a “global” business. It offered IT and business process outsourcing services spanning various sectors. Satyam won numerous awards for innovation, governance, and corporate accountability. “In 2007, Ernst & Young awarded Mr. Raju with the ‘Entrepreneur of the Year’ award. On April 14, 2008, Satyam won awards from MZ Consult’s for being a ‘leader in India in CG and accountability’. In September 2008, the World

Council for Corporate Governance awarded Satyam with the ‘Global Peacock Award’ for global excellence in corporate accountability”. Unfortunately, less than five months after winning the Global Peacock Award, Satyam became the centerpiece of a “massive” accounting fraud.

By 2003, Satyam’s IT services businesses included 13,120 technical associates servicing over 300 customers worldwide. At that time, the world-wide IT services market was estimated at nearly $400 billion, with an estimated annual compound growth rate of 6.4%. From 2003-2008, the company grew measurably. Satyam generated USD $467 million in total sales. By March 2008, the company had grown to USD $2.1 billion. The company demonstrated “an annual compound growth rate of 35% over that period”. Finally, beginning in January 2003, at a share price of 138.08 INR, Satyam’s stock would peak at 526.25 INR—a 300% improvement in share price after nearly five years. Satyam clearly generated significant corporate growth and shareholder value. But, the numbers did not represent the full picture.

3.3.3.1 Mr. Ramalinga Raju and the Satyam Scandal: On January 7, 2009, Mr. Raju disclosed in a letter to Satyam Computers Limited Board of Directors that “he had been manipulating the company’s accounting numbers for years”. Mr. Raju claimed that he overstated assets on Satyam’s balance sheet by $1.47 billion. Nearly $1.04 billion in bank loans and cash that the company claimed to own was non-existent. Satyam also underreported liabilities on its balance sheet. Satyam overstated income nearly every quarter over the course of several years in order to meet analyst expectations. For example, the results announced on October 17, 2009 overstated quarterly revenues by 75 percent and profits by 97 percent. Mr. Raju and the company’s
global head of internal audit used a number of different techniques to perpetrate the fraud. “Using his personal computer, Mr. Raju created numerous bank statements to advance the fraud. Mr. Raju falsified the bank accounts to inflate the balance sheet with balances that did not exist. He inflated the income statement by claiming interest income from the fake bank accounts. Mr. Raju also revealed that he created 6000 fake salary accounts over the past few years and appropriated the money after the company deposited it. The company’s global head of internal audit created fake customer identities and generated fake invoices against their names to inflate revenue. The global head of internal audit also forged board resolutions and illegally obtained loans for the company”.

Greed for money, power, competition, success and prestige compelled Mr. Raju to “ride the tiger”, which led to violation of all duties imposed on them as fiduciaries. “The Satyam scandal is a classic case of negligence of fiduciary duties, total collapse of ethical standards, and a lack of corporate social responsibility. It is human greed and desire that led to fraud”. According to CBI, the Indian crime investigation agency, the fraud activity dates back from April 1999, when the company embarked on a road to double-digit annual growth. As of December 2008, Satyam had a total market capitalization of $3.2 billion dollars. Satyam planned to acquire a 51% stake in Maytas Infrastructure Limited, a leading infrastructure development, construction and project management company, for $300 million. Here, the Rajus’s had a 37% stake. The total turnover was $350 million and a net profit of $20 million. Raju’s also had a 35% share in Maytas Properties, another real-estate investment firm. Satyam revenues exceeded $1 billion in 2006. In April, 2008 Satyam became the first Indian company to publish IFRS audited financials. On December 16, 2008, the Satyam board, including its five independent
directors had approved the founder’s proposal to buy the stake in Maytas Infrastructure and all of Maytas Properties, which were owned by family members of Satyam’s Chairman, Ramalinga Raju, as fully owned subsidiary for $1.6 billion. Without shareholder approval, the directors went ahead with the management’s decision. The decision of acquisition was, however, reversed twelve hours after investors sold Satyam’s stock and threatened action against the management. This was followed by the law-suits filed in the US contesting Maytas deal. The World Bank banned Satyam from conducting business for 8 years due to inappropriate payments to staff and inability to provide information sought on invoices. Four independent directors quit the Satyam board and SEBI ordered promoters to disclose pledged shares to stock exchange.

Investment bank DSP Merrill Lynch, which was appointed by Satyam to look for a partner or buyer for the company, ultimately blew the whistle and terminated its engagement with the company soon after it found financial irregularities. On 7 January 2009, Satyam’s Chairman, Ramalinga Raju, resigned after notifying board members and the Securities and Exchange Board of India (SEBI) that Satyam’s accounts had been falsified. Raju confessed that Satyam’s balance sheet of September 30, 2008, contained the following irregularities: “He faked figures to the extent of Rs. 5040 crore of non-existent cash and bank balances as against Rs. 5361 crore in the books, accrued interest of Rs. 376 crore (non-existent), understated liability of Rs. 1230 crore on account of funds raised by Raju, and an overstated debtor’s position of Rs. 490 crore. He accepted that Satyam had reported revenue of Rs. 2700 crore and an operating margin of Rs. 649 crore, while the actual revenue was Rs. 2112 crore and the margin was Rs. 61 crore”. In other words, Raju: 1) inflated figures for cash and bank balances of US $1.04 billion vs. US $1.1 billion
reflected in the books; 2) an accrued interest of US $77.46 million which was non-existent; 3) an understated liability of US $253.38 million on account of funds was arranged by himself; and 4) an overstated debtors' position of US $100.94 million vs. US $546.11 million in the books.

Raju claimed in the same letter that “neither he nor the managing director had benefited financially from the inflated revenues, and none of the board members had any knowledge of the situation in which the company was placed”. The gap in the balance sheet had arisen purely on account of inflated profits over a period that lasted several years starting in April 1999. “What accounted as a marginal gap between actual operating profit and the one reflected in the books of accounts continued to grow over the years. This gap reached unmanageable proportions as company operations grew significantly”, Raju explained in his letter to the board and shareholders. He went on to explain, “Every attempt to eliminate the gap failed, and the aborted Maytas acquisition deal was the last attempt to fill the fictitious assets with real ones. But the investors thought it was a brazen attempt to siphon cash out of Satyam, in which the Raju family held a small stake, into firms the family held tightly”.

Fortunately, the Satyam deal with Matyas was “salvageable”. It could have been saved only if “the deal had been allowed to go through, as Satyam would have been able to use Maytas’ assets to shore up its own books”. Raju, who showed “artificial” cash on his books, had planned to use this “non-existent” cash to acquire the two Maytas companies. As part of their “tunneling”\(^{114}\) strategy, the Satyam

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114 Tunneling refers to efforts by firms’ controlling owner managers to take money for themselves at the expense of minority shareholder – Jorfdan I. Siegel and Prithviraj Choudhary, *A Rexamination of Tunnelling and Business*
promoters had substantially reduced their holdings in company from 25.6% in March 2001 to 8.74% in March 2008. The aborted Maytas acquisition deal was the final, desperate effort to cover up the accounting fraud by bringing some real assets into the business. When that failed, Raju confessed the fraud. Unlike Enron, which sank due to agency problem, Satyam was brought to its knee due to tunneling. The company with a huge cash pile, with promoters still controlling it with a small per cent of shares (less than 3%), and trying to absorb a real-estate company in which they have a majority stake is a deadly combination pointing prima facie to tunneling. The reason why Ramalinga Raju claims that he did it was because every year he was fudging revenue figures and since expenditure figures could not be fudged so easily, the gap between “actual” profit and “book” profit got widened every year. In order to close this gap, he had to buy Maytas Infrastructure and Maytas Properties. In this way, “fictitious” profits could be absorbed through a “self-dealing” process. The auditors, bankers, and SEBI, the market watchdog, were all blamed for their role in the accounting fraud.

3.3.3.2 The Auditors Role and Factors Contributing to Fraud: Global auditing firm, PricewaterhouseCoopers (PwC), audited Satyam’s books from June 2000 until the discovery of the fraud in 2009. Several commentators criticized PwC harshly for failing to detect the fraud. Indeed, PwC signed Satyam’s financial statements and was responsible for the numbers under the Indian law. One particularly troubling item concerned the $1.04 billion that Satyam claimed to have on its balance sheet in “non-interest bearing” deposits. According to accounting professionals, “any reasonable company would have either invested the money into an interest-bearing account, or

[Website link]

returned the excess cash to the shareholders. The large amount of cash thus should have been a ‘red-flag’ for the auditors that further verification and testing was necessary. Further, more, it appears that the auditors did not independently verify with the banks in which Satyam claimed to have deposits”.

Whenever Satyam needed more income to meet analyst estimates, it simply created “fictitious” sources and it did so numerous times, without the auditors ever discovering the fraud. Suspiciously, Satyam also paid PwC twice what other firms would charge for the audit, which raises questions about whether PwC was complicit in the fraud. Furthermore, PwC audited the company for nearly 9 years and did not uncover the fraud, whereas Merrill Lynch discovered the fraud as part of its due diligence in merely 10 days. Missing these “red-flags” implied either that the auditors were grossly inept or in collusion with the company in committing the fraud.

3.3.3.3 Aftermath of Satyam Scandal -

Immediately following the news of the fraud, Merrill Lynch terminated its engagement with Satyam, Credit Suisse suspended its coverage of Satyam, and Price-Waterhouse Coopers (PwC) came under intense scrutiny and its license to operate was revoked. Coveted awards won by Satyam and its executive management were stripped from the company. Satyam’s shares fell to 11.50 rupees on January 10, 2009, compared to a high of 544 rupees in 2008. In the New York Stock Exchange, Satyam shares peaked in 2008 at US $ 29.10; by March 2009 they were trading around US $1.80. Thus, investors lost $2.82 billion in Satyam. Criminal charges were brought against Mr. Raju, including: criminal conspiracy, breach of trust, and forgery. Immediately after Raju’s revelation about the accounting fraud, “new”
board members were appointed and they started working towards a solution that would prevent the total collapse of the firm. Indian officials acted quickly to try to save Satyam from the same fate that met Enron and WorldCom, when they experienced large accounting scandals. The government appointed a board of directors for Satyam to try to save the company. The Board’s goal was “to sell the company within 100 days”. By mid-March, several major players in the IT field had gained enough confidence in Satyam’s operations to participate in an auction process for Satyam. The Securities and Exchange Board of India (SEBI) appointed a retired Supreme Court Justice, Justice Bharucha, to oversee the process and instill confidence in the transaction. Several companies bid on Satyam on April 13, 2009. The winning bidder, Tech Mahindra, bought Satyam for $1.13 per share—less than a third of its stock market value before Mr. Raju revealed the fraud—and salvaged its operations.

3.3.3.4 Investigation: Criminal and Civil Charges - The investigation that followed the revelation of the fraud has led to charges against several different groups of people involved with Satyam. Indian authorities arrested Mr. Raju, Mr. Raju’s brother, B. Ramu Raju, its former managing director, Srinivas Vdlamani, the company’s head of internal audit, and its CFO on criminal charges of fraud. Indian authorities also arrested and charged several of the company’s auditors (PwC) with fraud. The Institute of Chartered Accountants of India ruled that “the CFO and the auditor were guilty of professional misconduct”. The CBI is also in the course of investigating the CEO’s overseas assets. There were also several civil charges filed in the US against Satyam by the holders of its ADRs. The investigation also implicated several Indian politicians. Both civil and criminal litigation cases continue in India and civil litigation continues in the United States. Some of the main victims were: employees, clients,
shareholders, bankers and Indian government. The Indian affiliate of PwC “routinely failed to follow the most basic audit procedures. The SEC and PCAOB fined the affiliate, PwC India, $7.5 million which was described as the largest American penalty ever against a foreign accounting firm. According to President, ICAI (January 25, 2011), “The Satyam scam was not an accounting or auditing failure, but one of CG. This apex body had found the two PWC auditors prima-facie guilty of professional misconduct”. The CBI, which investigated the Satyam fraud case, also charged the two auditors with “complicity in the commission of the fraud by consciously overlooking the accounting irregularities”.

These 3 case studies brings out the clear distinction between the two concepts – of White Collar Crime and Corporate Crime, and the need to have a separate approach in dealing with them. Whereas HSBC as an organisation was clearly held guilty by the US DOJ for money laundering and would have been sent up to face prosecution but for the DPA, the case of Mr. Rajat Gupta is a classic example of white collar crime. Satyam’s case is an unusual one and since it has shades of both white collar as well as corporate crime, it was engrafted into the present chapter. Even though the actions of Satyam CEO, CFO and Head of Audit amount to white collar crime of accounting fraud, the role of PwC India comes out as a conspirator i.e. a corporation acting in conspiracy with white collar criminals. This precisely was the reason as to why PwC itself was also fined a huge amount in addition to its auditors being hauled up on criminal charges. The present research is focusing on the ability of a legal person to commit crimes in its own capacity and hence, be tried and convicted as nearly as possible like a natural person. The whole endeavour of this research is that international criminal law should eschew any difference between natural and legal person when it comes to judging the culpability of a
corporation. The following discussion thus again picks up the thread of research in this direction.

The question whether for a Corporate Crime, the Corporation should be arrayed as a principal accused in addition to the natural persons (i.e. its Directors and/or Officers) or as an accomplice/aider/abettor is complex. In so far as Indian law is concerned, this question has been recently answered in *Anita Hada vs. M/s Godfather Travels*\(^{115}\). The Supreme Court of India has held in the said case that where a company (i.e. a corporation or a legal person) is charged with an offence, its directors or its Officers cannot be proceeded against under criminal law so long as the company is itself not arrayed as an accused. The corollary of this finding is that in case of corporate crimes, the corporation has to be arrayed as the Principal Accused. This finding is in consonance with the discussion in preceding chapters that Corporation itself provides the *raison de etre* to its Directors or its officers for the commission of an offence. Sans the Corporation itself, probably, the Directors or its Officers would not have the platform to engage in culpable activities.

### 3.4 ENFORCEMENT POLICY

Corporate crime is a politico-economically sensitive issue in most countries, whether it is a nation having a highly developed free market economy e.g. USA, whether it is a developing country trying to build its infrastructure by attracting foreign investment e.g. India or the least developed countries which are grappling with basic issues of food, water and health care and for which they do not have sufficient resources and thus have to turn to private enterprises for augmenting their scarce resources. States depend on the business sector to deliver

\(^{115}\) Criminal appeal no. 838 of 2008 decided on 27 April 2012
a functioning economy because of which the politics of regulating the individuals and corporations which supply that stability becomes more complex.

Nations have diverse reasons for attaching culpability to wrongs committed by Corporations. In the United Kingdom, for example, following wider publicity of fatal accidents on the rail network and at sea, the term is commonly used in reference to corporate manslaughter and to involve a more general discussion about the technological hazards posed by business enterprises. In USA, corporate criminal culpability is a means of reinforcing the strong foundations of free market economy which has been built over a period of over 100 years of American economic history. In India, post the decision of Supreme Court in Standard Chartered Bank case the concept of corporate criminal culpability is gradually gaining ground as a means of checking the growing strength of such corporations and the resultant tendency to deliberately indulge in criminally culpable behaviour. Bhopal Gas leak was of course the starting point for making the Transnational Corporations criminally accountable but it did not have the desired impact. Before the Standard Chartered Bank case judgment, enforcement of criminal culpability was more in the nature of an attempt to justify the distinct legal personality that a company enjoys under law i.e. legal person having rights and liabilities as natural persons.

The Law Reform Commission of New South Wales offers the following explanation for such criminal activities: "Corporate crime poses a significant threat to the welfare of the community. Given the pervasive presence of corporations in a wide range of activities in our society, and the impact of their actions on a much wider group of people than are
affected by individual action, the potential for both economic and physical harm caused by a corporation is great."

Similarly, Russell Mokhiber and Robert Weissman\textsuperscript{116} assert:
"At one level, corporations develop new technologies and economies of scale. These may serve the economic interests of mass consumers by introducing new products and more efficient methods of mass production. On another level, given the absence of political control today, corporations serve to destroy the foundations of the civic community and the lives of people who reside in them."

Corporate criminality is thus a state of affairs. It denotes the culpable behaviour of an organisation as opposed to the criminality of an individual or a group of individual (in case of a white collar crime). Prosecution of white collar criminals is not difficult since the punitive aspect of physical imprisonment is well taken care of as white collar crimes are usually committed by natural persons. It is the corporate culpability which is laden with delicate issues, the most important being \textit{mens rea} and physical imprisonment in case of a guilty finding. It is a herculean task to judge the criminality of a Corporation, especially in the face of practical difficulties of judging the actions of an organisation which can neither act nor think independently of the persons that run it and yet, it has its distinct identity under law. In the following discussion, the research will graduate exclusively to corporate criminality and transnational corporate crimes, focusing on the corporate culpability of Multinational Corporations who manipulate the differently abled law and law enforcement mechanisms in multiple national jurisdictions for unethical and criminal gains.

\textsuperscript{116} Monroe, Maine, “Corporate Predators – Hunt for Mega Profits and the Attack on Democracy”; Common Courage Press, 1999
Since the aim of this research is to find ways and means for prosecution of multinational corporations under International Criminal Law (ICL), it is relevant to discuss the crimes which these corporations are often charged with or associated with and to analyse if such crimes can be characterized as international crimes so as to qualify for prosecution under the ICL. The purpose, as already outlined in the first chapter, is to make an effort to find a viable and effective international criminal law forum in which these corporations, can be effectively prosecuted for the crimes which affect thousands of individuals, directly as well as indirectly.

The starting point of this discussion has to be the existing standard under international criminal law for characterizing crimes as international crimes\(^\text{117}\). International crimes in very general terms can be described as crimes which have cross border ramifications. This cross border effect can itself take different shapes e.g. criminal activity in one country affecting another neighboring country or countries which is usually the case in case of organised criminal gangs/activity; activities which are not per se criminal but they have strong negative spill over of affect on human rights or environment, both of which are now considered to be crimes under various\(^\text{118}\) national laws as well as international law; activities of Organisations which simultaneously operate in multiple national jurisdictions and which are accused of committing crimes, both conventional like manslaughter, murders as

\(^{117}\) A very interesting reading relating to the crimes against humanity and war crimes having been committed by certain pharmaceutical multinational corporations is provided by the petition filed in the ICC at Hague by Dr. Mathias Rath. A complete copy of the said Complaint made to the ICC is available on Wikipedia.

\(^{118}\) Most of the environmental crimes also result in gross human rights violations since right to environment has now been regarded as an essential Human Right by many National as well as International Instruments.
well as unconventional like harm to environment and human rights violations.

This study is not concerned with organised criminal activity since almost all national jurisdictions, in association with each other, have taken steps to detect, prevent and deter conventional criminal activities being indulged in by these organised gangs as they have direct and visible effect on general peace and security environment of a society e.g. drug trafficking when the drugs are being produced in one country and being trafficked to another or arms trafficking or human trafficking. Similarly, this research is also not concerned with cross border effect of an activity arising in one country but having ill effects (which can be classified as criminal) in another country e.g. financing of terrorist operations either by the Government or by a group of insurgents. This research is solely concerned with the international crimes of the third type i.e. crimes committed by multinational business organisations which are typically characterised as Multinational Corporations or Transnational Corporations. Of course, even the first two types of crimes would also fall within the ambit of this research should they be either directly committed or aided or abetted by these multinational corporations. In other words, the essence is the involvement of an MNC/TNC in a stated or alleged crime.

3.5 TRANSNATIONAL CRIMES EMERGING AS INTERNATIONAL CRIMES

In order to analyse as to what of these crimes, which are typical of a corporate wrongdoing, can be classified as an International crime, we have to firstly briefly discuss these corporate crimes and then look up
in various international instruments dealing with International criminal law.

As a starting point I have chosen 3 major crimes –

   a)  **Money Laundering**
   b)  **Corporate Corruption**
   c)  **Crimes against Environment**

### 3.5.1 Money Laundering

Money Laundering Refers to the series of transactions by which money gained through criminal activities (called predicate crimes) is given the appearance of legitimate money. According to an IMF factsheet\(^{119}\), money laundering is a process by which illicit source of assets obtained or generated by criminal activity is concealed to obscure the link between the funds and the original criminal activity. In other words, it is the process to legitimise illegitimate money. The term money laundering describes graphically the process by which dirty money obtained through crime, is cleaned so that it is, or at least appears to be, legitimate money with no taint of its criminal origin\(^{120}\). The FATF, which has set international standard for anti-money laundering measures since it first issued its 40 Recommendations in 1990, answers the question ‘what is money laundering?’ in this way: 

*The goal of a large number of criminal acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. The process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source*\(^{121}\).

The question that arises is as to why do criminals need to disguise illegal money as legal money? The criminals anyways operate outside


\(^{120}\) id at p. 3
Money Laundering is an activity which is indulged in by organized criminals, not by petty thieves or robbers. Organized criminals have to run their activities in a systematic and professional manner which requires large funding. In most cases like the Italian Mafia, organized criminals live freely within the society because they are able to hide their ill-gotten money and channel it into legitimate business. The advantage is that whenever they require money for criminal acts, they can siphon off money from their legitimate business. Money Laundering becomes an important area of study as a corporate crime since organized criminals use illegal money to enter into legal financial systems and then re-divert their money into illegal acts e.g. there were recent news reports that Islamic terror organizations have placed money in the Bombay Stock exchange and are buying up shares. This they do with the help of front companies or sham companies and that is where corporate criminality comes into picture.

Money Laundering as a crime consists of 3 major steps:

- **Step no. 1**

  **PLACEMENT** - Stage 1 for Money Laundering: The launderer introduces his illegal profits into the financial system. This might be done by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments (cheques, money orders) that are then collected and deposited into accounts at another location.

- **Step no. 2**
**Layering**– In this phase, the launderer engages in a series of movements of the funds to distance them from their source. The funds might be channeled through the purchase and sales of investment instruments, or the launderer might simply transfer the funds through a series of accounts at various banks across the globe. This use of widely scattered accounts for laundering is especially prevalent in those jurisdictions that either do not co-operate in anti-money laundering investigations or do not have effective anti-money laundering rules and regulations.

**Step no. 3 – Final phase**

**Integration** – In this last stage, the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures. These assets become a part of legitimate financial/economic system.

It is thus clear that money laundering is an extensive exercise requiring detailed planning i.e. criminal planning would require designating locations from which money can be placed\(^\text{122}\) into the legitimate financial systems, finding routes for the layering phase\(^\text{123}\) and then for the final stage, to bring the illegitimate money out and then reinvest\(^\text{124}\) them in legal ventures. As has been discussed above, money laundering involves moving and disguising large amounts of money by organised criminals since their *modus operandi* is to control the criminal activities by operating from within the society and not as

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122 Those jurisdictions which do not require the depositor to disclose the source of income or money being deposited.

123 So that the movement of large amounts of money from one location to another does not arouse suspicion from enforcement officials.

124 Integration also requires detailed planning as to how should the money be channelized into various legal ventures without attracting too much attention of the regulatory authorities.
outcasts. For this kind of criminal management, they require legitimate money. The next question that arises is as to from where does such a large amount of money come from for Laundering?

- Illegal arms sales, smuggling, and the activities of organised crime, including for example drug trafficking and prostitution rings, can generate huge amounts of proceeds.

- Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to “legitimise” the ill-gotten gains through money laundering.

- The International Monetary Fund, stated in 1996 that aggregate size of money laundering in the world could be between 2 and 5 percent of the world’s gross domestic product. These percentages indicate that money laundering ranged between US Dollar (USD) 590 billion and USD 1.5 trillion. The lower figure is roughly equivalent to the value of the total output of an economy the size of Spain. The 2008 estimates of IMF put the money laundering figures at 3-5% of world’s GDP\(^\text{125}\). The estimated amount of money laundered globally in one year is 2-5% of global GDP or (US) $800 billion – (US) $2 trillion\(^\text{126}\).

It is natural to suppose that if such a huge amount of illegal wealth is being generated, it is bound to be routed into mainstream economy. Otherwise, such a huge stash of money is of no use to criminals even, if the same is not effectively utilised. This becomes all the more important in case of organised criminal activities which continuously requires large scale funding to keep up the scope of operations and


planning to such a level that the law enforcers can be checkmated. An important issue that needs to be highlighted is the effect on the legitimate socio-politico-economic scenario of a country when large scale laundered money is introduced in the national economy. According to Min Zhu, Deputy Managing Director of the IMF, money laundering and the financing of terrorism are financial crimes with economic effects. They can threaten the stability of a country’s financial sector or its external stability more generally. Effective anti-money laundering and combating the financing of terrorism regime are essential to protect the integrity of markets and of global financial framework as they help mitigate the factors that facilitate financial abuse. Action to prevent and combat money laundering and the financing of terrorism thus responds not only to a moral imperative, but also to an economic need\textsuperscript{127}.

The ill effects of money laundering are multifarious. It completely undermines the reputation and perceived integrity of a financial system and sooner or later it begins to be associated with crime itself. This in turn has a damping effect on foreign direct investment when a country’s commercial and financial sectors are perceived to be subject to the control and influence of organized crime. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and governments as well. It rewards corruption and crime. Successful money laundering damages the integrity of any political institution and the rule of the law. In addition, Money laundering is majorly used to finance terrorist operations worldwide especially money obtained through Drug trafficking. It is thus of international concern. Infact such has been the link between money laundering and terrorist

\textsuperscript{127} www.imf.org/external/np/exr/.../aml.html accessed on 4.2.2013
financing that IMF has included CFT (combating financing of terrorists) a part of their AML (Anti Money Laundering) program which is now know as AML-CFT.\(^{128}\)

3.5.1.1 *International Efforts to Check Money Laundering*: The cascading effects of money laundering have resulted in strong international efforts to detect money laundering and stop it. It is important to highlight that in case of money laundering, it is easier to take corrective measures rather than preventive since the origin of money laundering relates to the crime itself, something which can never be eradicated from any society. Hence, the next best thing is to take stern measures to detect money laundering and when discovered, stop it immediately by taking counteractive measures.

- Financial Action Task Force on money laundering (FATF) was established by the G-7 Summit in Paris in 1989 to develop a coordinated international response. It is a 36 member intergovernmental body and has primary responsibility for developing a worldwide standard for AML and CFT. It works in close cooperation with other key international organisations including the IMF, the World Bank, the United Nations and FATF style regional bodies. In April 1990, the FATF on money laundering issued a set of 40 recommendations for improving national legal systems, enhancing the role of the financial sector and intensifying co-operation in the fight against money laundering. These recommendations were revised and updated in 1996 and 2003 in order to reflect changes in money laundering techniques and trends. The 2003 Recommendations are considerably more detailed than the previous ones, in particular with regard to customer identification and due

\(^{128}\) IMF Factsheet dt. 5.9.2014 available at www.imf.org
diligence requirement, suspicious transactions reporting requirements and seizing and freezing mechanisms. The FATF extended its mandate in October 2001 to cover the fight against terror financing and issued 8 special Recommendations on combating the financing of terrorism. A 9th special Recommendation was adopted in October 2004. Taken together, the FATF 40 recommendations and the 9 Special Recommendations on terrorist financing provide a comprehensive set of measures for an effective legal and institutional regime against money laundering and the financing of terrorism129.

- European Union, Council of Europe, Organization of American States have established anti-money laundering standards for their member countries. The Caribbean, Asia, Europe and southern Africa have created regional anti-money laundering task force-like organizations.

- IMF has helped in shaping international AML/CFT policies and included over 70 AML/CFT assessments, involvement in the design of AML/CFT – related program measures, a large number of technical assistance and research projects. The IMF’s broad experience in conducting financial sector assessments, exercising surveillance over members’ economic systems and providing technical assistance to its member countries has been particularly helpful in evaluating countries’ compliance with the international AML/CFT standard and in developing programs to help them address identified shortcomings. In April 2009, the IMF launched a donor-supported trust fund to finance technical assistance in AML/CFT.

UNODC\textsuperscript{130}: the Law Enforcement, Organised Crime and Anti-Money Laundering Unit of UNODC (United Nations office on Drugs and Crime) is responsible for carrying out the Global Programme against money laundering, Proceeds of Crime and Financing of Terrorism, which was established in 1997 in response to the mandate given to UNODC through the UN Convention against illicit traffic in Narcotics Drugs and Psychotropic Substances of 1988. The Unit’s mandate was strengthened in 1998 by the Political Declaration and the measures for countering money laundering adopted by the General Assembly at its 20\textsuperscript{th} special session which broadened the scope of the mandate to cover all serious crime, not just drug related offences. The broad objective of the Global Programme is to strengthen the ability of Member States to implement measures against money laundering and the financing of terrorism ad to assist them in detecting, seizing and confiscating illicit proceeds as required pursuant to UN Instruments and other globally accepted standards, by providing relevant and appropriate technical assistance upon request.

Indian Response:
The Government of India also woke up to the urgent need to combat laundering of black money. Indian economy was characterised, initially by a regime of strict controls\textsuperscript{131} and mixed economy where private enterprise was permitted in a few select areas. The regime of strict control and socialistic economy gave immense opportunities for generating black money i.e. unaccounted money for tax purpose. This was in the form of bribes, commissions as well as smuggling activities.


\textsuperscript{131} Popularly known as Inspector Raj where one had to seek permits and quotas for practically everything
Money laundering was thus important to re-channelize this illegal wealth. Post liberalisation in 1991, generation of black money has increased manifold, thanks to a different set of reasons which are marked of a free market economy. Just as a closed economy gave opportunity to generate unaccounted money, in much the same manner a free economy has resulted in generating unaccounted money mainly in the form of public and corporate corruption. The string of financial scams, starting from the Harshad Mehta Stock Broking scam show that proportion of black money being generated is increasing every day. Thus the need for effective money laundering laws was imperative. This led to the enactment of the Act of 2002 by the Indian Government i.e. The Prevention of Money Laundering Act 2002.

The Act of 2002 defines the offence of Money laundering as “whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering.”

Prevention of Money Laundering Act 2002, S. 70 of this Act deals with the liability of companies i.e. corporate liability for indulging in money laundering. It places liability on directors, managers and any officer who was involved in the management or was in charge of the company affairs and had knowledge of such a crime being committed.

Whether Money Laundering has attained the status of an International Crime? This question can be answered by referring to various international legal instruments dealing with money laundering. The fact that money laundering is of global concern is not disputed. UN, IMF as well as international regional bodies have joined hands to combat money laundering which is perceived as a common
threat not just to national financial systems but the global financial system as well. However, it is only by referring to international legal instruments which form a legitimate source of international law can we come to the conclusion whether or not money laundering is an international crime.

The 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substance – This was the first international convention which criminalised money laundering. Although the word money laundering is not specifically used, yet Article 3 of the Convention leave no doubt that the acts which the said article is referring to corresponds partly to money laundering. One reason why the term money laundering was not used is possibly because at that time, the entire international law focus was on drug trafficking and little was researched on the relationship between money laundering and drug trafficking. The said sections (relevant part) are reproduced below –

Article 3
OFFENCES AND SANCTIONS
1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

   a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

   ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;

iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;

b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences.

**UN Convention against Transnational Organised Crime (Palermo Convention):** The Palermo Convention is one of the most significant international legal instruments which deals with the organised crime having trans-boundary effects. Article 6 of the Convention specifically deals with criminalization of the laundering of proceeds of crime. Article 7 then follows up with measures to combat money laundering. Although the words money laundering is not used in Article 6 but the term ‘laundering of proceeds of crime’ unambiguously places money laundering in that category. Moreover, Article 7 is devoted completely
for combating money laundering leaving no doubt that Article 6 & 7 criminalises money laundering as an international crime. Both the Articles are reproduced below -

Article 6. Criminalization of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

   (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

   (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

   (b) Subject to the basic concepts of its legal system:

      (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

      (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

   (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

   (b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate
offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7. Measures to combat money-laundering

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under
domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

_UN Convention against Corruption (UNAC) –_ This Convention was a result of the realization by the international community that corruption is not just a localised phenomenon but one which pervades through all countries and societies. The growing phenomenon of corruption in public as well as private sectors is threatening even the stability of national governments and undermining their economies. UNAC clearly puts money laundering in the category of crimes. Article 14 read with Article 23 makes it unambiguous that money laundering is viewed as an international crime by the community of nations.

_Article 14. Measures to prevent money-laundering_

1. Each State Party shall:
(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
(b) To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Article 23. Laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

   (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

   (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

   (b) Subject to the basic concepts of its legal system:

   (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

Both these conventions widened the scope of money laundering offence to include illegal proceeds not just from drug trafficking but all serious crimes. Both these conventions called for the setting up of
Financial Intelligence Units as well as setting up a regulatory and supervisory regime for banks and non-banking financial institutions.

*International Convention for Suppression of the Financing of Terrorism*: This convention requires member states to take measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities. Article 2 of the Convention makes money laundering (though the term money laundering is not specifically used) a crime and urges member states to take appropriate steps to combat the same. Interestingly, Article 5 of this Convention makes even ‘legal entities’ liable, in addition to individual offenders, for criminal prosecution if they commit offences as mentioned in the Convention. The relevant articles are reproduced below –

**Article 2**

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

   (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

   (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

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132 Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999
2.  (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

   (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

   (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

   (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

       (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

UN Resolution 1373 (2001)\textsuperscript{133}: This Resolution was an immediate reaction to the bombing of twin World Trade Centre buildings by Al Qaeda militants. Vide this resolution UN General Assembly unequivocally condemned the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001,

\textsuperscript{133} Adopted by the Security Council at its 4385th meeting, on 28 September 2001
and expressed its determination to prevent all such acts. The Resolution *Reaffirmed* that such acts, like any act of international terrorism, constitute a threat to international peace and security and the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist Acts. It further called on States to work together urgently to prevent and suppress terrorist acts, including through increased international cooperation and the need for States to complement cooperation by taking additional measures to prevent and suppress, in their territories the financing and preparation of any acts of terrorism. In addition to condemning terrorist activities as being a threat to international peace and security, the Resolution directly referred to the need to curb financing of terrorist acts, whether directly or indirectly and called upon member states to criminalise the act of terrorist financing. It has already been discussed above that money laundering and terrorist financing has an extremely close nexus. The Resolution specifically notes the link between terrorist financing and money laundering and classifies both, terrorism as well as financing of such activities as threats to international peace and security, and contrary to the principles of United Nations. Another very important highlight of this Resolution that it recognises the fact that apart from natural persons, ‘entities’ are also involved in money laundering and financing of terrorist activities and to classify such activities as criminal including those committed by the ‘entities’ also. The relevant part of the Resolution is reproduced under -

1. *Decides that all States shall:*

   (a) *Prevent and suppress the financing of terrorist acts;*

   (b) *Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should*
be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:
   (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

   (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

   (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

   (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

4. Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations Convention On Laundering, Search, Seizure And Confiscation Of The Proceeds From Crime (Strasbourg Convention): This European convention sought to create regional system for co-operation between members of the European Council to check the laundering of proceeds of crimes, especially organised crime, and to provide for confiscation of
the same, where ever possible. Vide this convention, as outlined in the Preamble of the Convention, the member States of the Council of Europe considering that the fight against serious crime has become an increasingly international problem, called for the use of modern and effective methods on an international scale. The Convention outlined that one of these methods consists in depriving criminals of the proceeds from crime and that for the attainment of this aim, a well functioning system of international co-operation must be established. 2 relevant factors of this Convention need to be highlighted. First important factor of this convention which needs highlight is that the convention recognises the complicity of ‘legal persons’ in the offence as outlined in the Convention. Secondly, this convention, which is basically in relation to international co-operation in confiscating proceeds of crime which have been laundered, recognises that absence of an act as an offence in the requested State will not result in denial of co-operation to the requesting party. The only discretion in such a case is not to take coercive measures against the person. This convention thus, serves as a precedent to show that differences in criminal philosophy should not come in the way of effective response to a problem. The relevant part is reproduced under -

**Article 1 – Use of terms**

*For the purposes of this Convention:*

a “proceeds” means any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;

b “property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property;
c “instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

d “confiscation” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property;

e “predicate offence” means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention.

Chapter II – Measures to be taken at national level

Article 2 – Confiscation measures
1 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

2 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration.

Article 6 – Laundering offences
1 Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

a the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

b the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is
proceeds; and, subject to its constitutional principles and the basic concepts of its legal system;

c the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

d participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2 For the purposes of implementing or applying paragraph 1 of this article:

a it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

b it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

c knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

3 Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender:

a ought to have assumed that the property was proceeds;

b acted for the purpose of making profit;

c acted for the purpose of promoting the carrying on of further criminal activity.

4 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to
predicate offences or categories of such offences specified in such declaration.

Chapter III – International co-operation

Section 1 – Principles of international co-operation

Article 7 – General principles and measures for international co-operation

1 The Parties shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2 Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

a for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.

Section 2 – Investigative assistance

Article 8 – Obligation to assist

The Parties shall afford each other, upon request, the widest possible measure of assistance in the identification and tracing of instrumentalities, proceeds and other property liable to confiscation. Such assistance shall include any measure providing and securing evidence as to the existence, location or movement, nature, legal status or value of the aforementioned property.

Section 5 – Refusal and postponement of co-operation

Article 18 – Grounds for refusal

1 Co-operation under this chapter may be refused if:
a the action sought would be contrary to the fundamental principles of the legal system of the requested Party; or

b the execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of the requested Party; or

c in the opinion of the requested Party, the importance of the case to which the request relates does not justify the taking of the action sought; or

d the offence to which the request relates is a political or fiscal offence; or

e the requested Party considers that compliance with the action sought would be contrary to the principle of ne bis in idem; or

f the offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction. However, this ground for refusal applies to co-operation under Section 2 only in so far as the assistance sought involves coercive action.

2 Co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter, may also be refused if the measures sought could not be taken under the domestic law of the requested Party for the purposes of investigations or proceedings, had it been a similar domestic case.

3 Where the law of the requested Party so requires, co-operation under Section 2, in so far as the assistance sought involves coercive action, and under Section 3 of this chapter may also be refused if the measures sought or any other measures having similar effects would not be permitted under the law of the requesting Party, or, as regards the competent authorities of the requesting Party, if the request is not authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.
Co-operation under Section 4 of this chapter may also be refused if:

a under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates; or

b without prejudice to the obligation pursuant to Article 13, paragraph 3, it would be contrary to the principles of the domestic laws of the requested Party concerning the limits of confiscation in respect of the relationship between an offence and:

i an economic advantage that might be qualified as its proceeds; or

ii property that might be qualified as its instrumentalities; or

c under the law of the requested Party confiscation may no longer be imposed or enforced because of the lapse of time; or

d the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought; or

e confiscation is either not enforceable in the requesting Party, or it is still subject to ordinary means of appeal; or

f the request relates to a confiscation order resulting from a decision rendered in absentia of the person against whom the order was issued and, in the opinion of the requested Party, the proceedings conducted by the requesting Party leading to such decision did not satisfy the minimum rights of defence recognised as due to everyone against whom a criminal charge is made.
5 For the purpose of paragraph 4.f of this article a decision is not considered to have been rendered in absentia if:

a it has been confirmed or pronounced after opposition by the person concerned; or

b it has been rendered on appeal, provided that the appeal was lodged by the person concerned.

6 When considering, for the purposes of paragraph 4.f of this article if the minimum rights of defence have been satisfied, the requested Party shall take into account the fact that the person concerned has deliberately sought to evade justice or the fact that that person, having had the possibility of lodging a legal remedy against the decision made in absentia, elected not to do so. The same will apply when the person concerned, having been duly served with the summons to appear, elected not to do so nor to ask for adjournment.

7 A Party shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

8 Without prejudice to the ground for refusal provided for in paragraph 1.a of this article:

a the fact that the person under investigation or subjected to a confiscation order by the authorities of the requesting Party is a legal person shall not be invoked by the requested Party as an obstacle to affording any co-operation under this chapter;

b the fact that the natural person against whom an order of confiscation of proceeds has been issued has subsequently died or the fact that a legal person against whom an order of confiscation of proceeds has been issued has subsequently been dissolved shall not be invoked as an obstacle to render assistance in accordance with Article 13, paragraph 1.a.
3.5.2 Corporate Corruption

Bribery and corruption are problems which are common to both the developed as well as developing world economies. The malady of corruption of public officials is a serious impediment and an obstacle to development in developing countries as they don’t have effective regulatory and legal mechanisms to check bribe money like developed nations. There is a subtle difference in bribery and corruption. Whereas, bribery has a narrow connotation and is majorly associated with giving illegitimate financial rewards to a person in authority, corruption is a wider term denoting a state of affairs where there is rampant offering and acceptance of illegitimate money. Most of the developed nations have a very low percentage of corruption in public life even though bribery does exist at higher echelons of power or even judicial levels. Contrary to this, in developing countries the problem is profound in as much as corruption pervades through practically all spheres of life, including private sector. In the words of Kofi Anan\textsuperscript{134}:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government’s ability to provide basic services, feeding

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\textsuperscript{134} The Then Secretary General of the United Nations, in his foreword to the UN Convention Against Corruption (UNAC)
inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

Every revolution in the less developed world has been at least partially inspired by the desire to drive out corrupt rulers and officials, replacing them with honest men and raising the moral tenor of the society. But the process is never completed. One regime replaces another, and the corruption appears again. Till 1994, Government in most industrialized countries allowed their citizen – in particular their exporters – to bribe foreign officials. Through generous tax deductions of bribes, these governments even subsidized and promoted corrupt behavior of their corporate sector in global markets. A major exception was the Foreign Corrupt Practices Act of 1977 passed by the United States. The other industrialized states did not follow the American example. This process evolved into a grand phenomenon in the globalised economy, especially in the natural resources extractive industries. This widespread corruption was one of the major reasons for poverty, terrorism, conflict and violence in the developing world. It was in 1999 that OECD’s Convention on Combating Bribery of Foreign Public Officials was signed by 35 exporting countries and entered into force in 1999. In the meantime many other international conventions came into existence, the most important being United Nations Convention against Corruption 2004. There were certain regional responses also in the form of Inter

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American Convention against Corruption and the African Union Convention of 2005\textsuperscript{136}.

Professor Peter Schrot\textsuperscript{h} suggests that any discussion of international measures against corruption and bribery must begin with the United States. In early 1974, investigations linked to \textit{Watergate} revealed, inter alia, several instances of money laundering though foreign countries and the use of campaign funds to bribe foreign officials. Because US multinational corporations were implicated in the investigations, the Securities and Exchange Commission (SEC) began to conduct its own investigations of illegal payments that these corporations made in foreign countries. Over the next three years, the SEC gathered admissions from four hundred US multinational corporations that they made payments amounting to $300 million in bribing foreign officials. The newly discovered magnitude of the problem called for an international effort, which the United States spearheaded. On July 10, 1975, the United Nations General Assembly adopted a resolution condemning corruption by transnational corporation and others involved in corruption GA Res. 3514, UN GAOR, 30\textsuperscript{TH} Session. Even though SEC discovered serious improprieties on the part of multinationals but adverse publicity failed to produce remedial measures. No prosecutions ensued. These facts triggered the enactment of Foreign Corrupt Practices Act of 1977. The Organisation of American States' \textit{“Inter American Convention Against Corruption”} was the first binding international convention aimed at combating corruption. It entered into force on March 6, 1997 and was

\textsuperscript{136} Dr. Peter Eigen, “Fighting Corruption In A Global Economy: Transparency Initiatives In The Oil And Gas Industry”; \textit{Houston Journal of International Law} Vol. 29, 2007, p. 329
adopted by 34 member of the Organisation of American States. The next important development was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It entered into force in Feb. 1999137.

Infact in most developing nations, corruption and public life have symbiotic relationship involving a strong political-bureaucratic-private sector nexus with all the three participants reinforcing each other by bending and circumventing laws, sometimes even resorting to downright violation. In this entire endeavor, corruption or bribe money acts the lubricant which keeps this illegal nexus in smooth motion. This nexus becomes more potent when politician-criminal angle also gets attached. In other words, law makers and law enforcers join hands with law breakers.

Corporate corruption is no different from the term ‘Corruption’ that we understand in general terms. The only difference is that instead of two individuals who are involved in demand and supply of bribe money, in corporate corruption, it is done by the business organization, on a much larger scale and the recipients usually are the national or state governments i.e. through politicians in association with high ranking public officials. Corporate Houses indulge in corruption for a variety of reasons –

➢ Gaining access to lucrative markets but which function in closed economy. One of the biggest examples of this kind of corruption has recently rocked the Indian economy

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137 Id Note 125 at p. 696
wherein *Wal-Mart*¹³⁸, the American retail giant, has been alleged with paying off money to lobby with US government to negotiate with India government for opening up the retail sector.

- Getting permission to invest on favourable terms e.g. tax holidays. Generally, tax holidays are given for setting up industries in backward areas for their speedy economic development as they set up infrastructure, generate employment and in addition thereto, bring about general rise in living standard. However, these kinds of tax holidays invariably involve payment of kickbacks to Governments because giving tax holidays results in loss to state revenue even though state resources are being used.

- Especially in developing and underdeveloped economies, TNC’s get away with undue bargains in return for foreign investment which these national economies badly need as they don’t have sufficient resources of their own. On

¹³⁸ http://www.thehindubusinessline.com/news/international/walmart-continues-lobbying-in-us-for-india-entry/article4375075.ece accessed on 20.1.2012 - Amid a probe being initiated into Wal-Mart's US lobbying with regard to its India entry, the global retail giant has continued to lobby with the American lawmakers on this issue, as also others, and spent a total amount of $6.13 million on the same during 2012. Recently, the Indian government initiated a probe into the lobbying activities by Wal-Mart in the US for gaining access to Indian market, after disclosures about these activities caused a furore and a political debate in India. The company has, however, maintained that these disclosures have nothing to do with political or governmental contacts with India government officials and they only show that Wal-Mart's business interest in India was discussed with the US government officials along with many more other topics. Wal-Mart has been waiting for years to open its supermarkets in India and it has been lobbying with the US lawmakers since at least 2008 to facilitate its entry into the highly lucrative Indian market. Its total bill on these activities has now crossed $34 million (about Rs 180 crore) since 2008, which has been incurred on account of lobbying for “enhanced market access for investment in India”.
paper, it appears to be a mutually beneficial arrangement but in reality, it is the developing countries which need the economic power of multinational companies more to give boost to infrastructure and overall development. This in turn leads to undue favours to these companies for the grant of which, the politicians and public officials take bribes as these form a very insignificant loss to the MNC’s as compared to the macro economic advantages which they gain.

- Exploiting natural resources which the National Governments are unable to do on their own e.g. Gas and Oil
- Getting permission to work with very few regulations i.e. ordinary laws are not applicable.
- Dictatorships or Military Rulers often invite TNC’s to invest in return for large illegal payoffs which they need to support their ‘Rule’, often resulting in human rights violations for which these TNC’S are indirectly responsible. These TNC’s usually provide monetary and logistics support to such military rulers resulting in mass murders and killings, often termed collectively as human rights violations. African continent is a good example of these kinds of corporate-military dictator nexus.

There has been a concerted international response to check bribery in foreign commercial transactions, especially by private companies. At the forefront is the UN Convention Against Corruption (UNCAC), draft of which was prepared by the Ad Hoc Committee of United Nations Office on Drug and Crime Head-quartered in Vienna. The background to this
Convention are UN Resolutions 55/61 of 4.12.2000 for setting up of Ad Hoc committee for negotiations on an International Instrument against Corruption and Resolution 56/186 of 21.12.2001 and 57/224 of 20.12.2002 on preventing and combating corrupt practices and transfer of funds of illicit origin. Monterrey Consensus was adopted by International Conference on Financing for development in which it was underlined that fighting corruption was a priority at all levels. Even Para 19 of Johannesburg Declaration on sustainable Development highlights that Corruption is a threat to Sustainable Development. UN Convention Against Corruption was adopted vide resolution no.58/4 of 31.10.2003.

The UNCAC patently classifies corruption as a crime of international concern and proportions. The Preamble of the Convention itself brings out the connection between organised crime, money laundering and corruption. The relevant part of the Preamble is reproduced below:

**Preamble**

*The States Parties to this Convention,*

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

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Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential,

Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

Determined to prevent, detect and deter in a more effective manner inter-national transfers of illicitly acquired assets and to strengthen international co-operation in asset recovery,

Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective....

The Convention specifically requests the member states to criminalise corruption of public officials. In addition Article 3 of the Convention starts with the presumption that Corruption is a crime and needs to be prosecuted. Article 3 is reproduced below -

Article 3. Scope of application

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.

2. For the purposes of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

140 “Requests the Conference of the States Parties to the Convention to address the criminalization of bribery of officials of public international organizations, including the United Nations, and related issues, taking into account questions of privileges and immunities, as well as of jurisdiction and the role of international organizations, by, inter alia, making recommendations regarding appropriate action in that regard;”
In addition to the UN response, there are other significant international instruments dealing exclusively with corporate corruption vis-a-vis national Governments and which criminalise corruption or bribery. The OECD Convention on Bribery of Foreign Officials criminalises bribery of foreign officials in international transaction. The Convention makes a specific reference to responsibility of ‘Legal Person’. The relevant text is reproduced below –

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Adopted by the Negotiating Conference on 21 November 1997):

**Preamble**

The Parties, Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, inter alia, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the
Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

HAVE AGREED AS FOLLOWS:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. For the purpose of this Convention:
   a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
   b) “foreign country” includes all levels and subdivisions of government, from national to local;
   c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

Article 2
Responsibility of Legal Persons Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3
Sanctions
1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign
public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

**Article 4**

**Jurisdiction**

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

The OECD has established a monitoring program to assure effective and consistent implementation and enforcement of the Convention.

The *EU Criminal Law Convention on Corruption* is much more elaborate in defining the types of bribery. In particular, as in the OECD convention, a specific article has been devoted to legal personality. The EU convention goes a step further and lays down in detail the responsibility of corporation in bribery offence. The relevant part is reproduced below –
Criminal Law Convention On Corruption (Strasbourg, 27.I.1999):

**Preamble**

The member States of the Council of Europe and the other States signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recognising the value of fostering co-operation with the other States signatories to this Convention;

Convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures;

Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society;

Believing that an effective fight against corruption requires increased, rapid and well-functioning international co-operation in criminal matters;

Welcoming recent developments which further advance international understanding and co-operation in combating corruption, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the OECD and the European Union;

Having regard to the Programme of Action against Corruption adopted by the Committee of Ministers of the Council of Europe in November 1996 following the recommendations of the 19th Conference of European Ministers of Justice (Valletta, 1994);

Recalling in this respect the importance of the participation of non-member States in the Council of Europe’s activities against corruption and welcoming their valuable contribution to the implementation of the Programme of Action against Corruption;
Further recalling that Resolution No. 1 adopted by the European Ministers of Justice at their 21st Conference (Prague, 1997) recommended the speedy implementation of the Programme of Action against Corruption, and called, in particular, for the early adoption of a criminal law convention providing for the co-ordinated incrimination of corruption offences, enhanced co-operation for the prosecution of such offences as well as an effective follow-up mechanism open to member States and non-member States on an equal footing;

Bearing in mind that the Heads of State and Government of the Council of Europe decided, on the occasion of their Second Summit held in Strasbourg on 10 and 11 October 1997, to seek common responses to the challenges posed by the growth in corruption and adopted an Action Plan which, in order to promote co-operation in the fight against corruption, including its links with organised crime and money laundering, instructed the Committee of Ministers, inter alia, to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption;

Considering moreover that Resolution (97) 24 on the 20 Guiding Principles for the Fight against Corruption, adopted on 6 November 1997 by the Committee of Ministers at its 101st Session, stresses the need rapidly to complete the elaboration of international legal instruments pursuant to the Programme of Action against Corruption;

In view of the adoption by the Committee of Ministers, at its 102nd Session on 4 May 1998, of Resolution (98) 7 authorising the partial and enlarged agreement establishing the “Group of States against Corruption – GRECO”, which aims at improving the capacity of its members to fight corruption by following up compliance with their undertakings in this field,

Have agreed as follows:

**Chapter II – Measures to be taken at national level**

**Article 2 – Active bribery of domestic public officials**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or
indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.

**Article 3 – Passive bribery of domestic public officials**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.

**Article 4 – Bribery of members of domestic public assemblies**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any domestic public assembly exercising legislative or administrative powers.

**Article 5 – Bribery of foreign public officials**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving a public official of any other State.

**Article 6 – Bribery of members of foreign public assemblies**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any person who is a member of any public assembly exercising legislative or administrative powers in any other State.

**Article 7 – Active bribery in the private sector**
Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

**Article 8 – Passive bribery in the private sector**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

**Article 9 – Bribery of officials of international organisations**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3, when involving any official or other contracted employee, within the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents.

**Article 10 – Bribery of members of international parliamentary assemblies**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Article 4 when involving any members of parliamentary assemblies of international or supranational organisations of which the Party is a member.
Article 11 – Bribery of judges and officials of international courts

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 and 3 involving any holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.

Article 12 – Trading in influence

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

Article 13 – Money laundering of proceeds from corruption offences

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime (ETS No. 141), Article 6, paragraphs 1 and 2, under the conditions referred to therein, when the predicate offence consists of any of the criminal offences established in accordance with Articles 2 to 12 of this Convention, to the extent that the Party has not made a reservation or a declaration with respect to these offences or does not consider such offences as serious ones for the purpose of their money laundering legislation.
**Article 18 – Corporate liability**

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
   - a power of representation of the legal person; or
   - an authority to take decisions on behalf of the legal person; or
   - an authority to exercise control within the legal person;
   as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

In addition to the above documents which criminalise corruption, there is yet another convention by the Organisation of American States (OAS) – *Inter American Convention Against Corruption*. Article VIII of the convention specifically addresses the issue of Transnational Bribery and makes it punishable. Then there is *African Union Convention on Preventing and Combating Corruption* which in addition to checking bribery in international trade by multinationals (without
actually referring to a corporation or company), lays stress on eradicating corruption in private sector also (along with public sector).

A special mention in this context is necessary regarding the efforts made by International Chamber of Commerce (ICC). In 1977, ICC issued a Report\textsuperscript{141} on Extortion and Bribery in business transactions. In 1977, in the aftermath of the international bribery scandals of the 1970s, ICC produced its first Report on Extortion and Bribery in International Business Transactions. This included the first version of the Rules of Conduct to Combat Extortion and Bribery recommended by ICC for voluntary application by enterprises. These Rules of Conduct strongly expressed the objective of ending both bribery and extortion. ICC also recommended that the United Nations adopt an international convention to prohibit corruption. UN efforts to reach such an agreement fell through in the 1980s. It took another round of corruption scandals in the 1990s to revive international interest in matters of integrity. Again ICC was at the forefront and issued its second Report in 1996. The Organisation for Economic Cooperation and Development (OECD) became the key forum for anti-corruption reforms. In particular, the adoption in 1997 of the Convention on Combating Bribery of Foreign Public Officials represented a major milestone. This was recognized in a revised version of the ICC Report which was issued in 1999. This broke new ground in calling for complementary and mutually supportive action by governments, intergovernmental bodies, and the business community to combat extortion and bribery in international trade. The Report aroused interest in intergovernmental fora, such as the OECD and the UN Commission on Transnational Corporations. ICC with its revised Rules of Conduct 1999 has been laying emphasis on additional efforts

required to deal more effectively with the demand side of corruption: extortion by foreign public officials. To that end, ICC has called upon the national governments to strengthen their enforcement of laws prohibiting the solicitation and receipt of bribes, as well as the payment of bribes. ICC also renewed its 1996 recommendation that the WTO take an active role, because bribery and extortion are clearly important factors distorting international trade.

The ICC Rules of Conduct clearly prohibit bribery in the private sector, as well as bribery of public officials. ICC has published in the Spring of 1999 a manual of best corporate practices to accompany the Rules of Conduct, and to provide guidance for compliance with the OECD Convention. ICC has linked public corruption with significant aspects like democracy and trade liberalisation e.g.in the early 1990s, scandals involving extortion and bribery were a significant factor in toppling governments in many parts of the world. In addition, bribe and extortion hits hard at the liberalization process of world trade in goods and services achieved through the Uruguay Round: freer trade must be matched by fair competition.

ICC decided in 1994 to review its 1977 Report and set up for this purpose, an Ad Hoc Committee under the chairmanship of Mr. François Vincke (Belgium), Secretary General of Petrofina. The updated Report confirms the basic approach recommended initially i.e. the need for action by international organizations, governments

142 The best example of this is provided by India. Rajiv Gandhi led Congress (I) stormed to power in the General elections in 1984. In just over 2 years, the dynamic and suave youngest Prime Minister of India was involved in thick allegations of bribe and kickbacks allegedly received from Swedish Gun maker AG Bofors. Although the Government survived its full term of 5 years despite close calls for dismissal of the Government on bribery allegations, it lost badly in the ensuing general elections in 1989 when the perceived whistle blower VP Singh, who was a minister in the Rajiv Gandhi led Cabinet, became the Prime Minister.
and by enterprises, nationally and internationally, to meet the goal of greater transparency in international trade. The report by ICC is divided into 3 parts. Noticeable part of this Report is reproduced below.

**PART I - Recommendations to Governments and International Organizations**

*In the interest of developing consistent standards of criminal legislation in this field, each government should ensure that they effectively prohibit all aspects of both the giving and the taking of bribes including promises and solicitation. Where no such legislation exists, the governments concerned should introduce it and take concrete steps to enforce its legislation in this area.*

**National Measures:** In order to deal with the problem of extortion and bribery, governments should, in conformity with their jurisdictional and other basic legal principles, take the following measures, if they have not already done so.

*Preventive measures -*

- **Disclosure procedures:** for the sake of transparency, procedures should be established providing for periodic reports to an authorized government body of measures taken to supervise government officials involved directly or indirectly in commercial transactions. Such reports should be open to public scrutiny.

- **Economic regulations:** when laying down any economic regulations or legislation, governments should, as far as possible, minimize the issuance of individual authorizations, permits, etc. Experience shows that such systems offer scope for extortion and bribery because decision-making involving the issue of permits make is incapable of effective control or supervision.

- **Transactions with governments and international organizations:** Such transactions should be subject to special safeguards to minimize the influence by extortion and bribery. The system for
awarding government contracts might include disclosure of the criteria and conclusions upon which the award is based.

- **Political contributions**: Undisclosed political contributions can be a source of abuse. Governments should enact legislation which ensures that such payments are publicly recorded.

**Enforcement measures:**

Governments, in conformity with their jurisdictional and other basic legal principles, should ensure adequate mechanisms for surveillance, investigation and prosecution with appropriate penalties for those who offer, demand, solicit or receive bribes.

**International Cooperation and Judicial Assistance:**

ICC believes that the OECD Convention and Recommendation on Bribery in International Business Transactions provide a useful framework for government action. All governments, including non-OECD governments, should promptly take action to adhere to the Convention and implement the steps set forth in the Recommendation.

**Cooperation in law enforcement:**

Governments should agree to exchange through law enforcement agencies relevant and material information for the purpose of criminal investigation and prosecution of cases of extortion and bribery.

**Role of international financial institutions:**

International financial institutions, e.g., the World Bank, the European Bank for Reconstruction and Development, should aim to make a significant contribution to the reduction of extortion and bribery in international business transactions. They should take all reasonable steps to ensure that corrupt practices do not occur in connection with projects which they are financing.
PART II - Rules of Conduct to Combat Extortion and Bribery

Introduction

These Rules of Conduct are intended as a method of self-regulation by international business, and they should also be supported by governments. These Rules of Conduct are of a general nature constituting what is considered good commercial practice in the matters to which they relate but are without direct legal effect. The highest priority should be directed to ending large-scale extortion and bribery involving politicians and senior officials. Small payments to low-level officials to expedite routine approvals are not condoned. However, they represent a lesser problem.

Basic Principle:

All enterprises should conform to the relevant laws and regulations of the countries in which they are established and in which they operate, and should observe both the letter and the spirit of these Rules of Conduct. For the purposes of these Rules of Conduct, the term "enterprise" refers to any person or entity engaged in business, whether or not organized for profit, including any entity controlled by a State or a territorial subdivision thereof; it includes, where the context so indicates, a parent or a subsidiary.

Basic Rules:

Article 1: Extortion - No one may, directly or indirectly, demand or accept a bribe.

Article 2: Bribery and "Kickbacks" –

a.) No enterprise may, directly or indirectly, offer or give a bribe and any demands for such a bribe must be rejected.

b.) Enterprises should not (i) kick back any portion of a contract payment to employees of the other contracting party, or (ii) utilize other techniques, such as subcontracts, purchase orders or consulting agreements, to channel payments to government officials, to employees of the other contracting party, their relatives or business associates.
Article 3: Agents - Enterprises should take measures reasonably within their power to ensure:

a) that any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;

b) that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and

c) that they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate, duly authorized governmental authorities under conditions of confidentiality.

Article 4: Financial Recording and Auditing –

a) All financial transactions must be properly and fairly recorded in appropriate books of account available for inspection by boards of directors, if applicable, or a corresponding body, as well as auditors.

b) There must be no "off the books" or secret accounts, nor may any documents be issued which do not properly and fairly record the transactions to which they relate.

c) Enterprises should take all necessary measures to establish independent systems of auditing in order to bring to light any transactions which contravene the present Rules of Conduct. Appropriate corrective action must then be taken.

Article 5: Responsibilities of Enterprises - The board of directors or other body with ultimate responsibility for the enterprise should:

a) take reasonable steps, including the establishment and maintenance of proper systems of control aimed at preventing any payments being made by or on behalf of the enterprise which contravene these Rules of Conduct;
b) periodically review compliance with these Rules of Conduct and establish procedures for obtaining appropriate reports for the purposes of such review; and

c) take appropriate action against any director or employee contravening these Rules of Conduct.

**Article 6: Political Contributions** - Contributions to political parties or committees or to individual politicians may only be made in accordance with the applicable law, and all requirements for public disclosure of such contributions shall be fully complied with.

**Article 7: Company Codes** - These Rules of Conduct being of a general nature, enterprises should, where appropriate, draw up their own codes consistent with the ICC Rules and apply them to the particular circumstances in which their business is carried out. Such codes may usefully include examples and should enjoin employees or agents who find themselves subjected to any form of extortion or bribery immediately to report the same to senior corporate management. Companies should develop clear policies, guidelines, and training programs for implementing and enforcing the provisions of their codes.

**PART III - ICC Follow-up and Promotion of the Rules** - To promote the widest possible use of the Rules set forth in Part II and to stimulate cooperation between governments and world business, ICC is establishing a Standing Committee on Extortion and Bribery. The Chairman of that body shall be nominated by the President of the ICC and the Secretary General shall be responsible for ensuring, in conjunction with ICC National Committees, that members of the Committee are representative of both developed and developing countries and that businessmen are adequately represented in the membership.

The importance of checkmating bribery and corruption by international business organisations can be well gauged from the above reproduced report. The notable aspect is the use of word extortion along with bribery in the ICC Report. Significantly, the ICC Report lays emphasis on striking at corruption in high government offices rather than low level corruption. Corruption, if unchecked, in
reality leads to a situation where the officials/politicians start extorting money for granting regulatory clearances or approvals. Bribery is undoubtedly a crime but extortion is an aggravated form carrying much higher punishment. Whereas bribery has a subtle element of consent for the giver, extortion is forcible from inception. It is thus imperative to take corrective as well as preventive measures to ensure that an atmosphere of corruption does not change into that of extortion. The Report also takes note of the fact that free trade is possible only if there is fair competition. If a free economy is tampered with bribes, the basic economic principles of demand, supply, elasticity and cross elasticity are distorted leading to economic imbalance due to ripple effect. Consequently, such a free market economy no longer offers equal opportunity for all and hence the very purpose of free trade is frustrated. Thus, corruption and bribery in addition to being crimes in general, also have strong trade distorting capacity. Although distortion of free trade does not in any way enhance the criminality of bribery, it does bring into sharp highlight the international ramifications of this socio-politico-economic malady.

The concerted international response to check money laundering and bribery leaves no doubt that these crimes have trans-boundary effect, are widespread and international in character. There are numerous international instruments, as discussed above, which categorically place money laundering and bribery in the class of international crimes. Although, there is no accepted definition of what is an international crime, we have to look at the effects and nature of a crime to conclude either way. This would also include the response to the control of such a crime by the international community. Going by these simple but definite twin standards of effect and regulation, it can be safely presumed that both money laundering and corruption and extortion in international transactions have become international crimes which need to be deterred through effective prosecution under
international criminal law. Another factor worth highlighting is that in all conventions dealing with corruption and money laundering, there is shown to be a symbiotic relationship between money laundering and corruption. Thus any effort to make money laundering or corruption an offence under international criminal law, has to include both offences as they are two sides of the same coin and mutually reinforce each other. Thus unless they are both checked in concert, prosecution of one offence alone will not yield any desirable results.

3.5.3 Environment Crimes
In addition to money laundering and corruption in international transactions, there is a third category of harmful acts which in the opinion of the researcher should be classified as an international crime. This category covers the harmful acts of the TNC’ which have a substantial direct or indirect repercussion on the environment. Infact, the worst sufferer of rapid urbanisation and globalisation has been the environment. It is only recently that the community of nations has woken up to the need for protecting environment from damaging effects of industrialisation. The concept of sustainable development is so inherently linked with the issue of environment protection. Sustainable development speaks about utilisation of available natural resources in the most optimum manner such that even the future generations can make use of such resources. In other words, our present day consumption levels should not impede inherent and intrinsic right of future generations to receive clean and healthy environment for their use. However, they manner in which the big corporations are polluting and plundering natural resources in the name of GDP and free trade, there is an urgent need to control these activities and engage them in a deterrent manner. As in the case of money laundering and corporate corruption in foreign transactions, need for environment protection has been highlighted by a number of international instruments. These instruments specifically highlight
the role of multinational corporations and responsibilities of legal persons.

_Espoo convention_ (Convention on Environmental Impact Assessment in a Transboundary Context Espoo, 25 February 1991) highlights the concern of the international community for protection of environment in the context of transboundary harm. Convention on Biological Diversity also highlights the responsibility of nations to regulate the activities and processes arising in their jurisdiction which have a negative trans-boundary effect. Right to healthy environment has been held (by the Supreme Court of India) to flow from Right to Life under article 21 of the Constitution of India which is a fundamental human right. In addition, right to a healthy environment has been held to be closely linked to basic human rights under international law. Damages have been awarded in certain cases for trans-boundary environment harm i.e. where activity in one country harms the environment of another neighbouring country. There is a growing body of international environment law incorporating principles of environment impact assessment, civil responsibility for trans-boundary harm, carbon emissions and sustainable development.

A number of countries have made environment harm a criminal offence. India has an elaborate environment protection act and a separate judicial machinery to deal with environment related cases. It is also not in dispute that municipal criminal law principles are the fundamental source of international criminal law. However in view

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144 Trail Smelter Arbitration, 33 AJIL (1939); 30 ILM (1991) 846

145 This is because International Criminal law follows the principle of individual criminal responsibility and its derivatives like abettors, aiders and joint criminal liability through shared intention which principles are found in most national penal law systems. Public international law on the other hand is the law of nations and regulates the conduct of sovereign states which
of the well documented ill effects on environment due to the harmful activities of industrial corporations, especially TNC’s, a thorough discussion would be necessary to analyse whether deliberate environment harm has attained the status of an international crime.

International environment crime is defined as “the deliberate evasion of environmental laws and regulations by individuals and companies in the pursuit of personal financial benefit, where the impacts are trans-boundary or global”\textsuperscript{146}. Multinational Corporations intentionally release 3.5 billion pounds of industrial toxins and 1 to 2 billion pounds of pesticides every year in the US alone. Societal factors also create a climate favourable for international environment crime. Factors such as differential cost of values, enforcement and regulatory failure, and trend towards trade liberalisation and deregulation create a power differential favourable to corporate polluters. Clearly an economic advantage exits when corporations move from a First world country to a Third world country, as the labour is cheaper, laws are less stringent and regulated erratically, government corruption is rampant. Investigating and prosecuting corporate environmental crime in developing countries is extremely challenging\textsuperscript{147}. Even where environmental laws exist, local police forces are often uneducated about environmental concerns or influenced by corrupt officials. Often corporate polluters will incorporate the cost of violation penalties into the cost of doing business, rather than correct the problem. In the pursuit of a global economy, countries have been persuaded or forced to sign agreements which include stipulations such as reduction of governmental intervention in the regulation of business. Often in developing countries, corporations can run amuck with few

\textsuperscript{146} Parkash Talwar, \textit{Corporate Crime}; Isha Books; 2006, Introduction p. 9

\textsuperscript{147} Ibid
restrictions to regulate environmental contamination. One such striking example is Chapter 11 of the NAFTA which allows the corporations to sue nation states whose laws protecting their people and the environment violate corporate free trade rights.\textsuperscript{148}

The 2 major conventions relating to environment protection i.e. Espoo convention and Convention on Biological diversity lay stress on transboundary harm. The relevant provisions of the Espoo Convention are reproduced below –

**Article 2 GENERAL PROVISIONS**

1. **The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.**

2. **Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.**

3. **The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.**

4. **The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a**

\textsuperscript{148} Relying on this Clause, Bechtel, an MNC, sued the Govt. of Bolivia in 2003 for violating the company’s free trade rights to privatise water despite the violent protest of local citizens to maintain a clean, safe and affordable public water source.
proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

7. The provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact.

**Article 3 NOTIFICATION**

1. For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.

2. This notification shall contain, inter alia: (a) Information on the proposed activity, including any available information on its possible transboundary impact; (b) The nature of the possible decision; and (c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity; and may include the information set out in paragraph 5 of this Article.
3. The affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification, and shall indicate whether it intends to participate in the environmental impact assessment procedure.

4. If the affected Party indicates that it does not intend to participate in the environmental impact assessment procedure, or if it does not respond within the time specified in the notification, the provisions in paragraphs 5, 6, 7 and 8 of this Article and in Articles 4 to 7 will not apply. In such circumstances the right of a Party of origin to determine whether to carry out an environmental impact assessment on the basis of its national law and practice is not prejudiced.

5. Upon receipt of a response from the affected Party indicating its desire to participate in the environmental impact assessment procedure, the Party of origin shall, if it has not already done so, provide to the affected Party: (a) Relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments; and (b) Relevant information on the proposed activity and its possible significant adverse transboundary impact.

6. An affected Party shall, at the request of the Party of origin, provide the latter with reasonably obtainable information relating to the potentially affected environment under the jurisdiction of the affected Party, where such information is necessary for the preparation of the environmental impact assessment documentation. The information shall be furnished promptly and, as appropriate, through a joint body where one exists.

7. When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall
apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.

8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

**Article 5 CONSULTATIONS ON THE BASIS OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION**

The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to: (a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin; (b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and (c) Any other appropriate matters relating to the proposed activity. The Parties shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.

The relevant provisions of Convention on Biological Diversity highlighting concern for transboundary environmental harm are reproduced below:
**Article 3. Principle**

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

**Article 4. Jurisdictional Scope**

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:

(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and

(b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

Both these Conventions highlight 2 critical components of International Environment Law. Firstly, the sovereignty aspect i.e. of utilising the nation's natural and bio diversity resources. Second, the limitation of this sovereignty aspect while underscoring that activities relating to environment exploitation in one country should not have negative transboundary effects\(^{149}\). The International Court of Justice (ICJ) has decided that this obligation on states to protect against transboundary environmental harm has crystallised as a norm of

\(^{149}\) Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 241–2; Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgement) [2010] ICJ Rep No 135, [193] (‘Pulp Mills Case’). The ICJ and other international arbitration bodies have sought to develop the content of this obligation. For instance, in 2010 the ICJ held in the Pulp Mills Case (at para [193]) that part of this obligation requires states to ‘undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.’
customary international law. To this end the Espoo convention lays down an elaborate system of Environment Impact Assessment study. Consistent with this transboundary concern, environment harm has been gradually characterised as transboundary environment crime.

_Dibley & Kerr_151 in their paper refer to Rob White, a criminologist who has written extensively on global environmental harm. White categorises the levels at which environmental harm occur as ‘the local’, ‘national’, ‘regional’, ‘global’ and ‘transnational’- that is harm that is transferred from one state to another. White specifically categorises ‘transnational’ harm as that which can occur wholly within a region or across regions, and which may or may not have a ‘global’ impact. A concrete example of White's ‘transnational’ harm is that caused by contamination to ground water as a result of hydraulic fracturing (or ‘fracking’) for natural gas in one locality. This process may be carried out, for example, by a corporate group headquartered in a country outside the site of the mining, and/or the natural gas may be exported overseas. In this way, it may also have transnational impacts. _Dibley & Kerr_ observe that strong emphasis on territorial sovereignty in IEL is reflected in its attempts to impose criminal laws to minimise environmental harm.

There are no independent international criminal offences against perpetrators of environmental harm to the world at large; instead IEL


151 The central theme of the Paper was to question whether the current IEL and ICL regimes are effectively suppressing environmental harm as a criminal law system should, and if not, whether the international community should expand its use of international criminal sanctions to protect the environment.
obliges states to create and enforce auxiliary regimes – that is national criminal regimes against environmental harm. One common tool utilised by IEL to further this indirect criminalisation regime is through what is often termed, transnational environmental crimes. Explaining the term, Dibley & Kerr state that transnational environmental crime regimes are auxiliary obligations found in IEL treaties that oblige states to introduce crimes within their municipal legal system to serve the ends of the IEL treaties in which they are found. These regimes criminalise environmental harm with a transboundary component – that is, harm caused by the cross-border movement and disposal of hazardous or protected materials, smuggling of flora and fauna and smuggling of illegal pollutants. The ‘Paper’ further states that in addition to these obligations on States to create municipal penal laws, the international community has also expanded efforts to coordinate the enforcement of transnational environmental crimes. Examples of this include the work of the UN Office of Drugs and Crime (UNDOC), and the international police agency, Interpol, which has formed an ‘Environmental Crimes Division’.

Transnational environmental crime provisions in IEL treaties do not set international standards for the environmental offences which states are supposed to introduce. Instead these transnational crime provisions leave it to each state party to create and enforce a criminal regime within their national law. For example, the Convention on the Transboundary Movements of Hazardous Wastes (Basel Convention) obliges states to ‘introduce appropriate national/domestic legislation to prevent and punish illegal traffic’\textsuperscript{152}. However, the Basel Convention

\textsuperscript{152} ARTICLE 4 GENERAL OBLIGATIONS......
3. The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.
does not elucidate what is 'appropriate'. *Dibley & Kerr* argue that by allowing states to decide the limit and nature of penal provisions against environmental destruction, the transnational criminal regime leaves too much room for the state to craft weak laws, or not to create or enforce criminal penalties at all. The fact that transnational environmental harm continues to expand in size and in profit despite these transnational environmental crimes, strongly suggests the regulatory regime is not effectively deterring individuals or others from carrying out environmentally harmful activity. The paper finally concludes by suggesting that focus of International Environment Law should shift from State responsibility to the principle of individual responsibility (recognised by International Criminal Law) in so far as criminalisation of environment harm is concerned.

By reaching behind the veil of the nation state, ICL has the potential to uncover a range of non-state actors whose conduct causes detrimental environmental outcomes and have hitherto been undeterred by IEL. Secondly and more importantly for the purpose of this research, the paper outlines the increasing acceptance of corporate criminal liability as 'individual responsibility' in the light of many of the examples that massive instances of environmental harm are often caused by the conduct of corporate entities though no international courts or tribunals yet have jurisdiction over corporations. *Dibley and Kerr* thus advocate the direct criminalisation process (i.e. under International Criminal Law) of environment crimes rather than auxiliary criminalisation which puts an obligation on the states to criminalise transboundary environment crime.

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4. Each party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention
Bernard Marquet acknowledges that there is a legal vacuum regarding environmental responsibilities of business actors in these high-risk fields of activity. While discussing the ‘Polluter Pays’ principle, Marquet highlighted that the bargaining power of guilty enterprises is often stronger than fragmented legal frameworks and the political will of decision-makers. Prof. Sergio Marchisio, while delivering his lecture on Environment Crimes and Violation of Human Rights highlighted that existing legal issues allow environmental crimes to continue largely without prosecution. In this line, an important way to protect the environment is through criminal law, which seems to be an appropriate response to offences posing serious threats to the environment. Moreover, the protection of the environment through criminal law should include also international criminal law, which can play an important role in fighting against eco-crimes and eco-criminals. Prof. Marchisio while supporting the emergence of environmental crimes as crimes punished by international law submitted that multilateral treaties criminalising environment harm is not sufficient. It is mandatory to advocate the emergence of environmental crimes as crimes of international law since some environmental crimes, in fact, deserve special attention at the international level because of their heavy political, social and economic consequences. Specifically, Prof. Marchisio highlighted the difference between international crimes and international wrongful act, based on the definition given by International Law Commission.

153 Vice-Chairperson of the PACE Committee on Social Affairs, Health and Sustainable Development, participating in the UNICRI-UNEP Conference on Environmental Crime - Current and Emerging Threats in Rome on 29-30 October 2012
155 Prof. Marchisio drew a direct link between the Human Rights and Environment Protection and outlined that Human Rights are the main drivers of International Criminal Law.
draft code on State Responsibility. The draft code stated that in case of international crimes not only States were to be considered responsible, but also, and mainly, the individuals involved in their commission. In other words, international crimes of States were coupled with individual international crimes. Prof. Marchisio stressed on the need to resume the debate on international environmental crimes as crimes that should be prosecuted at all levels, including the international level, by reason of the cross-border damage which they may cause, and by reason of their scale and effects.

Frédéric Mégret\textsuperscript{156} opines that there is an “indirect” criminal law emanating from international mandates of criminal sanctions for the violation of certain environmental norms. For example, the International Convention for the Prevention of Pollution from Ships (“Marpol”) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (“London Convention”), along with a range of regional treaties, deal with ocean pollution. The Convention on International Trade in Endangered Species (“CITES”) contains some criminal implementation provisions, as does the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. To date, the general approach of international environmental law has been to avoid issues of criminal responsibility by relying on soft approaches to international environmental regulation. Thus, anticipated solutions in this realm are typically administrative, preventive in nature. Even with non-state actors that are the classical subjects of international criminal law and that might more readily attract criminalization, the approach has been

characteristically soft. For example, many international norms are articulated in terms of guidelines and codes of conduct.

Frédéric further explains that International criminalization typically refers to one of two complementary possibilities: (i) an international obligation of states to domestically criminalize certain offenses, thereby allowing improved transnational criminal cooperation and a harmonized approach to the protection of globally meaningful values; or (ii) the possibility that, at least occasionally and on the basis of (a) the gravity of offenses, (b) the transnational character of the offenses, and/or (c) the unwillingness or inability of states to prosecute them, the international community will provide supranational criminal law enforcement either on a decentralized (universal jurisdiction) or centralized (international criminal tribunals) basis. The transnational basis of much environmental harm (e.g., transboundary pollution) has provided the impetus for early work on international environmental criminal law. Several existing environmental crimes concern international trade of products including illicit trade in wildlife, timber, ozone depleting substances, and chemicals. Others involve transboundary transportation of hazardous waste or smuggled fuel or

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157 For example, on July 23, 2010, a Dutch court fined Trafigura, a multinational corporation, one million euros for illegally exporting toxic waste to various locations in Abidjan, Ivory Coast. The ruling notably included individual convictions of the captain of the ship involved and a Trafigura employee. However, this was a characteristically ambiguous verdict: the trial involved charges of concealing the “harmful nature” of ship-borne waste as it transited through Amsterdam, rather than the actions of the company and its agents in Ivory Coast where the harm actually occurred. Separately, Greenpeace Netherlands sought to compel in the Trafigura case, the company paid for its violations. The individual sentences reflect the lesser gravity of such offenses: a five year suspended jail term for the Captain of the ship carrying the toxic waste, and a 25,000 euro fine for the employee in charge of operations at Amsterdam harbor. Trafigura as a company was fined close to a million euros.

the unlawful exploitation of international zones. This transnational basis for criminalization is further justified by the involvement of multinational corporations or organized criminal networks in creating such harms. Additionally, certain harms, such as massive oil spills may have the “shocking of mankind” quality that has become a hallmark of the worst international crimes.

Nonetheless, the gravest crimes against the environment, especially those that affect the global environment, may be neither strictly transnational, nor inter-state. Rather, they should be understood as part of a new category of global crimes that endanger the conditions of global communal life. For example if someone were to attempt to destroy the Amazon forest entirely. The destruction would not be a crime against humanity in the generally understood sense in that it would not systematically target a civilian population or represent a generalized or systematic attack as such, nor would it incorporate any specific nefarious intention toward human beings. Instead, what would make this a crime of considerable proportions is the impact it would have on the conditions that sustain the life of mankind. One might also build on the later notion that briefly appeared in the process leading to Nuremberg—that of non-localizability. In the 1943 Moscow Declaration, the Allies stipulated that although most war criminals should be returned to the country where they committed their crimes, offenses that “have no particular geographical localization” should be punished internationally. In fact, there is a strong argument that some crimes against the global commons are so inherently global that they would be natural candidates for at least partial international criminalization. The rationale for universal jurisdiction is that environmental crimes affect the whole international community, such that each state has an interest in repressing them even if they were not committed in its territory or by its nationals.
Prosecuting certain environmental offenses before an international criminal tribunal may prove necessary when states decide to provide significant jurisdictional cover to offenders, for example by organizing sham proceedings to deflect international attention\textsuperscript{159}.

The Rome Statute incorporates, as a part of definition of ‘war crimes’, the international criminalisation of harm to environment. In other words, environmental harm has already received preliminary recognition as an international crime or as an ingredient of an international crime (war crime) by the Rome Statute. The relevant part is reproduced below:

\textit{Article 8 War crimes}

1. \textit{The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.}

2. \textit{For the purpose of this Statute, ‘war crimes’ means:}

\textit{\begin{enumerate}
\item Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
\item Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
\end{enumerate}}

The limitation of the recognition of environmental harm as a crime within the ‘war crimes’ umbrella, is that the scope of prosecution of environmental harm as an international crime is severely restricted. For one, it completely shuts out the massive and continuous abuse of environment in the name of globalisation and commerce which is

\textsuperscript{159} \textit{Supra Note 156}
going on in different parts of the world and which has no co-relation with war crimes. Classification of destruction of natural environment as a result of wartime activities is a basic acknowledgment by international criminal law to criminalise acts which deliberately harm environment. Proceeding on this premise, it can be argued that acts which deliberately harm the environment should find a place in the list of international crimes irrespective of whether the same are committed during war time or peace time. For environmental crimes to be considered an independent crime under the ICL, the same would need to be defined as well, especially in relation to corporate activity or otherwise it will be difficult for the States to strike a balance amongst their development needs, exploitation of natural resources and environment protection responsibilities.

In addition to the Rome Statute, there are other international law instruments which criminalise environmentally harmful acts. They are however, in relation to specific areas and do not represent a broad approach to the problem of environment harm. Nonetheless, they aid the purpose of this research and advance the argument in favour of international criminalisation of environment crimes.

There is no doubt that perpetrator of environment crimes are the corporations. Infact, in so far as environment crimes are concerned, it is the TNC’s which are principal criminals while nation states are abettors or aiders in the name of development. Environment being so fundamental to human existence that there is hardly any argument against international criminalisation of environment. Frantic efforts are being made globally to save our planet and it only seems appropriate that environment being a common heritage of the mankind, should be protected against indiscriminate, brazen and unmindful exploitation through the tool of international
criminalisation. An attempt is being made below to define environment crime –

Environment crimes mean:

(A) An act committed with intention or knowledge that it will cause irreparable damage to natural environment which may have effect locally or a transboundary effect OR

(B) An act committed with intention or knowledge that it will cause substantial damage to the natural environment of a local area or has a transboundary damaging effect

(C) Damage to natural environment will include damage to water (including various life forms), air (includes birds), vegetation, ecosystems, natural habitats of wild animals, humans and human life.

provided, in either case, commercial necessity will not be pleaded as a defence by the accused. However, depending upon the facts of case, the Court may presume that the activity complained of was justified keeping in view the need for development of a national or local area which presumption will be rebuttable. The Court shall however at all times be guided by the principle of sustainable development.

In the understanding of the researcher, transboundary environment harm should not be the only criteria for classifying an act of a polluter as an international crime or of international concern. Environment is common heritage of mankind. It should make no difference if the act of the polluter is causing harm within the jurisdiction of the country where it is operating or beyond the same. The Bhopal Gas Tragedy (1986) is a case in point here. The extent of damage caused not just to the environment but the scale of lives lost due to the culpable negligence of UCC leaves no doubt that an environmental crime within
the national boundaries must also classify as international crime. The only limitation that can be placed is that the polluter should be a TNC or an MNC so as to satisfy the ‘international’ connection. Probably, if environmental harm did not affect humans, it would be of least concern to anybody. This argument is being raised since bringing crimes against environment within the category of international crime will enable individuals affected by such environmental damage to bring an action directly against the polluter. If harm to human body resulting from environment harm is not included in the definition of environmental crime, the affected individuals would have no locus to file a complaint against the polluter. In such a case, it is only the States who would have the right to initiate action and this precisely is the monopoly which the ICC seeks to break.

The aforesaid discussion has clearly brought out the status of at least 3 corporate crimes as international crimes i.e. money laundering, corporate corruption in international commerce and environment crimes. Without a body of international legislation, and absent codification by treaty or convention, the only way to ascertain international criminality is to apply existing international instruments which prohibit and penalize such conduct\textsuperscript{160}.