Corporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like. With the rapid development of technology and increasing liberalisation of trade it has become possible for corporations to operate easily and routinely on a transnational level. Whilst corporations may raise living standards and bring prosperity through the provision of jobs, education and technology, corporations are also frequently the perpetrators of human rights violations. Corporate abuse of human rights in the 21st century is both systematic and pervasive. Increasingly, criminal liability of corporations has thus been recognised in domestic civil and common law legal systems based on a jurisprudential understanding that the corporate entity is a legal person who is consequently subject to criminal liability. Similarly, international law, in particular international human rights law, has recognised corporations as having legal personality and thus having human rights duties and responsibilities under international law. Despite these domestic and international developments, international criminal law to date has failed to recognise corporations as legal subjects by restricting the jurisdiction of the International Criminal Court (ICC) to natural (not legal) persons\textsuperscript{343}. This aspect becomes all the more intriguing since

the London Charter of 1945\textsuperscript{344} pursuant to which the IMT’s were set up to try war crimes committed during the 2\textsuperscript{nd} world war, specifically recognised the jurisdiction of IMT to declare an organisation as ‘criminal’. \textit{Article 9} of the Charter lay down as follows:

\textit{‘At the trial of any individual member of any group or organisation, the Tribunal may declare (in connection with any act f which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation….’}

Strangely, this significant principle was never developed as an integral part of international criminal law. The reason behind fading of this important principle of ICL into oblivion is not too far to seek. In the years of rebuilding after the WW II, business corporations had a major role to play since Governments needed private capital and enterprise for infrastructure re-building. This provided the route to corporations for massive growth and in just a few decades, they became so powerful that they had the power to control national economies, topple governments and even influence international relations.

The discussion in preceding chapters has undeniably confirmed the status of TNC’s as a subject of Public International law. In addition, there is no ambiguity about the fact that TNC’s are capable of committing crimes and their culpability can be assessed under the existing principles of international criminal law. The current stage of development of international criminal law is best expressed by reference to the Rome Statute and the resultant International Criminal Court (ICC). Setting up of ICC was a defining moment in the development of international criminal law. In a sense, signing of the

Rome Statute and setting up of ICC was a step towards harmonization of different criminal law jurisdictions i.e. national law jurisdictions at the international level. However, the pertinent question at this stage of the deliberation is whether the TNC’s/MNC’s should be tried for their criminal wrongs in national law jurisdictions, existing forum of ICC or by way of setting up a separate forum?

One of the possible responses to corporate wrongdoing is the setting up of Global Ombudsman, a suggestion which was made by John Ruggie, the Special Representative of the Secretary General on Human Rights and TNCs in his recommendations to strengthen grievance mechanisms against corporations. However, the said proposal suffers from an inherent weakness. Office of ombudsman traditionally has little punitive powers. It works more on the principle of conciliation and mediation. The most potent authority that an Ombudsman generally has is that it can make its reports public which basically works as a public criticism. Even if disciplinary powers are given to an ombudsman, they are likely to be in the nature of imposition of civil fines which the corporations are too willing to pay up and cover up their wrongdoing. Thus ombudsman would be no better than an administrative body.

Nation states will and should remain primarily responsible for regulating corporate behavior. But national governments are often too weak, too desperate for foreign investment, or too dependent on corporate campaign contributions to hold global firms accountable for their crimes. Thus, there is a pressing need for stronger mechanisms at the international level to build a counterweight to corporate power.

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345  Supra Note 11
Sarah Anderson has raised the demand for following the precedent set by the creation of the International Criminal Court and for establishing court for corporations that could exact real punishment on corporate criminals. She argues that why is it that a dictator now faces the prospect of being brought before an international tribunal over a crime such as torture but a CEO who has profited from forced labor does not? Similarly, why is it that a private foreign investor can sue a government in an international tribunal (under international investment law) over the loss of a contract or a new environmental law that reduces their profits, while residents of a community poisoned by a global company must rely solely on domestic courts for justice? 

There are numerous obstacles to establishing any type of international enforcement mechanisms. However, the suffering caused by a lack of enforcement authority at the international level outweighs these concerns. We need to understand and appreciate that no system is ever perfect, for every system whether existing, developing or a proposed one will always require fine tuning at regular intervals depending upon the actual working response. Society is dynamic and so are the political and economic parameters which operate in tandem within the societal boundaries. Sometime of course politics and economy tend to overawe boundaries set by a given society but it is Law which plays the role of a whip in pulling back political and economic segments within the broader social framework and restrains them for deviating from the expected course. Law thus exudes a strong corrective force. It is precisely because of this unique nature of Law that it is dynamic and has to continuously adjust itself to the changing socio-economic-political contours of a given society. Static Law is antithesis of the very concept of a society. Society is a

346  Supra Note 11
manifestation of higher development, greater progress and ever expanding horizons for its constituents and hence, Law as a corrective and cohesive force must also make readjustments as and when called upon to do so. It is in this philosophical background that we must gather courage to either further develop an existing mechanism to broaden its scope or look beyond the existing institutions to find a unique solution to the problem at hand. In order to infuse vitality in an institution, we must first believe in it. Suffice to say that a innovative thought process must be encouraged and evolved with positive inputs rather than trying to nip the very idea in the bud.

The mere threat of international enforcement may also strengthen national government actions. For example, when a Spanish judge used international law to accept jurisdiction over a case against former dictator Augusto Pinochet, the Chilean government charged that this undermined Chile’s national sovereignty. In the end, it was the international pressure that resulted from the Spanish case\textsuperscript{347} that led to Chilean authorities stripping Pinochet of the immunity he had enjoyed in his home country, opening the door for a trial there. Without the threat of prosecution under international law, this would not have happened.

Another argument against international enforcement is that punishing a corporation for violating international standards will only hurt the workers employed by that firm. It is certainly possible that a stiff fine could result in job cuts. Some might also argue that a judgment against the corporation might cause it to move to another country where workers might be less likely to file complaints and regulatory structure is flexible or underdeveloped. However, this is much less

\textsuperscript{347} Spanish Court exercised passive personality principle – protecting a country’s nationals who are in foreign lands
likely to occur under an international binding instrument than if we have only national-level regulations. In any case, in the face of an instrument providing for international prosecution, moving or relocating to another country under the threat of criminal prosecution would not be such an easy task. It entails a massive exercise involving movement of capital and machinery in addition to winding up operations and then setting up a new venture in another country. The threat of a criminal prosecution is likely to bring the errant Corporation quickly to its knees rather than exercising the option of relocation. The American example of DPA is a point in highlight in this regard. Companies facing possible criminal indictment are quick to accept conditions imposing strict internal reforms in addition to paying up huge fines for wrongs already done.

The biggest area of concern in relation to corporate malfeasance is human rights violation. Corporations will seldom be directly accused (i.e. as a principal accused) of any of the 4 crimes that have been recognised as international crimes by the Rome Statute. At best, they will either be implicated as aiders or abettors i.e. any of the form of an ‘accomplice in crime’ but not as direct perpetrators. Corporations have money making as the sole aim and all their actions are directed towards achieving this aim. Therefore, say in a war or war like situation where the actual aggressor/s have been accused of violations of humanitarian law or crimes against humanity, the accused Corporation will usually be an actor behind the curtains, supplying either logistical or tactical support (supplying crucial information) or supplying weapons/materials which enable the aggressors to commit international crimes. For example, the recent conflict in the Democratic Republic of Congo in which more than 80

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348 Internal strife or aggression not amounting to full scale war
companies from developed nations were identified as being directly involved in the illegal exploitation of natural resources, forced labour and the transfer of weapons to warring parties which have been implicated in the commission of war crimes\textsuperscript{349}.

Outside this sphere of Rome Statute, Corporations have been accused of international crimes\textsuperscript{350} like money laundering, corruption and bribery in international transactions, damage to environment which is also forms a part of human rights violation and more recognised forms of HR violations like child labour, arms trafficking, human trafficking. \textit{Nora Gotzmann} opines that it is consistent with the acknowledgment that a globalised economy context requires the development of international legal avenues by which corporations can be held accountable for human rights abuses. As the ICC is currently one of the pre-eminent forums for considering breaches of international humanitarian and criminal law, \textit{Nora} argues that it is both normatively desirable as well as legally necessary to extend ICC jurisdiction to include legal persons such as corporations\textsuperscript{351}.

The all pervasive role of multinational corporations in our lives has already been explained in detail in receding chapters. They have a bearing on our lives 24 x 7 primarily because of the range of products that they produce or the range of services which they provide. It is because of their increasing influence in controlling the common lives which gives them the scope for committing crimes. The impetus for committing crimes of course comes from their inherent characteristic of making more and more money. The inefficiency or inadequacies associated with national prosecutions of multinational corporations

\begin{footnotesize}
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\item \textsuperscript{349} \textit{Supra} Note 343
\item \textsuperscript{350} Status of such crimes as international crimes is by virtue of an international convention or a treaty e.g. Palermo convention
\item \textsuperscript{351} \textit{Supra} Note 343
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for alleged international crimes have also been discussed hereinbefore. Given their power (by virtue of financial strength) and difficulty in prosecuting multinational corporations which have operations spreading across international boundaries, the question which therefore posed is, not whether Corporations should be punished at an international forum, but whether they should be prosecuted by setting up a specialised international forum, parallel to the International Criminal Court or by expanding the ambit of Rome Statute such as to include the jurisdiction of ICC to legal persons and also by recognising more crimes, in addition to the 4 core crimes, as international crimes. However, more than the demand for a separate court to try MNC’s, the emphasis has been on the need to prosecute them under international criminal law. The limitation put by the Rome Statute on ICC’s jurisdiction to prosecuting natural persons for 4 core crimes raises a natural demand for setting up a separate international court to try Multi-National Corporations. In order to answer this question, we need to understand as to how does the international law develops which in turn will shed some light on the practicality of working out modalities for a new international criminal forum.

There are 3 primary sources of International law – Conventions and Treaties, General Principles of Law recognised by civilised nations, and customary law. In addition there is a subsidiary source of international law which is judicial decisions and teaching of most highly qualified publicist of different nations as subsidiary means of determination of rules of law. Of these, the most comprehensive evidence of development or recognition of international law principles is provided by Conventions and Treaties. Unlike treaty based international law, in case of municipal statutes, development of new

352 Article 38 of the ICJ Statute
law is not based on consensus but on the will of the sovereign or of the elected government. Maximum effort is expended at the preparation of draft stage. Treaty based law on the other hand requires herculean efforts not only at the drafting stage but at the negotiation stage. Treaties or conventions being based on consensus, there is massive groundwork to be done before the nations can be brought on to the final negotiating table with drafts being rewritten many times over. Even at the seemingly final stages of negotiations amongst national law makers, the ‘Draft’ can sometimes needs revision. This whole process usually runs into years. Rome Statute setting up the ICC itself was a result of hard sell international negotiations running into 10 years. Even after the signing of the Rome Statute, USA took an unprecedented step of un-signing the statute to get out of the jurisdiction of ICC.

This option of making efforts to set up another specialised criminal court to try multinational corporations seems a bit too cumbersome (especially in the light of efforts made for signing of Rome statute). The option of an ad hoc tribunal for prosecuting TNC’s/ MNC’s is also not a viable option for a number of reasons. Firstly, an ad hoc tribunal is set up for a specific crime situation e.g. ICTY or ICTR. Crimes by TNC’s on the other hand are wide ranging, both in time as well as space. Secondly, collection of evidence and investigation in case of corporate crimes is much more complex than in case of individual crimes. Therefore, to expect an ad hoc body to carry such investigation and evidence collection is naïve. It is prudent to have such investigative machinery within a permanent body which can be overseen by a prosecutor. Thirdly, an ad hoc tribunal is not likely to contribute in jurisprudence of ICL. The judgments of such tribunals don’t have the precedent value attached to the decision making by a permanent court. Ad hoc tribunals might result in unbalanced
development of international criminal law which will not be capable of uniform application for future cases. Especially in matters of corporate prosecution, twin principles of *mens rea* & *actus reus*, and *respondeat superior*’ must be very carefully developed which are capable of being clothed with precedent value or *ratio decidendi*.

7.1 EXTENSION OF ICC JURISDICTION – THE MOST FEASIBLE OPTION

In view of the above discussion, the most viable, practical and workable option is to extend the International Criminal Court’s (ICC’s) jurisdiction over ‘legal persons’. The ICC has a number of features that suggest it is an appropriate international institution to regulate directly the conduct of TNCs that may amount to an international crime within Art. 5 of the Rome Statute. It is a permanent international body with jurisdiction over serious international crimes committed by individual non-state actors (this unique feature of Rome Statute i.e. jurisdiction over non state actors is itself an additional ground for extending the jurisdiction of ICC over TNC’s/MNC’s who are also non state actors). The ICC has in place procedures to receive complaints about alleged crimes; investigate and prosecute crimes; and order the imposition of fines, the confiscation of proceeds of crimes and reparations to victims[^353]. In addition, there is a strong natural logic to work for the further development of international criminal law in its present form i.e. Rome Statute, because it will serve a dual purpose. Firstly, it will save the international community from another presumably extensive and demanding round of comprehensive negotiations to set up another international criminal court. Secondly, extension of the jurisdiction of ICC to include ‘legal persons’ within its scope of prosecution will further strengthen the

[^353]: Supra Note 47
international criminal law jurisprudence. It makes sense to nurture the fledgling body of international criminal law which also requires support from the international community to encourage the working of ICC. Expanding its ambit would buttress the faith of international community in the efficacy of ICC and also reinforce the hope of victims of international crimes of getting justice. Enabling the ICC’s jurisdiction to be extended to corporations will be a significant development for the protection of international human rights.

**7.1.1 Principle of Complementarity**: As has been highlighted in previous chapters, the major impediment in including legal person within the jurisdiction of ‘person’ i.e. under the Rome Statute is the strong divergence of opinion between common law and civil law countries with respect to corporate criminal liability. This divergence of opinion assumes relevance when the principle of complementarity comes into play, which also has been discussed in preceding chapters. The major concern of countries which do not recognise criminal liability of corporations is that the principle of complementarity overrides their sovereignty. This concern stems from the assumption of authority to prosecute the criminal under principle of complementarity if the member country does not prosecute (‘is unable or unwilling to prosecute’) the criminal. This conflict between the civil law and common law countries has been highlighted by Kathryn Haigh.

The article by Kathryn argues that the negative impact that transnational corporations may have on the protection and promotion of international human rights can be improved by extending the

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354 The ICC’s jurisdiction is complementary to national criminal jurisdictions. Under Art 17 of the Rome Statute, the ICC has jurisdiction when it has been determined that a state is unable or unwilling to act.  
355 Supra Note 47
International Criminal Court’s jurisdiction to corporations. Realising this goal would require that the concerns, including complementarity concerns, expressed by Rome Conference delegates be addressed. Kathryn explores a number of ways to address the complementarity concerns and identifies limitations with those approaches. Given these limitations, if state parties cannot be dissuaded of their complementarity concerns, it is argued that a pragmatic response is to adopt an exception-based approach to including corporations within the ICC’s jurisdiction — that is, to extend the ICC’s jurisdiction to corporations generally, but specifically exclude corporations registered in state parties that do not recognise corporate criminality for the offences subject of the Rome Statute in their national criminal jurisdictions.

Kathryn highlights that a number of the challenges were highlighted during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference) in 1998. State delegates negotiating the provisions of the Rome Statute of the International Criminal Court (the Rome Statute) considered a proposal to extend the ICC’s jurisdiction to include corporations. After three weeks of debate, the proposal was withdrawn when it became clear that it would be unsuccessful. There were a number of reasons why the proposal failed, including the concerns generated among delegates whose national criminal legal systems did not recognise the concept of corporate criminal liability. The draft Rome Statute considered by the delegates at the Rome Conference contained a proposal in Art 23 to extend the ICC’s jurisdiction beyond individuals to legal persons. Given such difficulties, the proposal was revised several times, culminating in a working paper that granted the ICC jurisdiction over a ‘juridical person’, defined as a corporation whose main objective was to ‘seek private profit or benefit’.
5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, ‘juridical person’ means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural and the juridical person may be jointly tried. [United Nations1998d (the Working Paper).]

The Working Paper was withdrawn when it became clear that a majority of delegates would not support it. Reasons for the delegates’ lack of support included concerns about how the indictment would be served, who would represent the corporation, how corporate intent would be determined and how evidence would be presented. Another reason that the ICC’s jurisdiction was not extended to corporations
was due to the uncertainty that the proposal created about the operation of the complementary nature of the ICC’s jurisdiction when the concept of corporate criminal liability was foreign to a number of states’ national legal systems. Such concerns were expressed by delegates from states that did not recognise corporate criminality in their national legal frameworks. The ICC is founded on the premise that its jurisdiction will supplement, or be complementary to, states’ national criminal jurisdictions. A case is admissible before the ICC when a state is unwilling or unable to conduct a prosecution. The circumstances of inadmissibility are prescribed in Art 17 of the Rome Statute and include:

**Issues of Admissibility**

... *The Court shall determine that a case is inadmissible where:*

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute ...  

States wanted to avoid a situation whereby it could be argued that because the state was unable to prosecute the corporation, the ICC had authority to pursue the corporation under Art 17.

Nations Convention Against Corruption (a detailed discussion on these conventions has already been done in preceding chapters) recognise international offences by legal persons. The Conventions enable each state party to determine how to hold a legal person to account for its actions contrary to the convention, through either criminal, civil or administrative processes. The Conventions enable all states to recognise corporate criminality at the international level, even if the state does not recognise corporate criminality at the national level. This approach allows international treaties to be negotiated that regulate international corporate criminal conduct, despite differences in states’ national concepts of corporate criminality. If the Rome Statute included a similar approach to the offending international corporate houses, it would address states’ complementarity concerns by allowing a state to pursue a corporation involved in an international crime in a manner that was consistent with its national criminal jurisdiction. The state would determine whether the sanctions against the corporation were to be criminal, civil or administrative.

357 Art 10 of the United Nations Convention Against Transnational Organized Crime provides:
1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group ...
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

358 Footnote to Art 23 of the draft Rome Statute: There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed ... [United Nations 1998b, 31.]
However, this argument does not take into consideration the fact that as a forum purely dealing with criminal prosecution, the ICC cannot be expected to show deference to punitive civil and administrative actions, taken by a state party under the complementarity principle, and hence arrive at a conclusion that the corporation or a legal person has been duly prosecuted warranting no further action under the Rome Statute.

However, Kathryn raised a relevant issue - If a state responded to an alleged international crime by a corporation with anything less than a criminal prosecution, arguably this would constitute unwillingness or inability to prosecute under Art 17 of the Rome Statute. However, this argument is not compelling. The ‘unwillingness’ of a nation to criminally prosecute a corporation cannot be inferred from its incapacity to prosecute as a result of its criminal philosophy of not amounting criminal intent to legal persons. However, the unwillingness can be inferred, if out of two possible courses – civil as well as criminal proceedings, the member state concerned adopts a civil course without justifiable reasons or where it raises a reasonable concern that the member is deliberately avoiding criminal prosecution of the corporation by adopting and initiating civil proceedings against it. There is thus a fundamental difference between not willing to do and cannot do, the former referring to national intent whereas the latter referring to national policy.

Any proposal to provide for the civil and/or administrative responsibility of corporations under the Rome Statute raises another fundamental issue — would it be appropriate for the ICC itself to provide a civil law response to international crimes? Alternatively, would the ICC use civil proceedings rather than criminal proceedings against all corporations, or would the ICC’s use of civil proceedings be
confined to corporations incorporated in state parties that do not recognise corporate criminality? Kathryn finally argues that an alternative approach may be to extend the ICC's jurisdiction to all corporations but create a specific exception for corporations incorporated in states that did not recognise corporate criminality. There is some precedent for excluding certain corporations from the proposed extension to the ICC’s jurisdiction359.

Principle of Complementarity makes the ICC prosecution complementary to the national jurisdiction which is given the first right to prosecute in case of a criminal being found or present in its territory. In case the national jurisdiction is unable or unwilling to prosecute the alleged Offender, the ICC steps in to prosecute him. The concern of the countries which do not recognise corporate culpability was that since they do not recognise corporate criminality as such, the use of principle of complementarity by the ICC will ultimately undermine their sovereignty since such countries will be deemed to be unable to prosecute legal persons, whereas in reality it would be because of the State criminal law policy which does not recognise that a corporation or legal person can do a criminal wrong. The Exception Based Approach - suggested by Kathryn Haigh - suggests that the Rome Statute should be amended so as to include the legal persons in addition to natural persons over which ICC has currently jurisdiction. However, the prosecution of legal persons domiciled in countries which yet do not recognise corporate culpability should be excluded. In other words, an exception will be carved out under the Rome Statute which will enable the ICC to prosecute legal persons domiciled/incorporated in those countries which recognise corporate

culpability while leaving out the legal persons registered/incorporated in countries which do not prosecute legal persons. Following an ‘Exception’ based approach will enable the further development of International criminal law (ICL) – prosecution of legal persons by ICC will result in formulation of sound legal principles to judge the culpability of legal persons under ICL, including sentencing policies. Fear of prosecution by ICC itself will be a huge deterrent for legal persons (MNC’s) to check their activities. Corporation will not be able to hide behind State patronage/shield which is given by host countries to the detriment of common citizens making domestic prosecution either impossible or futile.

7.1.1.1 Exception Based Approach – Modification: There is a possibility that ‘Exception based approach’ might be met with some resistance by member countries which recognise corporate culpability. The reason being that ‘exceptions’ under civil law are more readily accepted between parties since civil law is primarily viewed as a branch of law that regulates private rights. However in criminal law, situation is different since criminal prosecution is the collective social disapproval of an individual or a group of individuals and crime is viewed as being against the collective right of the society to live in peace and without fear. To carve out an exception in criminal law, there has to be a strong rationale between the object and the class to which such exception relates. Further, since mens rea is such an important ingredient of a crime, carving out a prosecution exception in criminal law usually means that the exception has to somehow be justified by lack of mens rea. Following the ‘Exception’ based approach as above, might result in criticism since there seems to be no connection between mens rea and the ‘exception’ on the basis of non recognition of criminal culpability by a country from which the alleged offender (legal person) comes.
In order to pre-empt any opposition to the ‘Exception’ based approach, a modified version of ‘Exception’ based approach is proposed. The basis for this modification is proposed on the basis of a comparative study conducted between the approach of US laws relating to corporate criminal culpability and the approach of German laws relating to corporate wrongdoing. The study was conducted by Edward B. Diskant. 360

Diskant gave an exhaustive description of how the US prosecutors (DOJ) handles the corporations when some criminal wrongdoing on their part surfaces. Even though US specifically recognises corporate culpability, yet with the tool of DPA (Deferred Prosecution Agreement 361) the Prosecutors, instead of prosecuting the Corporations, impose huge fines as well as conditions for internal reforms to check any future criminal wrongdoing. In addition, they force the Corporations to give up attorney-employee privilege, hand over internal investigation documents and also give up legal indemnification of employees 362. The net result is that the Corporations as entities are spared of criminal prosecution which would otherwise sound a death knell for them in US market. Instead, the Prosecutors then go after the specific employees or Directors who can be held guilty for the crimes which the Corporation is originally charged with.

Diskant then goes on to analyse the German legal system which does not recognise corporate criminality and highlights that German legal system prefers to impose civil sanction in the form of fines and

360 Op cit.
361 Also known as Pre-Trial Diversion.
362 Under US laws, Companies usually enter into contracts with their employees that in case of any possible prosecution as a result of anything done in the course of employment, the Company shall indemnify all legal cost which such an employee may incur to defend himself.
injunctions against the Corporations. However, the German criminal laws allow for prosecution of Directors/officers of a Corporation for an alleged crime. Diskant thus concludes as under:

- Both US and Germany, even though at opposite ends of the pole in so far as corporate prosecution is concerned, end up imposing fines on the legal person (corporation) instead of its actual prosecution

- Both US and Germany, eventually go after the natural persons who are actually complicit in the crime alleged against the Corporation.

In this regard, the reference to the decision of the Supreme Court of India in Standard Chartered Bank case is relevant wherein it has been held that a corporation/ legal person can be prosecuted and punished by imposing fine even for crimes which provide a *mandatory* punishment by way of imprisonment and fine. Based on this comparative study, it is proposed that the ‘Exception’ based approach as proposed by Kathryn, can be further modified as follows. Instead of following an outright ‘Exception’ based approach which would leave out corporations from countries which don't recognise corporate criminality, the ‘Exception’ should be carved out in the sentencing policy\(^{363}\) of the Corporations. Taking a cue from the judgment by the Supreme Court of India and amalgamating it with the exception based approach as suggested by Kathryn, it is proposed that corporations which are registered in those countries which do not yet impose criminal liability should be prosecuted by ICC but if found guilty, be only served with a heavy fine, much like what the US does in case of a Deferred Prosecution Agreement. This approach will serve two

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\(^{363}\) It is widely believed that the only available criminal punishment to a guilty corporation is in the form of Fine since it cannot be sent behind bars. This is however a misconception. The range of punitive sanctions against a legal person are – Fine, Forfeiture, Breaking up the Corporation, Prohibition or restriction of business for a specified period or areas, and judicial winding up.
purposes. It will pave way for a consensus to be built up for amending the Rome Statute (i.e. amongst countries which do recognise corporate criminality and which do not recognise it) to include legal person within the jurisdiction of ICC prosecution. Secondly, imposition of fines as a prosecution sanction will mean that in effect the primarily civil approach adopted by countries i.e. which do not recognise corporate criminality in case of corporate wrongdoing will be reflected in the imposition of fines plus such other measures for redeeming the corporate conduct which may be imposed by the ICC. This approach in the suggestion of researcher will not only take care of the complementarity concerns but also help in gradual development of the principle of notional internment/ confinement of a legal person as had been suggested in this thesis which is an equivalent of sentencing a natural person to a prison term. Following this approach, it can be provided that in case of prosecutions of corporations from the specified countries, the only punishment that will be handed out is fine along with directions for carrying out internal governance reforms. It is assumed that this modified ‘exception approach’ will take care of the concerns of both group of countries - which recognise corporate criminality and which do not. Prosecution with ‘exception’ in sentencing a corporation from a country which does not recognise criminal prosecution will have the following rationale:

1) Prosecution of legal person (corporation) will be without exception of nationality or domicile

2) The imposition of fine alone as sentence will ensure that the basic philosophy underlying the law dealing with corporate wrongdoing in countries which do not recognise corporate criminality will remain intact i.e. that illegal corporate deviations can be well corrected through civil law sanctions.
The major advantages of following an exception or modified exception based approach will be -

- Deterrent effect on TNC culpable behaviour;
- Initiation of principles to determine corporate culpability under International criminal law.

Law is dynamic and hence has to continuously respond to changes in the society. Corporate criminality is a stark truth. Studies have shown that white collar crimes are more harmful in range as well as effect than blue collar crimes but research in this area is severely restricted because the research funders are the corporate houses themselves and for obvious reason, they do not wish to highlight the extent of corporate wrongdoing. Complicity of multinational companies in international crimes is also an accepted fact now. It is thus imperative that all concerns must be addressed at the earliest to ensure that criminal prosecution of legal persons in the ICC is expedited.

At the cost of repetition it may be reaffirmed that TNC’s enjoy right under international law. They are clothed with international legal status. The very fact that a company incorporated in one county is entitled to do business in another country without fresh incorporation is good enough proof for the argument that TNC’s enjoy international corporate personality. Furthermore, there is significant evidence that corporations are capable of possessing international rights. Corporations have historically been attributed with international rights due to the strong tendency towards international investment protection giving rise to the correlative attribution of rights to corporations to have such protection judicially enforced. Apart from international investment law cases, in Editions Periscope v France
(1992) 234 ECHR (ser A) it was held that France had violated the right of a French company to a hearing within a reasonable time under article 6(1) of the ECHR. In, Observer v United Kingdom (1991) 216 ECHR (ser A) it was held that the United Kingdom had violated two British newspapers rights to freedom of expression under article 10 of the ECHR. These two decisions show that the European Court of Human Rights has recognised that corporations have certain rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus corporations are capable of asserting and enforcing their rights at an international level is relatively undisputed as most international contracts provide for international arbitration in the event of dispute. The issue of corporate duties under international law, is slightly more difficult to establish. Alien Tort Statute (ATS) is one example where international law can enforce tortuous liability on corporations for their conduct against an alien in a foreign land. In other words, it is the enforcement of a duty against a Corporation under international law which the US law applies in favour of Aliens as a part of its International law principles. Strictly speaking most international duties of corporations have tended to be voluntary i.e. such duties under international law non performance of which can give rise to a corresponding liability. However, human rights are universal and non-derogable. That is, all members of the world community have a duty to respect the human rights of others, and a duty not to impede on the protection of human rights. As such, there is a case to be made that through Drittwirkung \(^{364}\), corporations have binding international duties deduced from instruments originally directed at states.

\(^{364}\) According to this doctrine certain rights do not only apply to the vertical relationship between governments and individuals but also in horizontal
The ICC’s Rome Statute in Article 10 provides that its definition of crimes should not be read "as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Likewise, that Statute’s Article 22(3) states that the limitations on its jurisdiction (including the limit to natural persons) "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." Finally, Article 25(4) of that Statute provides that "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law," which means and implies that States’ responsibility to enforce international law through their own domestic legal systems is unaffected.

7.2. CONCLUSION AND FURTHER SUGGESTIONS:

The above discussion throws up five major issues, all of which must be adequately addressed before corporate criminal liability of Transnational Corporations/Multinational Corporations can be brought within the ambit of International Criminal Law. They have been discussed in different parts of preceding chapters and are now being consolidated here. The first and foremost issue is the justification for corporate liability i.e. what is the underlying basis of corporate criminal liability? The second issue is of mens rea i.e. guilty mind - how do you attribute guilty mind to a fictional personality or a lifeless entity? The third issue is of the practical difficulty in sentencing a corporation. The fourth issue is concerning those countries which do not recognise corporate criminal liability and hence are unwilling to examine the possibility of expanding the mandate of international criminal law under the Rome Statute.

relationships for example between an individual and a corporation
Closely connected with the fourth issue is the issue relating to the Principle of Complementarity which is enshrined in the Rome Statute. This issue was in fact the major stumbling block during the negotiations leading to the signing of Rome Statute. Since a majority of countries, especially in Europe (civil law countries) do not recognise corporate criminal liability or recognise very limited form of corporate wrongdoing, there were strong opinions that inclusion of legal person within the definition of person would in fact make the Principle of Complementarity redundant in so far as these countries are concerned. The final issue relates to the scope of corporate criminal liability under the Rome Statute i.e. whether the corporate criminal liability is to be limited to the existing international crimes under the Rome Statute or whether the scope of international crimes (as in the Rome Statute) should be expanded to include crimes which are typical of a corporate wrongdoing.

7.2.1 First Issue – Why make the Corporate Body liable at all?

The fundamental issue which needs to be addressed is with respect to the need or logic for making a corporate body liable under criminal laws. The discussion here would be relevant both from a national perspective as well as international perspective. The starting point of this discussion would be as to why make a corporate body liable at all, whether for civil liability or for criminal liability? The question which is relevant therefore is not of liability of an impersonal and lifeless body under a particular branch of law but under law as such. To ignore the logic behind imputing civil liability to a corporate body and restricting

365 Principle of Complementarity gives the first right of prosecution to the country where the offender is found or the country to which he belongs. The jurisdiction of ICC will come into play only if the host country either does not prosecute the offender or conveys/expresses its unwillingness to prosecute him or prosecutes him in such a fashion that the same is ineffective or is a sham prosecution, thus making the jurisdiction of ICC complementary to the member states’ jurisdiction.
it to only finding an explanation qua the criminal liability would mean that the law expressly accepts that a corporate body can commit civil wrongs which in turn would mean that a corporate body is capable of acting on its own minus its human resource but only in so far as civil wrongs are concerned. Such a conclusion is unacceptable.

In order to understand that the sense behind imputing civil or criminal liability has to be the same, let us analyse a very basic example. A contract is entered into between a corporate body say Company A and a natural person for supply of certain goods i.e. the goods to be supplied by Company A. On the date agreed for supply of goods, the Supplier i.e. Company A makes a default. Consequently, the buyer brings an action in a court of law for damages. While allowing the motion in favour of the buyer, the Court will take into consideration a host of factors to assess the damages payable. For example, the Court will take into consideration the nature and value of goods, whether they were immediately available with another vendor, whether the buyer has subcontracted those goods further and hence, whether time is the essence of that contract, whether the supplier itself was not diligent in executing the contract etcetera. However, there is another very important factor which the Court may look into and that factor is whether there was a deliberate default on the part of the supplier i.e. whether the contract was deliberately breached. If the Court comes to the conclusion that the supplier or Company A deliberately breached the contract\textsuperscript{366}, the Court is bound to award a higher level of damages than it would have otherwise ordered in case of a contractual breach which might be attributable to lack of due diligence or any plausible reason which would mitigate the illegal conduct of the supplier but not negate the civil liability. Even

\textsuperscript{366} For a deliberate breach, possibility of earning excessive monetary profits from a different vendee can be the major reason.
while assessing the lack of diligence, the Court will automatically stumble on to the issue of ‘intention’ because lack of diligence is also attributable to ‘intention’ though of a much less degree and consequently less liability. To substantiate this I take support from Indian criminal law itself i.e. Indian Penal Code S. 279 prescribes the offence of negligent driving read with S. 304-A IPC. Under this penal provision, the maximum sentence prescribed is 2 years even if there is a death as a consequence of negligent driving. The wording of S.279 is patent – the negligence (or lack of due diligence if we compare it with civil law) in causing death or hurt to someone as a result of such driving has been made culpable but the sentencing is lenient because of lack of intention to cause death. Thus ‘negligence’ under section 279 has been attributed the status of ‘mens rea’. To put it simply, there are stages of mens rea which have been dealt with under the Indian Penal Code, the highest state of guilty mind being clear intention to do an act, thereby attracting the highest penalty and the lowest being mere negligence, attracting least punishment.

I, therefore, argue that even for a civil wrong, there can be situations where the ‘intention’ of a corporate body becomes a necessary element in judging the corporate liability and consequent civil law relief. Thus mens rea or intention is as much relevant while judging civil liability as it is in the case of criminal liability367.

Reverting to the discussion on the logic behind corporate liability, it is most commonly argued that a corporate body, minus its personnel/human resource, is capable neither of taking or making a decision nor implementing it. In such a factual background, State acting through the instrument of law cannot play God and try to infuse life in an

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367 However, it is also important to acknowledge that the crucial difference between civil law and criminal law is that of standard of proof which is much higher in case of criminal law.
entity which is not designed to accept such a status i.e. at par with natural persons. Since a corporate body lives and breathes through natural persons, who do everything from giving birth, to nurturing it at every step, it is plain logic to assign the liability of any act (whether civil or criminal) done on behalf of a corporate body to its human resource which could be it management or its officers. To counter this argument which prima facie looks to be very reasonable, the philosophy underlying a corporate body has to be gone into. In the second chapter of this research, a descriptive study of birth of the company form of organisation has been undertaken. The birth of a ‘Company’ was a natural response to the commercial needs of the times when sea routes were being explored for trade between Europe and Indian subcontinent/south-east Asia. The enormity of the entire enterprise made it imperative for a group of persons to come together, pool their resources and agree to a limited share out of the expected earned profits. A corollary of this arrangement was the limited liability which each member undertook to bear in case of loss. Growth of ‘Company’ as a form of organisation necessitated structural adjustments as the number of shareholders grew and the nature of commercial activities diversified. The large number of shareholders could not be expected to manage the affairs of a company as decision making would be rendered practically impossible. Thus decision making was put in the hands of a specialised group of professionals i.e. management who were expected to take the right decisions368 for the benefit of the shareholders. However, balancing the benefit of the shareholders and the benefit of the organisation was a complex task as conflicting interests might come into play e.g. making a long term investment or large acquisition resulting in reduced profits for

368 Read ‘profit making decisions’ as the contributors of capital had little interest except return of principal amount along with profits
shareholders for a period of time. The Management thus, even though apparently working on behalf of the shareholders, was to take decision for the benefit of the organisation through which ultimately the shareholders were to derive profits. It was natural that an association as large as a company consisting of a body of shareholders, management and a large workforce to implement and operate management decisions needed to be categorized in a compact unit which could function as a unified body/entity. Furthermore, it was necessary to let this compact unit function as a body with legal sanction, capable of carrying out commercial activities as a natural person or as a small group of persons could. Such an arrangement necessitated the recognition of Company as a body which had all the rights and liabilities of a natural person so that it could operate as a natural person would in a commercial sphere with all possible liberties. This aim could be achieved only by regulating the Company form of organisation through the instrument of law and clothing it with a special status. This led to the Corporation being given the status of a legal person or a juristic person i.e. a person in the eyes of law capable of enforcing rights and discharging its liabilities as a natural person is expected to in a rule of law setting. Once the Corporation was recognised as a person having rights and liabilities of a natural person, the corollary was that any action or claim against a Corporation had to be filed in its own name i.e. in the status of the Corporation of a legal person. In other words, for enforcing right or for defending a claim against it, the Corporation had to sue or be sued in its capacity as a legal person. In the absence of the status of a legal person, it was impossible for the Corporation to file a claim as it would have entailed filing a claim on behalf of each shareholder, management and officers, as together they complete the Company/Corporate structure. It would have been equally true for
those who wanted to file a claim against the Corporation for sans a juristic personality, they would have to file a suit against each and every shareholder, management and the officers – an impossible task and if presumed to be technically possible, an extravagantly wasteful exercise in terms of time and resources, both for the bar and the bench. Thus corporate liability was a necessary and natural consequence of the unique status with which it has been clothed by law.

In addition to the afore-detailed reason supporting the logic behind imputing liability to a Corporation there is another very basic reason for fastening liability (civil as well as criminal liability) on a Corporation in addition to the officers who are actually responsible for managing its affairs. Whatever be the nature of the act complained of in the case of a corporation, it has to be always remembered that the existence of a Corporation provides the raison de etre to its officers or management (or majority shareholders through its directors) to commit the illegal act. It is the Corporation which provides them with the motivation as well as a medium to execute its wrongful or blameworthy decisions. In the absence of the Corporation itself, no such action would be committed in the first place. It is thus plain corollary that if the Corporation is providing a reason for the commission of a wrongful act, the same must share the liability and its consequences also, whether civil or criminal. In addition, it has already been discussed in Chapter 6 that criminal prosecution and sanctions convey the necessary moral and collective disproval by the society for a crime which civil liability does not. Besides, it is logical from jurisprudential point of view - there can be no right without a

369 Wrongful act here refers to those acts which are committed by or on behalf of the corporation and not all illegal acts which are committed merely within a corporate setting.
corresponding duty. Thus if Corporations can claim rights under international law, corollary is that they must also be subjects of international law for enforcement of duties against them.

Having justified the need to have corporate liability apart from individual liability or group liability in case of corporate wrongdoing, we move on to the next important issue which forms the basis of criminal liability i.e. mens rea.

7.2.2 Second issue – How do you attribute ‘mens rea’ or a guilty mind to a fictional personality?

This issue is the most complex when it comes to establishing criminal liability of a corporation. With few exceptions to the general rule, a person cannot be held guilty of a criminal wrong unless he possesses the necessary guilty intention in his mind to do that act. There is no direct proof to establish a particular ‘state of mind’ even in case of natural persons and the same has to be gathered from the attending circumstances of the crime which could be co-ordinate or immediately preceding or after the crime. The assessment of guilty mind of a natural person or a group of persons is practicable since their actions are a reflection of their state of mind, mind being the controller of all bodily actions. However, in case of a corporation or an impersonal body, the assessment of guilty mind is a very difficult exercise for obvious reasons. The most common argument given in this regard is that a fictional entity cannot be attributed a mind of its own since it has none. The corollary of this argument is that since a corporate body does not have a mind, it cannot possibly be expected to have a guilty intention which is required to be proved as a basic ingredient for judging criminal culpability. In addition to this technical objection, there are other reasons put forth which make it difficult to prove the Corporation’s guilty mind.
The organisational structure of a corporation is such that it is difficult to pin the liability of decision making on a particular individual. There can be a host of officers involved in decision making which has resulted in the crime and it is not possible to point out one individual who can be attributed as the final decision maker. In addition, to assess as to who have been a part of the decision making, large number of organisational documents have to be scanned which itself is a herculean task. The problem in assessing guilty mind in case of a corporate is that this ‘guilty intention’ is spread over the minds of a large number of natural persons. Thus to assess the guilty mind in a corporate setting is like solving a jigsaw puzzle, the pieces of which have to be painstakingly put together by the investigating authorities. Still further, this entire exercise becomes even more complex when the entities involved are parent and a subsidiary company. It is very difficult to trace the trail of decision making through the maze of corporate hierarchy. In cases of parent-subsidiary liability, the theory of ‘one economic unit’ put forward by Lord Denning can be useful\textsuperscript{370}. However, the case laws do reveal any uniform pattern. In case of parent-subsidiary liability, the more important theories used by the Courts are ‘agency theory’ and ‘alter ego theory’.

Lawmakers tried to overcome this limitation of criminal investigation by attributing liability to those officers, including its directors and managers, who are responsible for its decision making and functioning. In other words, those officers of a Corporation were to be made liable who are making policy decisions as well as handling the day to day affairs and are thus presumed to be the actual decision makers or the ‘Brain’ of the Corporation. The intention is to be

inferred from the conduct of these officers. However, the basic question still remains – how do you attribute guilty mind to a corporation?

‘Guilty mind’ basically means a negative intention i.e. a mala-fide intention to commit an illegal act or a wrong. It is obvious that this intention has to be formed in the brain or mind; in other words it is the thinking faculty of a human that can be said to be the harbour of such a thought. If we try and draw an analogy of a human body with that of a Corporation, the ‘mind’ of a Corporation has to be the decision makers i.e. the management or the high level decision makers which is actually a collectivity of human minds. To put it in simpler terms, even in case of a corporation, the organ that makes decisions or does the planning and thinking part is actually a group of human minds. Thus, to impute a guilty intention to the mind of a Corporation is nothing more than actually imputing guilty intentions to the high ranking decision makers of a Corporation. This is also known as the ‘Identification test’, ‘Directing Mind’ theory or the ‘Organic theory’ of Corporations.

There is another way to look at the ‘Organic Theory’. A Corporate structure can be likened to a human skeleton. On its own, the skeleton is a lifeless structure but when it is covered with skin and blood flows through it, the organs develop and function under the control of brain and heart, and this lifeless configuration is converted into what we call a live human body. In much the same manner, when the Corporate structure (i.e. the incorporation, Articles of Association, Memorandum of Association, share subscription) is infused with human resource which are then categorized into different organs (i.e. departments of a corporation), the Corporation starts to live like a
human body under the control of its Brain i.e. the management and pumped by its heart i.e. Finance.

Undoubtedly, the practical aspect of this approach is pretty much cumbersome, for in a corporate setting the actual decision making is spread over a large group and this becomes more complex when there is parent and subsidiary company involved in a criminal allegation. However, that aspect might be a deterrent for law enforcing agencies to initiate an investigation but cannot in any way be termed as a valid ground for exempting a corporate body from criminal liability. To overcome this problem, it is suggested that while dealing with the mens rea of a corporation, the Identification test as followed in UK and Aggregation theory as followed in US, both need to be put into service.

There has been considerable debate regarding the two theories i.e. as to which one represents a better way of determining the mens rea of a juristic person. In my understanding the ‘aggregation theory’ infact has more to do with the actus reus than mens area or at any rate both. Aggregation theory is a ‘catch all theory’ wherein even conduct of lower level employees can trigger prosecution of the corporation even though such employees cannot be said to be representing the brain of the corporation. For a crime, both actus reus and mens rea are required. Law does not punish only for thinking about a crime. Therefore, in my understanding, the two theories do not enter into any conflict zone. Rather both can be harmonised.

The material question is whether the act of the employee, for which the corporation is also implicated, should have been done for the benefit of the corporation, or can the corporation be made liable only on the basis of the act of the employee done in the course of its responsibility (or discharge of its duties) i.e. course of its employment.
The answer is not simple but nevertheless, capable of an objective evaluation. If an act is done by the employee acting within the scope of his employment and such an act being illegal, is done for the benefit to the corporation, such an act will necessarily trigger criminal liability of the corporation. In this scenario, the fact that the employee or officer also gains an advantage, as a byproduct of the illegal act, will not be material for the purpose of corporation’s liability. The second scenario is where the illegal act is done in the scope of employment and is done with the intent that it will result in benefit to the employee as well the corporation. In such a case also, the illegal act will trigger criminal liability of the corporation. Third scenario is where the illegal act in question does not confer any benefit on the corporation but nevertheless, such an act is a result of the lack of institutional mechanisms or organisational laxity or negligence, and results in harm to a third party. In such a situation, even though no benefit is passed on to the corporation, yet it will trigger criminal liability because the entity itself will be charged with not taking adequate precautions to prevent the occurrence of illegal act. It will thus be an example of culpable negligence. Fourth scenario will be where the illegal act in question is done purely with the intention of benefit for the delinquent employee but it causes harm to a third party. In such a situation the Corporation should not be held guilty provided the Corporation had set up a reasonable system of internal checks and controls which would negate imputation of any sort of intent to the entity itself. Thus, having an effective compliance and monitoring system by a corporation should prove a legitimate defense to the corporation against prosecution. It is of course a matter of investigation and trial whether such a compliance system was a mere eye wish or fully functional, depending on which the corporation may be held guilty or acquitted. Italian corporate criminal law supports
this contention. Though US court do not accept this as a defense (reference to Martin’s criticism of Ionia Judgment), yet Thompson Memorandum (which has now been replaced with McNaughty Memorandum) dealing with corporate prosecution includes this factor as a guideline for the prosecutors who are investigating corporate crime.

In addition, the standard for judging corporate intent, as laid down in the report of ICJ, part of which has been reproduced in preceding chapters can form the most objective basis for determining whether the corporation had the requisite mens rea. It represents, by far, the most comprehensive analysis on corporate criminal intent.

After overcoming the initial obstacles of having a ‘sound basis for corporate liability’ and ‘mens rea’ of a corporate body, the next major issue is of the difficulty in sentencing a Corporation to actual imprisonment. The previous two issues were more philosophical in nature dealing with criminal jurisprudence and it was relatively easier to deal with them with cogent reasoning. However, the issue of ‘sentencing’ has a practical dimension and hence, a solution to this problem has to be tested for its efficacy in practice, not merely through reasoning.

7.2.3 Third issue- How to ‘Sentence’ a Corporate Body?

This issue is perhaps the biggest and the most convincing argument available to the theorists who contend that the entire criminal prosecution of a corporate body goes waste since it cannot be sentenced to actual imprisonment and hence, corporate criminal liability should not be pursued at all. This is no doubt a strong argument against the concept of corporate criminal liability because for a large variety of offences, for which imprisonment is a mandatory
part of sentence, even if found guilty, the Corporate body cannot be sentenced like a human. However, it would be so strange and ironic that a person, even if a juristic person, whose guilt can be established by leading cogent evidence, should be allowed to go scot free simply because it cannot be awarded the prescribed punishment.

At this stage, it needs to be emphasised that establishment of guilt is not dependant on the sentencing policy which is a subsequent step in the criminal justice administration process. In fact the sentencing policy is dependent on the criminal guilt of an accused i.e. the sentence has to be in accordance with the guilt established. Thus to hold that sentencing policy can control the prosecution would defeat the entire criminal justice process. Say, for example, in a criminal trial where the prosecution evidence is over and the defence evidence is being led, the accused who is on bail jumps bail thinking that his conviction is imminent on the basis of prosecution evidence adduced till then. Can the trial court stop the prosecution on the ground that the accused has jumped bail? No, because even in his absence he can be prosecuted and sentence imposed, to be served as and when he is apprehended in addition to any other sentence that may be imposed on him for jumping bail. So what is required is a shift in the sentencing policy which is the logical step keeping in mind that corporations are capable of committing crimes which are far more heinous in effect and magnitude than crimes committed by natural persons.

Let us examine the issue threadbare. Sentencing policy under municipal laws can be of varied types. Some countries like India, which is a mix of common law and civil law systems, even for civil
liabilities sentencing by way of imprisonment can be ordered\textsuperscript{371}. The sentencing in case of civil liabilities is more in the nature of an effort to force the judgment debtor to discharge his liability then to actually punish him for his default. Thus, it is deterrent in nature and not retributive. There are many countries which have banned capital punishment but there are many which still impose death sentence. Islamic countries have their sentencing policies based on their religion which are a mix of deterrent, retributive and compensatory punishment theories. Thus sentencing policy is not necessarily an outcome of criminal prosecution system followed by a country but is more related to the notions of justice dispensing prevailing in a given society. A brief reference to the theories of Punishment would be appropriate in this regard. The four accepted theories of punishment are – \textit{Deterrent Theory, Retributive Theory, Compensatory Theory and Rehabilitative Theory}.

\textit{Deterrent theory} is concerned with invoking fear in the minds of the criminals. This theory highlights ‘punishment’ as a harsh outcome of a wrongful act such that it can dissuade people from committing offences. It is thus aimed not only at the actual wrongdoer but serves out a notice to possible criminals in the society at large. \textit{Retributive Theory} justifies the punishment given to a wrongdoer as a quid pro quo for the wrongful criminal act. It thus seeks to balance the quantum of punishment with the gravity of the offence. It is directly aimed at the actual wrongdoer. \textit{Compensatory Theory} is aimed directly at the victim of the crime and seeks to give him a sense of personal vindication. This theory has to be understood in the light of the philosophy underlying criminal law that a crime is an act against the

\textsuperscript{371} The imprisonment is in civil prison which is different from the actual convict prisons and there is maximum limit of 40 days to which the person can be sentenced. Even after the sentence is over, the civil liability, if not discharged, remains.
whole society and not against the person who is actually the victim or one who has actually suffered the loss. This is precisely why in all countries criminal prosecution is the duty of the State and not the private individuals. It is only when the State fails in its duty that a right is given to private aggrieved individuals to seek remedy for the criminal wrongs done to them. Thus there is a semblance of the principle of complementarity here where the first right to prosecute is given to the State but if it fails to act the private individual can take the prosecution in his own hands. This is an example of how the national criminal law systems act as a source of international criminal law. **Rehabilitative Theory** has its emphasis on the guilty mind or the convict as it seeks to bring him into the mainstream society. This theory serves a very important purpose. It is the duty of State to ensure that there are no distortions in the society so that the delicate societal balance is maintained. Crime and criminals are the biggest threats to this balance. Thus, both these elements are serious distortions in the social fabric and it is imperative for the State to ensure that these are removed at the earliest. This is possible if the guilty minds are cleansed and are somehow rehabilitated by the process of assimilation.

States follow a sentencing policy which is usually a mixture of the above discussed theories. The common thread running through all is the need to strike a balance amongst the requirements of criminal rehabilitation, victim compensation and overall social harmony. However, while carrying out this delicate balancing, one requirement which comes out as a priority is that of maintaining social harmony. To meet this end, it becomes necessary at times to relegate the other considerations and this is precisely where the need to physically incarcerate the wrongdoer comes into picture. Physical incarceration gives a sense of security not just to the victim but also to the society.
Any member of the society is a potential victim if the wrongdoer is not kept within bounds. Moreover, even for the victim, the sense of justice having done is felt when the wrongdoer is sentenced to physical punishment. Monetary reparation is unable to give the satisfaction which physical internment to the wrongdoer provides. Similarly, for criminal rehabilitation, it is the wrongdoer who has to show his bona-fide intentions of improving which can be judged only once he is sentenced and sent for physical detainment. Thus, the issues relating to victim compensation and criminal rehabilitation have to follow this primary requirement of maintaining social balance.

Physical imprisonment as a part of penal law serves the purpose of keeping the criminal under a watchful eye apart from segregating him from the mainstream society so as to protect the other members from his criminal tendencies. Sentencing a Corporation however is impossible for obvious reasons. The only punishment is by way of fines. A Corporation cannot be put in Jail or a detention centre but for the fact that a Corporation is prosecuted and punished in its own capacity as a (legal) person, the physical imprisonment of its Directors or officers in-charge of the affairs (presuming that they have been found guilty) would not suffice because their culpability is distinct from that of the Corporation. However, instead of taking this as a basis for not attaching criminal culpability to Corporations at all, a new way of sentencing can be devised which though unique and peculiar, will meet the requirements of the penal justice system under ICL (international criminal law). Precedent for alternate form of corporate punishment is available under Nuremberg trials, US, French and Italian law.

I propose that a Transnational Corporation, when found guilty of an international crime such that it has to be sentenced mandatorily,
should be restrained from carrying all its activities in the Country in which it is found to have committed the guilty act. In other words, the activities of the Corporation will be deemed to have been ‘detained’ which is corresponding to physical imprisonment of a criminal. It is actually like cutting off the criminal from the society for his punishment to be completed period and in the process hoping that he will be reformed as well. This deemed detainment can take the shape of taking over the business of the Corporation by the national government for a prescribed period or temporary taking over by a government nominated independent Board of Directors. Actual cessation of all activities (like compulsory winding up) which would correspond to a death sentence and can awarded in case of companies or corporations which have been specifically set up for criminal purposes. The following punishments are available to be handed down to corporations which are found guilty:

- Deferred Prosecution Agreements (as widely followed under the US law) provide a very good example of where the corporation is to be let off under probation and yet retain control over it for ensuring that the organisational set up is rectified to prevent the reoccurrence of the crime by the organization.

- Restriction of doing business in certain areas or regions (akin to simple imprisonment – commercial movement is circumscribed or limited).

- Revocation of permits/ authorizations to do business in certain commercial fields. Under Italian law, Article 2 paragraph 20 of Law No. 481/1995 imposes fines on the companies and in case of reiteration of the violations, suspension of the activity and the suspension or loss of the authorization. Similarly, with respect to management companies in the financial sector, Article 75 of
Legislative Decree No. 58/1998 provides for the revocation of the market’s authorization if the irregularities are exceptionally serious;

- Nationalization of business (temporary or permanent). Under Italian law, Article 33 paragraph 4 of Law No. 223/1990 provides that, as a consequence of the infringement of the rules provided by Article 15 and concerning the abuse of dominant position, the company may incur the following sanctions: disconnection of the plants; forced divestment of the company or capital shares, unbundling or forced sale of activities.

- Winding up or Dissolution in cases where the organisation has been set up only for a criminal purpose\(^\text{372}\).

- Debarment (governed by the US Code of Federal Regulations and authorizes agency officials to debar any corporation convicted of certain felonies, including “embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property” or any felony “in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract”) from doing business with government agencies or participating in government programs, a deprivation that can singlehandedly destroy producers in sectors from aeronautics (no defense contracts) to pharmaceuticals (no federal funding for drug research, no reimbursement for welfare recipients receiving medication).

\(^{372}\) International Criminal Law has yet not recognised death penalty. This fact is an advantage for the corporations in case the jurisdiction of Rome Statute is widened to include juristic person.
- the mandatory seizure (confiscation or forfeiture) of the price or profit deriving from the violation;

- the interdiction of the company’s activities (for a period ranging from three months to two years or permanently in case of significant and repetitive violation);

The major argument that would be advanced against the proposed punishments is regarding the interests of the shareholders, employees and of the third parties. Why should shareholder suffer? This is of course a very tricky issue and it is very hard to come up with a solution that caters to the interest of all the stakeholders. Shareholder or members of a corporation accept the possibility of harm right from the beginning when they take up individual shares. However this they do in order to get monetary benefits and to save themselves from any liability arising from the actions of the corporation which the company will have to bear. So for illegal acts, they will be immune from legal process but in case of profits, they will be paid their dues. Thus the risk of losses is inherent in the membership of a corporate body and cannot be made the basis for not punishing the corporations with sanctions or heavy fines. In so far as third parties are concerned, there can be a provision in the judgment holding the corporation guilty, for compensation to be paid by the parent company. Similarly, the employees’ major concern is about their salary and savings (in the form compulsory deductions which are mandatory under the laws of many countries as a part of social security measures) which can also be paid out of the existing assets of the Corporation. The interest of shareholders is limited to its paid up capital for the number of shares held by it which can be taken care of in case the Company is forced to windup or broken up.
If we were to draw an analogy with a human criminal - employees, shareholders and third parties connected with a Corporation are like the people who are dependent upon him (i.e. a natural person) which could be his immediate family, his employers and persons outside his personal circle with whom he might have contracted certain liabilities. When such a criminal is sentenced, law does take into consideration the impact of sentence on his immediate family or his future prospects but that consideration is to a very limited extent. The maximum consideration is of the gravity of the offence, its impact on the society and the likelihood of it being repeated. In any case this suggestion of deemed internment or detaining the Corporation will have to be fine-tuned before such a punitive order can be started to pass against the guilty corporation. However, I have no hesitation in contending that subject to working out of an adequate compensation for stakeholders, such a punitive action will not only a deterrent effect but will also have a reforming effect.

In any case, this drastic action is subject to modifications in accordance with the gravity of the offence and the sentencing prescribed. For example, after World War – 2, in the Nuremberg Trials, IG Farben, a German industrial conglomerate which had been formed after amalgamation of 7 leading chemical industries of Germany, was ordered to be disbanded on the ground that the Company was found guilty of supplying gas for use in the Nazi gas chambers. The trial chamber ordered Farben corporation to be broken into 3 smaller chemical companies – Hoechst, Bayer and BASF. 24 of its officers were actually sentenced to various terms of imprisonment. This extreme

373 Though there are times when the conduct complained of is such that sentencing the criminal might not be in overall social interest as well as the interest of the criminal and his dependents. In such a case, the Courts pass on order of probation where in sentence is not imposed, on the surety of good conduct
order of the Nuremberg Trial Chamber actually amounted to death sentence for the Corporation but at the same time life was restored in the corporation by breaking it up instead of dissolving it completely. This action was justified in view of IG Farben’s complicity in facilitating large scale organised deaths of Jews in the most horrible manner. The precedent of IG Farben clearly comes in support of the contention that under international criminal law, a Corporation can be actually sentenced thereby negating the very basis for opposition to imputing criminal liability to corporations by a number of countries. Infact, breaking up IG Farben was a unique decision which took into consideration the needs for post war rebuilding by encouraging private enterprise and at the same time ensuring that the corporation is stripped of its organisational and economic power on the strength of which it became an instrumentality of war crimes under the Nazi.

Therefore, there is support from historical facts that criminal law is not powerless when it comes to passing a sentence on the Corporation. The need is for re-orienting the sentencing policy keeping in mind the sentencing requirements. The most significant characteristic of law is that it is dynamic – it continuously adopts itself to changing social requirements. A law which cannot make room for necessary adjustments itself loses its relevance and sheen, and is usually repealed to make way for a better law which is more alive to the changing socio-economic and even political dimensions, keeping in mind that the context might be any of these or an interplay of all the three factors. If Law treats an inanimate thing as capable of enforcing rights like an ordinary citizen, Law must also make an equal endeavour to ensure that it is made to discharge its obligations.
7.2.4 Fourth Issue – Principle of Complementarity - The Major Stumbling Block?

The conflict between principle of complementarity and corporate criminal liability was the major reason for not including legal person within the definition of ‘person’ under the Rome statute. Principle of complementarity, which largely flows from the principle of deference, gives the right to prosecute the accused/criminal to the country where the crime in question was committed unless that country is unable to prosecute the criminal or if it does prosecute, the prosecution is sham designed such as to shield the accused/criminal. The principle is derived from customary international law and seeks to protect the sovereignty of a State, a fundamental principle of International law.

The conflict between complementarity and corporate criminal liability arises in case of those countries which have not yet recognised the principle of corporate criminal liability. They contend that once their municipal law does not recognise the criminal liability of juristic persons, it is impossible for them to either prosecute a corporation. As a corollary, it is not possible for them to accede to the prosecution by ICC because that would mean tacit approval of corporate criminal liability, something which goes against their criminal law policy. However, if the ICC still exercises jurisdiction by holding that the concerned state is unable to prosecute the accused, same would be an infringement of their sovereignty since that would actually amount to taking over the prosecution from the concerned State forcibly and without justification. The basic issue involved would not be whether the state is unable to prosecute but that there is no legal basis to prosecute in the absence of corporate criminal liability. In other words, there is difference between contending that a state does not
wish to prosecute the accused (in which case another competent forum i.e. ICC, should be allowed to take over the prosecution) and that there is no legal grant for the exercise of that power to prosecute. A country would allow the ICC to initiate prosecution of a person whom it does not wish to prosecute for whatever reason but it is not logical for them to agree to the prosecution of an entity which they don’t recognise as being capable of committing a crime at all. There is thus fundamental difference between saying that I do not want to do a particular thing and saying that I cannot do it.

The problem surrounding issue of complementarity has been discussed in detail early in this chapter. Kathryn has suggested a viable alternative in the form of an Exception based approach to principle of Complementarity. Kathryn suggests that definition of person should be amended to include a juristic or legal person i.e. in the Rome Statute. She follows it up by contending that the prosecution however, should be initiated only in respect of those countries which recognise the principle of corporate criminal liability. In other words, wherever the ICC has to rely on principle of complementarity to initiate prosecution, it should examine a threshold question as to whether the country, where the prosecution should have taken place, recognises the principle of corporate criminal liability? In case it does, it should proceed with the prosecution. By following such an approach, Kathryn contends that a major positive step will be taken in the development of international criminal law under the Rome statute and wherever possible, guilty corporations can be punished under ICL. A positive trend of corporate prosecutions under ICL will encourage ready acceptance of corporate criminal liability amongst nations who have not yet recognised the principle under their municipal laws.
A modification to the exception based approach has been proposed above while discussing the proposal of Kathryn wherein it has been proposed that prosecution of corporations should be uniform but sentencing should be with exception. In case, the modified exception based approach is not acceptable, the approach suggested by Kathryn is undoubtedly the most workable solution to the problem posed by complementarity principle in the wake of non-recognition of corporate criminal liability by a large number of countries. Instead of waiting for a universal consensus on recognizing corporate criminal liability it is better to apply the principle at least in so far as those countries are concerned where it is permitted by the recognition of this principle by the respective municipal laws. This way at least the process of holding the Corporations accountable under international criminal law can be initiated. The countries which do not recognise corporate criminal liability yet are slowly responding to the inevitability of incorporating this principle in their municipal laws especially in the wake of recent corporate scandals starting from Enron. The recent examples have clearly shown that the Corporate entities provide the raison de etre for the crimes to happen and hence their culpability cannot be ignored. There is still another reason why an impersonal entity cannot escape the criminal law dragnet. The simplest possible example is where a State is sued for violating the human rights of its citizens. The human right violations can be as simple as denying basic drinking water to as heinous as custodial deaths to most heinous as Genocide. In such cases, State, if it is held liable for the acts of its officers, is asked to pay compensation to the victims or their families in addition to physical punishment to actual perpetrators i.e. the human agency. Recognition of state liability to pay for the tortuous acts of its employees and officers is well accepted. Thus, when a sovereign state
can be tried and held guilty, there is no reason why a corporation cannot be tried and held guilty. In any case, the ill effects of not imputing criminal liability to corporations is a luxury, which in times to come, will not be possible for any country to afford. In any case, most of these countries which do not at present recognise corporate criminality, do recognise civil liability of corporations for wrongful acts. Thus it is not a case where the divergence amongst various member countries with regard to a legal issue is such that the same cannot be reconciled.

7.2.5 Fifth Issue – Scope of Corporate Criminal liability under the Rome Statute?

Scope of Corporate criminal liability refers here to the range of crimes for which the ICC should be able to prosecute the corporations. The limitation of Rome Statute is that it recognises only 4 crimes as international crimes over which ICC has been conferred jurisdiction. These 4 crimes are: (1) Genocide, (2) War crimes, (3) Aggression and (4) Crimes against Humanity. The Rome Statute does not recognise any other crime as being international in character such that it can be tried by the ICC. However, it must be clarified that scope of international criminal law is not circumscribed by the fact that the number of recognised international crimes have been restricted to 4 in number. It has to be borne in mind that an international agreement or treaty is a complex interplay of multiple factors on which delicate international relations are balanced. Signing of the Rome Statute was a watershed mark in as much it resulted in a permanent international criminal court, a marked improvement over the hitherto ad-hoc tribunals set up under the UN aegis. Undoubtedly, the development of international criminal law got a big boost with setting up of ICC since the jurisprudence of any area of law gets a sound foundation
only when a permanent institution starts to adjudicate in the concerned area of law. Ad hoc criminal tribunals, even though have played an important part in the development of international criminal law, yet the binding and precedent value of a criminal law judgment comes from a permanent court only. Viewed in this backdrop, the setting up of ICC was an all important requirement and hence the consensus of the member countries for restricting the jurisdiction of ICC to 4 core crimes was an effort only to expedite the signing of Rome Statute as inclusion of other crimes would have resulted in further delay in setting up of the ICC.

Rome Statute, Article 10 itself lays down...*Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.* In other words, the Rome Statute itself recognises and encourages the need to further develop international criminal law and not restrict its scope to what has been laid down in the Rome Statute. It is obvious that with the general development of international criminal law, of which Rome Statute is an integral part, jurisprudence of the ICC cannot stay uninfluenced. Language of Rome Statute itself is suggestive of the fact that the negotiators clearly bore in mind the idea of integration of the limited scope of Rome Statute with the larger canvas of international criminal law jurisdiction.

There is another factor which pushes for the enlargement of ICC jurisdiction. If the current scope of Rome Statute is to be considered as being beyond expansion, the only alternative for prosecuting juristic persons under international criminal law is either by setting up ad-hoc tribunals or by setting up another permanent court with jurisdiction over juristic persons and crimes committed by them. Neither of these alternatives is efficacious.
Analysed from a different angle i.e. the efficient utilization of existing resources, both monetary and manpower, it would be prudent to extend the scope of the current permanent forum. Even if negotiations are initiated for a second permanent forum, it will hit the same roadblock which prevented the inclusion of juristic person within the scope of Rome Statute. The lack of acknowledgement of corporate criminal liability by a large number of countries would mean that the scope of the proposed new forum would be limited by the number of countries which sign the accord. In other words, only those countries would part with their exclusive territorial and temporal jurisdiction over Corporations or crimes committed in their jurisdiction which acknowledge corporate criminality. If this would be the most likely result, then the more reasonable approach would be to work for an exception based approach towards corporate criminality within the Rome Statute, which has been suggested by Kathryn or its modified version as has been proposed by the researcher.

The principles of international criminal law which are being evolved, developed and recognised by the ICC can be uniformly applied while prosecuting corporations as well. In contrast to it, a forum dealing with corporate crime alone will neither be able to draw upon the jurisprudence of ICC (due to its limited jurisdiction) nor contribute anything to the uniform development of ICL (International Criminal Law). Secondly, consensus on the nature of crimes for which corporations can be prosecuted will be easier to achieve for the ICC member states, the reason being that they already have a significant level of consensus regarding applicability of international criminal law to natural persons. This existing consensus coupled with the common criminal philosophy of recognising corporate criminality will facilitate the negotiations on the nature and number of crimes to be classified
as international crimes for the purpose of prosecuting legal persons under the ICC.

If the question of extending the jurisdiction of ICC to legal persons is answered in the affirmative, another inherent question in this analysis would also arise and that is whether the core crimes recognised by the Rome Statute should also be amended so as to include a crimes for which Corporations can be prosecuted directly and not merely as an aide or abettor. The most likely response to this issue would be to restrict the scope of review of Rome Statute only to include legal person within the definition of ‘person’ and leave the issue of inclusion of typical corporate crimes in Rome Statute to a later round of negotiations. In my opinion, once the core issue of including legal persons in the scope of Rome Statute is to be analysed, there seems to be a plausible reason to also extend this principle to the nature of crimes for which legal persons can and should be prosecuted under the Rome Statute. Presuming that ‘exception based approach’ forms the basis for revision of the Rome Statute, the negotiations /consensus is only to be carried out amongst those members states which recognise corporate criminality, and hence there is a greater expectancy of success for reaching a consensus on the nature of crimes to be included under the Rome statute. Those member states which do not recognise corporate criminality will be unaffected by increasing the number of crimes beyond the 4 core crimes.

The final question relates to the nature and number of crimes which should be included in the Rome Statute for the purpose of prosecuting legal persons. There are 3 major crimes which have international ramifications and which can validly be termed as international crimes. These are – 1) Money Laundering 2) Corporate Corruption; and 3) Environment crimes. Discussion in preceding chapters has clearly
brought out the international nature of these crimes and that international instruments relating to these crimes specifically contemplate the complicity of legal persons in these crimes. However, since there is no international instrument providing an international forum for prosecution of the above mentioned crimes. Thus even though for all practical purposes, these crimes have transnational effect and content, the only impediment in their classification is recognition that these crimes need to be dealt with at an international forum.

According to Nora Gotzman the importance of precedents set by international and international human rights law must not be underestimated on this issue. In so far as international law is international and thus theoretically applicable to all jurisdictions regardless of domestic legal principles, the recognition of corporate legal personality is, as a matter of deductive reasoning. Therefore overall, the consistent trends in common law, civil law and international law to recognise corporate legal personality provides an important basis for the argument that the revision of the Rome Statute should include corporations as legal persons for purposes of ICC jurisdiction. This reasoning is most logical and is in tune with the concept of law as being dynamic. Although domestic criminal law systems form the underpinning for international criminal law, development of ICL cannot be constrained by not extending the developing principles of international law of which ICL itself forms a part. How can the ICL be kept immune from the principles of public international law when it is most natural to expect that ICL shall be influenced progressively by developing public international law principles? Rome Statute itself talks about development of international criminal law outside the Rome Statute limitations. The limitations of Rome statute were not legal, but political and greatly
influenced by the role that MNC’s play in shaping international economy and its resultant effect on international relations between national governments.

In conclusion therefore, it is proposed that in view of the escalating range of criminal wrongs being committed by transnational corporations and their increasing proclivity for indulging in criminal behaviour on a global scale for making monetary profits, it is high time that international community wakes up to the necessity of recognising that Transnational Corporations should be included in the jurisdiction of international criminal law. Discussion in preceding chapters has shown that Transnational Corporations have become actively complicit as aiders even in the 4 core crimes that are currently recognised by the Rome Statute. The most effective, expeditious and practical manner in which this development in international criminal law can be brought about is by revision of the Rome Statute. In addition, at least 3 crimes - Money Laundering, Corporate Corruption and Environment crimes should be included in the list of international crimes. These crimes have a ripple effect on other crimes e.g. arms trafficking, human trafficking, terrorist financing and human rights violation. Extension of jurisdiction of international criminal law to include legal persons is expected to have a profound preventive and cautionary effect on the increasing tendency of the multinational corporations to indulge in criminal wrongdoing. Since, Transnational Corporations are moved solely by profit motive, I would like to end the discussion by emphasising the futility of indulging in the mad race for making more and more money by quoting from an unknown author:

‘Money has never made anyone happy…instead of filling up a vacuum it creates one’