CHAPTER 1

INTRODUCTION
(Objective and Scope)

THE PRECURSOR:

‘Money’ is a magical word. The simple mention of ‘money’ conjures up images of luxury, opulence and power. One can imagine that when the mere mention of ‘money’ is so scintillating and enchanting, what can be its effect on those who actually possess it? Those who don’t have it yearn for it every moment and those who have it, hanker for more every instant; and the biggest irony of possessing money is that no one ever has enough of it!

What makes ‘money’ so special? The simplest answer is provided in the old English proverb ‘money makes the world go round’. It is essentially a reflection of the power and influence which money wields in our daily lives where everything comes with a price tag. A more complex answer to the above inquiry would be that monetary system imparts and adds value to things/ actions/ efforts which otherwise would always remain undervalued and resultantly, underutilized e.g. Intellectual Property Rights. Another response could be that barter system\(^1\) does not recognise the need for innovation in as much as it places value only on existing things, things which are required for day to day living. In addition, Barter system is based on the principle of reciprocity and not individual gain. Monetary system thus, not only imparts value to intrinsic qualities of a thing but also gives incentive for a man to excel over another. Monetary system also is, in a way,

\(^1\) Predecessor of monetary system where one commodity of need is exchanged for another
complimentary to the Darwin’s Theory of Evolution – ‘survival of the fittest’. In other words, the society puts a premium on those who have outrun others and can excel over others. The most conspicuous manifestation of this societal recognition is the ‘money’ that an individual holds. What is true for an individual in a local society is equally true when we talk about a group of individuals or association of individuals in the larger context of an economy\(^2\) and the same also holds true for nations in the international political community.

Money is no doubt a social necessity but in order to fulfill it, one often blurs the distinction between need and greed\(^3\). Why does one cross the dividing line between need and greed is a metaphysical question which is not capable of an objective answer. Greed itself is manifested in a variety of ways e.g. direct form like theft, criminal misappropriation and corruption and to indirect forms like tax evasion, circumvention of law and undue political favours which enrich an entity\(^4\) but actually amounts to cheating the citizens of a nation and sometimes even harming its human resources and environment/ natural resources. It is not easy to deal with all the manifestations of greed. The direct forms can be dealt with by enacting law i.e. through legislation and statutes, but it is very difficult to contain the indirect forms. This is because indirect manifestations clothe themselves with cloak of legitimacy and one has to lift this cloak to prove the illegality. Everything is perceived as well

\(^2\) Business houses, entrepreneurs etc.
\(^3\) The problem is compounded by the fact that both these words cannot be defined objectively. What might be a need for one individual can be termed as greed for another? Still further, need for one person at a given point of time may become greed for the same at a different point of time.
\(^4\) Usually true for large business and corporate houses which in turn for political funding, pressurize the Governments to alter their policies in favour of the business houses. Such policy changes are often at the expense of the common citizens who are oblivious of the clandestine nexus between politics and business.
as portrayed as being done with the authority of law but in reality, the harm caused by such seemingly lawful acts is usually irreversible and widespread in content and impact. In order to make such indirect forms of greed culpable, it becomes important to show that even though law is being followed, but it is only apparently so and in real terms the nation and society as a whole is suffering. The problem of containing indirect illegal acts/crimes is compounded by the fact that perpetrators of such acts/crimes are not ordinary criminals but large entities who are resourceful enough to convert illegal acts into lawful acts by virtue of their financial power and clout. The obvious reference here is to the class of organisations popularly known as Multinational Corporations or Transnational Corporations. MNC’s have a pivotal role to play in international economy. They bring with them the advantage of financial investment/ capital movement in/to poor countries and consequent development, transfer of technology, consumer choices and large scale job creation. But they also are guilty of wrongdoings some of which are very serious in nature and call for stringent penal action. It is thus imperative to study the functioning of these organisations and to carefully assess their position under International law, especially International Criminal Law to fix their culpability. The underlying premise of this research as well as the starting point of the same is that MNC’s/TNC’s possess three unique characteristics which make them excellent perpetrators of criminal wrongs – firstly, they

5 This is the point where Human Rights assume importance. The suffering can practically take any form – from plundering of natural resources in the guise of good economy to causing water and air pollution, and even death due to unregulated industrial activity.

6 The reason being that MNC’s do not operate in a single national legal environment but are scattered over different jurisdictions. This difficulty in judging the jurisdictional aspect is compounded by the reason that such like corporate organisations are inter-linked through a corporate web i.e. subsidiary and holding companies, the threads of which are spread over different national jurisdictions, making it difficult to effectively gather evidence and prosecute the actual wrongdoer in one national jurisdiction.

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are cold i.e. insensitive; **secondly**, they are remorseless; and **thirdly**, they are driven by profit motive.

Multinational Corporations enjoy a unique position under the International Economic Regime. They are often termed as border less nations, de facto governments and States without subjects. The might of multinational corporations, in the present era of economic globalization, has assumed gigantic proportions. The financial strength of these multinational corporations often dwarfs even the annual budgets of small nations. The philosophy behind the working of multinational corporations, also termed as Transnational Corporations (TNC/MNC for short), is to tread on a path of ever increasing global presence and in the process annihilating whatever comes in its way. Infact, the sustainability of a multinational corporation depends on its ability to continuously enhance its operations’ area in as many regions as possible. The reason is simple – the sheer scale of operations of a multinational corporation requires huge capital and manpower which is possible only if the corporate entity has large scale funds for continuous investment and expansion activities. This continuous supply of funds in turn is possible only if the corporate entities are able to draw economic resources from a number of sources. Hence, the need to have business operations in as many regions as possible. Besides, having global operations also protects the multinational corporations against shortfall in supply of funds from one source due to recession

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7 Although both terms i.e. Transnational Corporations and Multinational Corporations are interchangeably used here, there is a difference between the two terms. Transnational Corporations refer to Corporations which have presence in more than 1 country i.e. presence beyond the Home country. Multinational Corporations on the other hand have operations spread over a number of different countries. The difference is in the scope and size of operations. The common feature is that both operate across the borders. However, majority of the United Nations documents refer to such organisations as Transnational Corporations.
in a particular region. In addition, having freedom of movement across different national jurisdictions gives them the advantage of relocating their operations in regions which are least regulated by law. For example, in 1972, Amatax, a Pennsylvania asbestos yarn mill, moved its entire production facility to Mexico to take advantage of the fact that Mexico had no laws regulating exposure of workers to asbestos fibre. TNC/MNC’s are thus able to manipulate regulatory shortcomings in developing and underdeveloped countries in their favour. The increasing global reach of modern transnational corporations aggravates the difficulties of arriving at a satisfactory conception of corporate crime. TNC's engage in practices which, while they would be illegal in their home countries, are legal in a number of host nations. The ability of TNCs to have a significant influence on the legal climate in host countries further renders the particular laws of these nations an inadequate basis for the study of corporate crime.

1.1 CORPORATE POWER

The twentieth century has witnessed the rapid growth of giant multinational corporations. These giants produce a large proportion of all manufactured products, employ tens of millions of workers and dominate important segments of the world’s economies through their global operations. Most of what we eat, drink, wear, drive, and watch is the product of firms that are now global in their operations. The power of these transnational corporations over our lives, our planet, and our democratic institutions has never been greater. And it is

9 Id, p. 34
10 Campbell Soup Company controlled 95% of soup preparation in the USA - Marshall B. Clinard and Peter C. Yeager, Corporate Crime; The Free Press 1980, p. 3.
growing. According to the United Nations, there were 7,000 transnational corporations in 1970. Today, there are about 64,000, with 870,000 affiliates around the world. Of these, the largest 200 firms are the dominant engines of the global economy. One way to measure the power of global corporations is to compare the rate of growth in their sales and assets to the growth in the world economy as a whole. Between 1983 and 2002, the top 200 firms’ sales and assets outpaced world economic growth. At the same time, their economic expansion far exceeded the increase in their workforces. In 2002, the combined sales of the Top 200 were the equivalent of 28.1% of world GDP, while their employees comprised only 0.82% of the world’s workforce\textsuperscript{11}.

The giant corporations possess such awesome aggregates of wealth and such vast social and political powers that their operations vitally influence the lives of virtually everyone from cradle to grave\textsuperscript{12}. The enormous and varied capital resources of these major corporations enable them to adopt and to change technology on a massive scale\textsuperscript{13}. Multinational Corporations have an insatiable appetite to grow big and in the process earn large scale profits. In order to achieve this objective, various methods are adopted like Acquisitions, Mergers, Takeovers, setting up of Subsidiary companies and so forth. These are tools which are available under the national corporate laws which provide for legitimate ways to expand the operations of the corporate entity. However, in the race to expand far and wide, these

\textsuperscript{11} Sarah Anderson, “International Regulation of Transnational Corporations” ; Paper presented at a Workshop on International Regulations sponsored by Focus on the Global South, held parallel to the World Trade Organization Ministerial meeting in Hong Kong in December 2006; at www.policyinnovations.org/ideas/policy_library/data/01311 accessed on 1.4.2012

\textsuperscript{12} Supra note 8

\textsuperscript{13} Supra Note 10, Preface
transnational/multinational companies often find themselves indulging in corrupt corporate practices. Principles of good corporate governance are ignored with the sole motive of earning profits. The range of corrupt corporate practices adopted by these Transnational Corporations stretches from ordinary crimes like indulging in bribery to serious human rights violations. Examples of criminal behaviour in most jurisdictions include antitrust violations, fraud, damage to the environment, exploitation of labour in violation of labour law and failure to maintain a fiduciary responsibility towards shareholders. In order to better understand the extent of misuse of corporate power it would be worthwhile to study the activities of certain Multinational Corporations.

1.1.1 Royal Dutch Shell: Oil giant Royal Dutch Shell invested in oil drilling operations in Nigeria which has huge oil reserves and accounts for 14 percent of Shell’s worldwide oil production. It had the support of Nigeria’s military dictatorship which was roundly condemned for the executions by human rights group and government leaders from around the world. However, Shell defended its association with the dictatorship on the ground that it was pursuing a ‘constructive engagement’ policy that benefited the down trodden, a claim which was vehemently controverted by the local population. Shell was accused of having a deteriorating pipeline infrastructure as a result of which there were 27 oil spilling incidents from 1982 to 1992. An estimated 1.6 million gallons of oil was spilled. The resultant environmental harm to the local population can be well imagined. The worst affected were the local Ogoni tribals. Anti Shell rallies resulted in brutal killing of hundreds of Ogoni people. In April 1993, a peaceful

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14 Corrupt practices here refer to illegal practices and not just practices associated with corporate corruption or bribery
demonstration was being held against the laying of Shell pipeline passing through the Ogoni farm lands. This demonstration was fired upon by the soldiers, which resulted in the death of a person and wounding 10 others. Subsequently, Shell wrote a military memo to the Nigerian authorities requesting ruthless military operations for smooth economic activities. 4 days after this memo was written 4 traditional Ogoni leaders were killed by a mob. The most shocking fact is that noted Nigerian environmentalist Saro-Wiwa, who was in military custody at that time, was charged with inciting the mob and was subsequently executed in November 1995. The same Shell company was prevented in 1995 from trying to dispose off an obsolete off-shore oil platform by a burial at sea. Shell wanted to sink 460 foot Brent Spar platform west of Scotland. However, it was disabled of its plans to convert Atlantic ocean into a corporate dump yard, thanks largely to a campaign led by Greenpeace, an environmental organization.

1.1.2 Anvil Mining Corporation: A report on the Australian Broadcasting Commission’s investigative journalism program, Four-Corners, brought to the attention of the Australian public details of the involvement of Anvil Mining in a counter insurgency operation undertaken by military forces of the DRC in the town of Kilwa, about 50 kilometers from the Company’s Dikulushi copper & silver mining operations. Anvil Mining is the parent company of Anvil Congo s.a.r.l., which owns and operates the Dikulushi mine. Anvil Mining holds 100% of the equity of its subsidiary, comprised of a 90% equity interest and administrative responsibility for the economic benefit of

the remaining 10% equity, which is held in trust for the social, economic and infrastructure development of the Dikulushi mine region\textsuperscript{18}.

On the morning of 14 October 2004, a small group of lightly armed insurgents occupied Kilwa. The group claimed to belong to the Revolutionary Movement for the Liberation of Katanga (MRLK), to be widely supported by politicians and soldiers of the Katanga region and to be seeking separatism of the resource rich area. Over the course of the morning, the MRLK held a public meeting urging the local community for their support, took strategic locations in the town including the police office, looted military and police stores for weapons and then moved toward the port of the town. The insurgency was reported to have been largely peaceful as the few police officers that were stationed in the town either joined the group or ran away and because the military capacities of the insurgents were limited. In response to the insurgency, a counter-offensive was undertaken by a brigade of the armed forces and was facilitated by the use of Anvil Mining vehicles. Anvil Mining trucks and planes were used to transport soldiers to the town, to move about within the town, as well as to withdraw. The MONUC and local human rights group reports both find that the military forces engaged in summary executions of insurgents and civilians believed to be collaborating with the MRLK, incidents of rape, widespread looting and extortion of civilian property and goods (some of which was later sold back by the army to the local population), arbitrary arrests and detentions. Some detainees subsequently disappeared or died in custody. MONUC obtained independent verification of 73 deaths during the counter-attack, at least 28 of which were by summary execution, and details of a

number of mass graves. In one instance, group of 12 men were allegedly forced to kneel on the edge of a grave and were killed in succession. The report of the local human rights organization cites up to 90 summary executions. The real violence appears to have commenced after the insurgents had given up and the army had recaptured the town, within a few hours of their arrival and without any real opposition.

The Congolese government initially sought to downplay what had occurred in the town. Anvil Mining also downplayed what had occurred in their public statements following the violence. In a news release in January 2005, the company stated that the evacuation of their staff due to the unrest and their subsequent return to work a few days later were ‘. . . carried out efficiently and without incident . . .’ and that ‘. . . the government and military response on both provincial and national levels was rapid and supportive of the prompt resumption of operations’. In the days immediately after the violence, the company indicated that they were ‘. . . in consultation with the Government of the DRC to provide additional security for the mine so that, should such incidents occur again, the company would be able to continue its operations’. The company has been brought under scrutiny as a result of these events. Aside from the Australian Federal Police investigation, Anvil Mining is also being investigated by Canadian authorities over their possible role in assisting in the conduct of hostilities and by the World Bank, an underwriter for the

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company, into the company’s due diligence on security and human rights.

1.1.3 Chiquita: One glaring example of TNC wrongdoing is provided by the US based banana giant Chiquita. Chiquita is a leading banana producer of seedless bananas. In order to ripen the bananas, Chiquita used pesticide DBCP in Latin American plantations even though the use of same was banned in USA itself since 1977. However, production of DBCP for export purposes was not banned. Use of DBCP resulted in large scale sterilization in workers employed in banana plantations. In lawsuits against Chiquita, it was alleged that in studies conducted by University of California as early as in 1961 revealed that DBCP is highly toxic and that its vapours alone can do damage to sperm cells, livers and kidneys.

Infact, the transnational corporations have become so powerful as a result of their economic might that sometimes in order to achieve their profit goals, they even manage to get the municipal laws changed to suit their business operations. This practice is more conspicuous where the transnational corporations set up operations in poor and/or developing countries which lack in indigenous economic strength for development. These developing countries are desperate to attract foreign investment for building up their infrastructure and overall national development. However, when they invite the multinational companies to invest in their countries, they sometimes have to agree to terms which are unfavourable and sometimes even detrimental to

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21 In collaboration with Dow Chemicals

22 As early as 1978, 2 of the 15 world's largest corporations i.e. General Motors and Exxon had sales of over $60 billion each which exceeded the revenues of states of the US and even the revenue of most countries at that time - Marshall B. Clinard and Peter C. Yeager, *Corporate Crimes*; Free Press 1980, p. 2
the national and local interests of the respective countries but which they have to accept in the absence of any viable alternative. The following example would further illustrate the aforesaid fact.

1.1.4 BHP: Australian mining giant BHP was given mining rights around OK Tedi river in Papua New Guinea (PNG). However as a result of the mining operations of BHP, a 70 km long stretch of OK Tedi river is now ‘biologically dead’. This resulted from a daily dose of more than 80,000 tons of toxic mining waste that BHP dumped into the river. In a suit for punitive and compensatory damages against BHP claiming $1.6 billion to $2.2 billion, the families of villagers represented that for generations they have relied on the river system for food, water, transportation and recreation. What is striking is the extent to which BHP went for immunizing itself from legal claims resulting from its damaging operations. Initially, when the mining permit was granted to BHP, a condition was laid down by the government of PNG that the Company would build a dam to contain the crushed rock, cyanide and heavy metal wastes that the mining was expected to discard. The dam that BHP was building was destroyed in a landslide. Subsequently, BHP decided to discard this environmental safeguard. The PNG government gave permission to BHP to operate without the dam, an eventuality which became possible because of the financial clout of BHP since it was a source of 30 percent the federal revenues of PNG. By 1991, OK Tedi river was declared biologically dead by Australian Conservation Foundation. After the aforementioned suit for damages was filed against BHP in 1994, BHP responded in August 1995 by helping to draft legislation which made it a criminal offense to sue BHP. Though in September 1995 Victoria State supreme Court found BHP in contempt of court for its role in drafting the legislation, in December 1995 the PNG Parliament itself passed a law that would block any future OTML liability i.e. OK Tedi Mining Ltd. (OTML), which
was controlled by the BHP, and also set up a compensation fund of $81,323,00 for landowners harmed by OTML operations, which was widely termed as too meager. Here again the financial clout of BHP worked since there was a clause put in the aforesaid legislation that anyone wanting a settlement under the Compensation fund would have to opt out of aforementioned suit for damages filed in Australia against BHP.

1.1.5 Enron: Almost on the same lines as above is the example of a deal signed by Enron\textsuperscript{23}, a US based TNC, to build a gas pipeline from Mozambique to South Africa. What were striking are the revelations by Mozambique Natural Resources Minister \textit{John Kachamila} that threats were handed out to Government of Mozambique (read by Clinton Administration) that in case they do not sign the deal with Enron, development fund would be cut off\textsuperscript{24}. Enron has been repeatedly accused of relying on political clout rather than low bids to win contracts, a glaring example of political corruption.

1.1.6 Union Carbide Corporation\textsuperscript{25}: On 3 December 1984, the world witnessed the worst chemical disaster ever when a gas leak in the union carbide plant in Bhopal, India killed at least 8,000 workers and residents in the first three days after the disaster and caused permanent and debilating injuries to more than 150000. The tragedy, caused by the leakage of a cocktail of methyl isocyanate and other lethal chemicals into the area surrounding the plant was caused mainly by insufficient safety systems and cost cutting measures by

\begin{itemize}
\item \textsuperscript{23} Enron is no longer in existence now. It collapsed following discovery of a huge accounting scandal in the US.
\end{itemize}
Union Carbide. 18 years after the tragic disaster, the legacy of poisoning continues. Even today chronically ill survivors remain in desperate need of medical attention. Thousands of survivors and the children born since the disaster continue to suffer debilitating health problems. The now abandoned chemical plant is a toxic hotspot strewn with toxic wastes and materials that have been either dumped or haphazardly stored in rotting sacks, and barrels. Union Carbide escaped its obligations, courtesy a willing national government. Recently, it merged with Dow Chemicals resulting in the creation of world’s biggest chemical company. Dow shows no signs of taking responsibility for the Bhopal legacy. The gas leak killed thousands instantly. Of the affected people who survived the initial leak, many died over the years due to lack of proper care. Improper diagnosis led to ineffective treatment. The improper diagnosis was due to refusal by Union Carbide India Limited to disclose all the details regarding the leaked gases. Misinformation and lying by the company led to confusion, making treatment difficult. Union carbide’s doctor of Health, Safety and Environmental Affairs, Jackson B. Browning, described the gas a few days after the disaster as nothing more than a potent tear gas. The survivors suffer from lung fibrosis, impaired vision, tuberculosis etc. A third generation of victims is emerging. These are the children born to parents born after the gas leak and they are suffering from various abnormalities. The storage of huge volumes of MIC in a densely inhabited area was Itself in contravention of company policies strictly practiced in other plants. A total of 67 tons were stored in Bhopal against a permissible max. in Europe of only .5 tons. The Company ignored protest and built large tanks in crowded community. MIC is required to be stored at extremely low temperatures, but the safety measures were reduced to cut operating costs. The air conditioning plant was expensive to run and cost
cutting led to less than optimal conditions in this critical area. The company cut down the size of the preventive maintenance staff to save money and then provided insufficient training even to this reduced few. Safety training was slashed to 2 weeks as against the standard 24 weeks. Routine maintenance was neglected and critical equipment, which should have been replaced every six months, was often replaced only after 2 years. State authorities are also culpable for failing to implement the law. The proposition to store large volumes of MIC on the site caused a public outcry but the Company managed the government and got it built. Supreme Court of India directed UCC and UCIL to pay a total USD 470 millions in full settlement and all claims arising for the tragedy. The government, UCC and UCIL agreed and the two companies paid in full on Feb. 24, 1989.

The aforesaid are only a few examples of TNC wrongdoing. The arm twisting methods as well as corrupt corporate practices that these transnational corporations resort to in order to get their work done especially in relation to poor and developing countries has become a subject of intense concern and debate in international law, especially international criminal law. There have been numerous instances of misuse and abuse of corporate power by these multinational corporations which has resulted in physical and economic harm to the local population as well as harm to the environment. Irreparable damage to the environment is one of the most rampant crimes that these Corporations are accused of. In most cases, they either get away as a result of the exemption clauses of the relevant treaty or agreement by virtue of which they set up their business or in the alternative they get away with meager punishment or liability. What is

26 Local population and local area here refers to the population and geographical area where the Transnational Corporations set up their operations.
most striking is that for the same crimes, which they are accused of committing in the developing countries and for which they get away with lightly, they would not only be heavily penalized in their home country but would also lead to extreme measures like prohibition from carrying out the particular business operations.

However, it would be relevant to point out that illegal activities of Transnational Corporations are not limited to their off shore operations in poor and/ or developing countries only, though such activities are definitely more conspicuous and more widely prevalent in those countries. There are instances of financial crimes by TNCs in developed countries as well. For example, ADM a leading US food multinational used its financial strength to make lavish donations to political parties worth millions of dollars in return for food subsidies. According to a report\(^27\), ADM has cost the American economy billions of dollars since 1980 as a result of ethanol subsidies, subsidized grain export and various other programs. The report also found that every $1 of profits that ADM earns on ethanol sales, costs taxpayers $30. ADM was also accused by one of its own executive of participating in a global conspiracy to rig prices of lysine, an amino acid supplement for animal feed. After ADM made a large investment in the product i.e. lysine, prices of lysine went down. In response, ADM tried to indulge in price fixing by getting the world’s leading lysine makers to fix higher prices.

Another glaring example corporate wrongdoing is provided by DuPont\(^28\). A public interest group in Washington D.C., the Environmental Working Group (EWG) brought to the notice of

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Environment Protection Agency (EPA) DuPont’s deliberate cover up of company studies that showed it was polluting drinking water and new born babies with an indestructible chemical that causes cancer, birth defect and other serious health problems in animals. The whistle blower in this case was a top technical expert of DuPont, having worked in the company for 22 years. According to EWG, Glenn Evers was the company’s top chemical engineer involved with designing and developing new uses of grease-resistant, or perflourinated chemical based coating for paper food packaging. Chemicals from these coatings and related sources have found their way into the blood of 95% people in the USA. DuPont has claimed that it does not know how the chemicals got there - and that it is not aware that company’s product is responsible. But Glenn Evers told EWG how his former employer hid for decades that it was polluting people’s blood with a hyper-persistent chemical associated with the grease-resistant coatings on paper food packaging. DuPont was fined $16.5 million (stated to be highest ever fine) by EPA as an administrative fine. However, as per EWG, the fine is less than half of 1 percent of DuPont’s after tax annual profits from the Teflon product when averaged over the 20 year cover up.

A recent news report[^29] revealed that Subway, a leading multinational retail food chain which clams to prepare the most nutritious food was found using a chemical in its eatables which is used in the manufacture of yoga mats. The chemical additive, azodiocarbonomide, is linked to respiratory illnesses like asthma and is banned in Europe and Australia but not in USA. After protests were raised by food activist and blogger Vani Hari, the company has now issued a

statement that the chemical shall not be used in their products any more.

Multinational Corporations have apparently no loyalty to either the host state (where they expand and set up their overseas operations) or the home state (the State of incorporation). Free economies, regulated by the philosophy of *laissez faire* provide a natural and conducive environment for the creation and development of large corporations. This explains the growth of multinational corporations primarily in the US followed by Europe. However, the reason why these corporations are often heard of committing crimes more in the developing world is because of the inadequate and underdeveloped legal and regulatory structure of these countries. The developed countries have a stringent set of laws to deal with economic crimes in particular and special laws which deal with entity liability, both in civil as well as criminal areas. The big corporations thus are very careful while operating in home country but throw all norms to the winds whenever they find a loosely regulated economy.

However, concern about the growing economic power of corporations is justified at a time when environmental and other public interest regulations, as well as government oversight to control corporate behaviour, are being weakened in most countries of the world. This has increased the possibilities for giant corporations to undermine democracy through excessive political influence and put their goal of increased profits above social goals, such as high quality jobs and a clean environment.  

Faced with the aforesaid situation, there is an urgent need to evolve an international legal framework where the Transnational
Corporations can be made accountable on a uniform basis for their illegal acts so that they cannot take undue advantage of the need of the poor, under-developed and developing countries for economic development. In the context of global economic interdependence, business is a major actor, and is gaining greater than ever reach and power. Complex relationships between businesses and individuals, communities and governments mean that business operations can and do impact immeasurably on human beings. Some businesses now wield considerable political influence and possess more economic power than some governments. Unfortunately, most governments around the world are pursuing policies to further enhance corporate power. Existing and proposed trade agreements increase the ability of corporations to move their products, money and factories around the globe more quickly and with less impediments from regulations. These policies are also supported by the World Bank and International Monetary Fund. Yet a powerful backlash has been gaining strength. In recent years, Bolivians used people power to drive out foreign corporate water privatizers that had hiked prices beyond reach. Consumers and small farmers around the globe forced Monsanto to drop plans to market GMO wheat. Lawyers, working with Burmese plaintiffs, won a historic settlement against Unocal for forced labor. Victims of human rights abuses and groups working on their behalf have increasingly turned to the law to constrain company power: to hold those responsible for abuses accountable and to seek remedies and reparations. This has led to a search for how different branches of national and international law can be harnessed to hold increasingly powerful non-state actors accountable when they do harm. Justice for such abuses is also a significant aspect of the relatively new International Criminal Court, which can hold individuals, including

31 Supra Note 9
company officials, personally responsible for gross human rights abuses that amount to international crimes.

This need arises not only for the reason that the Transnational Corporations must not be allowed to get away lightly for their crimes as a result of their financial strength but also for the reason that poor countries have an equal right under international law to secure a high level of development for its citizens as in the case of other developed countries. This right can be more effectively attained if they are able to attract foreign investment on terms which are on an equal footing and not as a result of the undue bargaining power that these multinational corporations possess. Concern for fixing appropriate liability for corporate crimes is not limited to just developing countries but spreads to developed nations as well. As has already been highlighted above, TNCs do not hesitate from committing crimes even in developed countries. Only the type of wrong doing and the modus operandi changes e.g. TNCs are more likely to indulge in financial and economic crimes in developed countries instead of human rights violation or crimes against public health.

1.2 TRANSNATIONAL CORPORATE CRIMES: MEANING AND SCOPE

In order to have any meaningful discussion on the issue at hand i.e. Transnational Corporate crimes, it is important to first understand the purview of this term. There are certain acts which per se qualify as

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32 The right to development was first recognized in 1981 in Article 22 of the African Charter on Human and Peoples’ Rights as a definitive individual and collective right. Article 22(1) provides that: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." The right to development was subsequently proclaimed by the United Nations in 1986 in the "Declaration on the Right to Development," which was adopted by the United Nations General Assembly resolution 41/128. The Right to development is a group right of peoples as opposed to an individual right, and was reaffirmed by the 1993 Vienna Declaration and Programme of Action.
crimes and for which the corporations can be held guilty like natural persons. However, the illegal corporate activities which the MNC/TNCs usually indulge in may not always be strictly termed as crimes under municipal laws. Though a number of illegal acts are classified as crimes even though they are not covered under the national penal laws, but they are so classified as crimes under special statutes. For example, in India offering bribery and trying to corrupt public officials is a criminal offence under the Prevention of Corruption Act. However, for the purpose of this research, we shall be restricting the scope of TNC crimes to those crimes which are considered as international in character under the relevant international instruments. Some of the acts of MNC/TNCs are out rightly violative of the basic human rights and can even loosely be termed as crimes against humanity which is recognised as a core crime under the Rome statute.

The term ‘Transnational Corporate Crimes’ itself can have different connotations. In one sense, it can mean those crimes that are committed by TNCs within the national setting in which they operate i.e. illegal practices that are typical of a Transnational Corporate house like bribing public officials or operations violating the public health. In the other sense, it can also mean to cover those corporate operations of TNCs which have a trans-national boundary effect i.e. where operations in one country have an effect in the territory of another country e.g. harm to the environment. Thus broadly speaking, transnational corporate crimes would cover not only those illegal acts which are committed by a TNC within the national jurisdiction of a country but also those illegal acts which have a Trans-boundary effect but for the purposes of this research, transnational corporate crimes would refer to those crimes which are committed by a specific actor i.e. Transnational Corporations. However, the determining factor
would be the recognition of an act as a crime under any of the international law instruments so as to qualify as international crime.

It is neither prudent nor feasible to presume within the scope of this research, all illegal corporate practices as international crimes. Moreover, the objective of this research is to explore the possibility of prosecuting multinational corporations at an international forum because they commit international crimes and not to classify all illegal corporate practices as international crimes. This research will rely on existing international instruments, case laws and available legal literature to support the argument that multinational corporations are subjects of international criminal law and commit crimes which have been classified as international crimes. Hence, there is an imperative and imminent need to provide for their prosecution under international criminal law.

1.3 PROBLEM

The real problem is how to counter the brute power of the MNC/TNCs by virtue of which they are able to get away lightly even if the damage caused by their activities is extensive. The issue is, thus, not only to fix the liability for a particular wrongful act but also to ensure that the Corporate Body (and not just the Officials in charge of the affairs of the Corporate Body) which commits that wrongful act is adequately punished irrespective of the fact as to where the wrongful act has been committed. In other words, the fact that a wrongful act has been committed in a poor developing country, where either the judicial and legal system is not so well developed so as to justly punish the TNC (or to say that the ends of justice are not met), or the fact that the investment treaty under which the TNC operates enables it to get away from the liability by virtue of exemption clauses, should not be a
ground which enables the concerned TNC to escape from liability when otherwise it would have been heavily penalized, had it committed the same wrongful act in a developed country. The Bhopal Gas Tragedy in India is an example of the aforesaid problem. Victims of the Gas tragedy had to wait for more than 15 years to get their compensation and even after the lapse of such a long time, it cannot be said that justice has been done to the victims. The quantum of compensation was comprehensively watered down by the time the final directions in the matter were handed down by the Supreme Court of India and this despite the fact that Indian Judicial system is supposedly well developed.

International Economic law is concerned about equitable development i.e. equal distribution of fruits of development between developed nations as well as developing and underdeveloped nations. Infact right to economic development has even been termed as a human right. However, this noble goal cannot be achieved until and unless the poor nations have access to resources of economic development on equitable terms i.e. on conditions which ensure that in return for investment and economic development, the poor nations are not unduly exploited. For economic development, poor countries have to inevitably seek foreign investment from TNCs because international donor agencies like the Breton Woods Institutions cannot possibly take care of different segments of economic development of a nation. It is at this stage that intervention is required to ensure adequate protection of countries seeking foreign investment from Multinational Companies. The protection is not required to be afforded to sovereign governments but to the ordinary citizens also who are the real sufferers of corporate wrongdoing.
1.4 EXISTING FRAMEWORK

The existing International legal framework does not provide any adequate solution to the aforementioned problem of Transnational Corporate Crimes. *International Investment Law* is at the nascent stage and is incapable of dealing with such a complex problem. Bulk of International Investment law is concerned with Bilateral Investment Treaties, popularly known as BIT’s. However, the problem with Bilateral Investment Treaties is that these are usually so worded so as to be more in favour of the Investors rather than the host nation. The biggest problem with BIT’s is that it only provides for a broad framework within which the foreign investment can take place and the redressal mechanism in case a dispute arises between the host and the investor which is usually by international arbitration. It does not take into account the possibility of Crimes being committed by the investors and its retribution. Thus, Arbitration as a means of dispute resolution in case of Investor – ‘Host state’ dispute is totally unsuitable when the question of criminal liability is to be judged. Infact, BIT’s are increasingly being viewed as a charter of rights for the multinational investors without any concomitant liabilities or duties. However, there is now emerging a strong argument in favour of the Host state’s Right To Regulate which was earlier viewed as something emerging from the BIT (investment treaty) itself. But there is now a growing argument that Host State's Right to regulate is part of its Sovereignty and is not something which can be granted by the Treaty or be restricted by the Treaty. A brief overview of International Investment law shows that the dominant purpose of this field of law is to guarantee investor protection by providing a safe and economically viable atmosphere for foreign investment leading to general economic growth and development. Thus, the very purpose of International Investment Law is economic stability for both the parties, to say that
the host nation, which lacks financial resources of its own, may invite foreign investment for national benefit and at the same time, the enterprises which come forward to invest money and build up infrastructure can also be reasonably assured of adequate monetary returns. Providing a framework for judging criminal liability of MNC’s under the current state of this branch of international law is thus not possible.

1.4.1 **ICSID**: One of the permanent bodies dealing with Investment law is ICSID (International Centre for Settlement of Investment Disputes). ICSID is an international organisation established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which came into force on October 14, 1966. ICSID provides facilities for conciliation and arbitration of investment disputes between States and nationals of other States in accordance with the provisions of the Convention. The Convention was sponsored by the World Bank on the belief that the availability of such facilities could promote an atmosphere of mutual confidence between States and foreign investors in order to increase the flow of private international capital into those States which wish to attract it. The sphere of ICSID is limited to providing facilities for entering into conciliation or arbitration in case of investment disputes between host states and foreign investors. It obviously is of little value when we talk about fixing criminal liability for TNC wrongdoing.

1.4.2 **World Trade Organisation**: WTO arguably one of the most effective permanent bodies under the International Economic law regime is completely silent about corporate crimes. The Dispute Settlement Body of the WTO is solely concerned with trade policy disputes arising under the various agreements entered between the

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member countries of WTO. It is, thus, restricted in its scope and is concerned with restrictive trade measures taken by the member countries in violation of the trade agreements. Besides, a dispute can be brought before the WTO DSB only by the national government of a member country against another member country and that too on an international trade issue covered under the WTO regime. Though there is provision of a Transnational Corporation or a group of people joining as associate parties in the dispute but no matter can be brought against a Transnational Corporation. In any case, as explained above, WTO DSB is not concerned at all with corporate crimes.

1.4.3 International Court of Justice: ICJ is the permanent judicial organ of the United Nations Organisation. Its jurisdiction is defined in the statute of the ICJ. Here again the jurisdiction of the ICJ is limited to adjudicating disputes arising between the member countries of the statute of the ICJ i.e. respective national governments. No matter can be brought against a Transnational Corporation. Moreover, the ICJ can exercise jurisdiction in a matter only if both the countries, or all the countries involved give their consent that the dispute be adjudicated by the ICJ i.e. consensual jurisdiction of the ICJ.

1.4.4 ILO\textsuperscript{34}: The International Labor Organization sets standards for working conditions globally. Although it targets governments rather than corporations, these standards set out internationally recognized norms in many areas that affect corporate behavior. Since its founding in 1919, the ILO has adopted 185 standards in the form of conventions that are subject to ratification by member states. Of these, the ILO has identified the following as most fundamental: the rights to freedom of association and collective bargaining and bans on

\textsuperscript{34} Supra note 11
forced labor, child labor, and discrimination in the workplace. As a standard-setting body, the ILO has had tremendous impact in strengthening the legal protections for workers around the globe. While the ILO monitors government (not corporate) compliance with global standards, its authority is limited by the fact that it holds no power to impose sanctions.

The limits on the ILO’s authority are perhaps most evident in its failure to remedy one of the most egregious violations in the world: the widespread use of forced labor in Burma. In 2000, an estimated 800,000 Burmese were being forced to work as porters for the army or as workers on construction or agriculture projects for no or very little pay. In response, the ILO took the unprecedented step of approving a resolution that denounced Burma’s military regime for inflicting a “contemporary form of slavery” and calling on ILO member states to consider imposing economic sanctions on the country unless it resolved the problem. This was the strongest measure available under the ILO charter. Unfortunately, it had little impact. The Burmese government responded by claiming that it was officially banning slave labor, but five years later, the problem remains.

1.4.5 OECD Guidelines for Multinational Enterprises: The OECD Guidelines for Multinational Enterprises represent the only comprehensive code for corporate conduct that is endorsed by a large number of governments. They cover multinational enterprises operating in or from the 30 OECD countries, plus 8 non-members, which means that they cover most of the large transnational corporations in the world. The OECD Guidelines explicitly state that they are non-regulatory and purely voluntary. However, they do

36 Supra note 11
provide a channel for raising complaints with governments. Each member state has considerable flexibility in establishing its own entity responsible for investigating and reporting on compliance, called a “National Contact Point” (NCP). According to OECD Watch, while a handful of countries have created NCPs that represent union and other stakeholders, the vast majority are made up solely by one government department.

The TUAC report includes some examples in which the NCPs played a positive role. For example, in 2002, the Czech NCP helped pressure a subsidiary of the German company Bosch to resolve a labor dispute. Workers had complained that the local management had used physical force and other means to prevent the workers from exercising their rights to organize. The Czech NCP raised the matter with the German government and held four meetings that eventually led to consensus between the workers and management. On the other hand, the TUAC report includes numerous examples in which the NCPs were either unresponsive or ineffective in handling complaints regarding violations of the OECD guidelines. Friends of the Earth, for example, has pointed out a number of weaknesses, but also notes that the procedure for filing complaints under the guidelines is not as expensive or complicated as filing a lawsuit and thus can give individuals or groups with limited means a chance at recourse.

1.4.6 UN Global Compact: There is considerable scepticism about the ability of the United Nations to play a strong role in controlling transnational corporations. In part, this is due to the painful history of efforts begun in the 1970s to formulate a code of conduct. After

38 Supra note 11
more than a decade of work, the initiative fell apart in the 1980s due to opposition from the Reagan administration and also the Japanese and some European governments. A further blow came in 1993 when the UN Centre on Transnational Corporations, which had conducted important research on corporate activity, was reduced to a small unit of UNCTAD and tasked with promoting foreign investment. In 2000, the United Nations rather timidly eased back into the area of corporate social responsibility with an initiative called the Global Compact. The Compact seeks to create a partnership between the UN and transnational corporations to promote 10 principles in the areas of human rights, labor, the environment, and anti-corruption.

The Global Compact has been widely criticized as nothing more than a ploy by transnational corporations to use their partnership with the UN for PR purposes (dubbed “blue-washing” by some, in a reference to the color of the UN flag). To participate, firms simply must state that they support the 10 principles and report annually on how they are supporting them. According to Kenny Bruno, of Earthrights International, “The Compact allows companies to say they are committed to UN principles, but they do not have to follow them. There is no monitoring, no evaluation and no accountability. No criticism is allowed, only good news.” The International Confederation of Free Trade Unions (ICFTU), the umbrella body for most labor federations in the world, is a participant in the Global Compact, but concedes that trade union experience with the initiative has been mixed. The ICFTU sees the Compact primarily as a channel for dialogue, and points out that some international union

39 www.unglobalcompact.org
41 www.corpwatch.org accessed on 7.8.2012
organizations have found it a useful means of engaging high-level corporate officials.42

1.4.7 UN Human Rights Norms on the Responsibilities of Transnational Corporations43: This is a body of independent human rights experts elected from all regions of the world by the UN Commission on Human Rights. In 1999 the Sub-Commission began a process of developing a draft corporate code of conduct, based on existing international agreements signed by nation states, including the Universal Declaration of Human Rights, as well as a wide range of labor, environmental, consumer protection, and anticorruption agreements. The Norms are innovative in that they are a comprehensive interpretation of the responsibilities of corporations under these international laws. After four years of work, including consultation with business, union, human rights and other organizations, the Sub-Commission unanimously approved the Norms in August 2003. The substantive provisions of the Norms cover:

- right to equal opportunity and non-discriminatory treatment
- right to security of persons (e.g. businesses shall not engage in nor benefit from war crimes, genocide, torture, forced labor)
- rights of workers (includes right to a living wage)
- respect for sovereignty and human rights (includes prohibition on bribery, rights to development including adequate housing and clean water, and indigenous peoples rights)
- consumer protection (prohibits producing or marketing harmful products)
- environmental protection (e.g., businesses shall respect the precautionary principle and be responsible for the environmental and health impacts of all of their activities)

43 Supra note 11
The Norms further would oblige corporations to incorporate the norms not only in their own practices but also in their contracts or other dealings with suppliers. Another significant point is that they state that corporations “shall be subject to periodic monitoring and verification by UN, other international and national mechanisms already in existence or yet to be created, regarding application of the norms.” They would also oblige corporations to compensate any people or communities adversely affected by violations of the norms.

There are differing interpretations of the Norms’ potential legal effect. Amnesty International claims that the Norms could over time evolve to become part of customary international law, especially if national and international tribunals and courts begin to reference and apply them and if advocates and corporations use them. According to Human Rights Watch, the Norms and the accompanying commentary “could provide the conceptual basis for a binding international instrument on corporate responsibility”\(^4\).

1.4.8 ICC - The International Criminal Court (ICC), which has been set up as a permanent body under the Rome Statute, although deals only with international crimes but its terms of reference are limited by the provisions of the Rome Statute. According to Article 5 of the Rome Statute, the subject-matter jurisdiction of the Court is limited to four core crimes, i.e. Crimes against Humanity, Crime of Genocide, War crimes and Aggression. Problem with prosecuting TNC’s under the Rome Statute is that the Statute does not recognise a legal person as a wrongdoer. The jurisdiction of ICC is only over natural persons. Even though TNC's have been accused of aiding and abetting crimes against humanity and even war crimes, their prosecution under the

ICC is blocked by the technical problem highlighted above. However, it would still be worthwhile to have a look at the objectives of the ICC which leads us to think that there might be a chance in the future to expand the jurisdictional ambit of International Criminal court. The objectives of the ICC\textsuperscript{45} are:

- To punish individuals responsible for perpetuating international crimes,
- To bring justice to victims so that their voices are heard and they are able to claim reparations for the wrongs that they have suffered;
- To deter commission of such crimes and create a culture of accountability;
- To promote the rule of law

The objectives of the ICC are, thus, very wide in scope. A collective reading of the objectives clearly spells out that the reason for setting up of the ICC is to ensure that crime as well as the crime doer should be adequately punished and the sufferings as a result of these crimes must be adequately redressed. The reasons, why the jurisdiction of the ICC was limited to just 4 core crimes, were purely political in nature. However as has been highlighted above, the objectives with which the ICC has been set up leaves no doubt that more crimes which are international in character or which can be so classified without much difficulty can be included in the jurisdiction of the International Criminal Court. In addition, certain provisions of Rome Statute itself admit of such a possibility which shall be discussed in succeeding chapters.

\textsuperscript{45} Philippe Kirsch (President of the International Criminal Court), The International Criminal Court, \textit{ICC Newsletter}, August 2004 at p. 5
1.5 CORPORATE SOCIAL RESPONSIBILITY

The principle of Corporate Social Responsibility has been gradually gaining ground over the years, especially in the face of growing criticism of misuse of brute corporate economic power. According to this principle, corporate houses have a duty towards the society within which they operate and from which they earn huge profits. They are supposed to return something to the society or contribute in a positive way to the society which has helped them to grow over the years. The principle of Corporate Social responsibility is now a part of most national corporate laws which mandates that the corporations should spend a specific amount of the earned profits for social good. However, studies have revealed that TNC’s resort to philanthropic activities only after intense public opinion is build up against them as a result of exposure of their corrupt practices. This principle has intense moral value but limited practical utility. This is not a binding principle either of International law or municipal corporate laws which can force the TNCs to mend their ways nor is this principle of such application that it can be made use of in a court of law or an international forum so as to enforce criminal liability against the erring TNC. It is highly unlikely that this principle can ever actually be made a part of a legal structure so as to ensure that big corporate houses do not go astray. It is, at best, statutory charity.

1.6 AIM OF THE STUDY

The impact of corporate crime on the society has often been understated. Media, powered by corporate houses, is more interested in sensational journalism and focuses largely on street crimes while conveniently hiding the white collar crimes and the loss to the society
as a result of such crimes. As per W. Steve Albrecht⁴⁶, FBI (Federal Bureau of Investigation) reports that burglary and robbery combined cost the USA approximately $4 billion a year. In contrast, white collar fraud costs 50 times as much – or $200 billion a year. Similarly, the FBI reports approximately 24,000 street crime homicides a year. But more than twice that number of Americans – 56,000 – die each year on the job or from occupational diseases such as job-related cancers and brown and black lung diseases. Apart from this, there are unaccounted health costs to the general public as a result of corporate environmental pollution. The aforesaid figures are in relation to a single country (USA) and assume more significance since we are talking about a highly developed nation. In other words, corporate crimes spare no one and are committed regardless of national settings. When the wrongdoer is a TNC, the scale of damage and loss to citizens, environment, and society as a whole assume huge proportions.

The primary objective of this study is to analyse the status of a TNC under international criminal law and suggest a forum under international law where the TNC’s can be prosecuted and its liability for the losses caused by its actions assessed. The requirement of such a forum arises from the fact that within the municipal judicial system, very often citizens do not get justice commensurate to the loss suffered by them. Their problems are compounded when the national governments also side with such TNC’s instead of making efforts to bring home their guilt. Transnational corporations are major players in a global economy. Accompanying this economic power is considerable political and social clout. TNCs can use this power to promote human rights by improving a population’s economic

development or the same power may enable TNCs to avoid liability for their role in serious crimes.

Many ‘host’ states, which are often developing states where TNCs locate their production capabilities, may be unwilling or unable to efficiently regulate the human rights conduct of TNCs within their jurisdiction. The problem is compounded if the host state itself has committed human rights violations in which the TNC has been complicit. In 2008, John Ruggie, the Special Representative of the Secretary General on Human Rights and TNCs, noted that there is debate about whether home states are required under international law to prevent extraterritorial human rights abuses by their corporations. While there is a view that home states may intervene when there is a jurisdictional basis for doing so as a practical matter, home states have been disinclined to test the scope of this extraterritorial jurisdiction in connection with the activities of their corporations abroad. Consequently, TNCs remain largely unaccountable for their human rights conduct in host states. There is, thus, an urgent need to provide an independent international forum where the real sufferers of Corporate wrongdoing i.e. crimes committed by TNC's, can bring an action for the redress of their grievances should the respective national justice system or national governments fail to do so.

The objective of this research is to make out a case for enacting an international instrument dealing exclusively with the crimes and wrongful acts committed by Transnational Corporations or in the alternative, submit that the corporate criminal liability of the TNC is judged under the existing international criminal law forum i.e. the

ICC. This would include an attempt to enumerate the principles on which such an action can be initiated against a Transnational Corporation. In this regard, it would be worthwhile to briefly enumerate the 10 principles of Transnational Corporate Accountability (Popularly known as The Ten Bhopal Principles) which were laid down in the case of *Union Carbide Corporation v. Union of India*, popularly known as the Bhopal Gas Tragedy case. These principles can provide us vital support while dealing with the question of TNC liability under ICL. These principles are as follows:

1. **Implement Rio Principle 13** – states must as a matter of priority enter into negotiations for a legal international instrument to address liability and compensation for the victims of pollution and other environmental damage.

2. **Extend Corporate Liability** – Corporations must bear cradle to grave responsibility for manufactured products. Parent Corporations as well as subsidiaries and affiliated local Corporations must be held liable for compensation and restitution on the basis of strict liability.

3. **Ensure Corporate Liability For Damage Beyond National Jurisdiction**. Liability must include responsibility for environmental clean-up and restoration.

4. **Protect Human Rights** – Economic activity must not infringe upon basic human and social rights. States must ensure effective compliance by all corporations of these rights and provide for legal implementation and enforcement.

5. **Provide for Public Participation and Right to Know** – Commercial confidentiality must not outweigh the interest of the public to know the dangers and liabilities associated with corporate outputs, whether in the form of pollution by-products or the product itself.

6. **Adhere to the Highest Standards** – Consistent with the Rio Declaration Principle 14, States must not permit Multinational corporations to deliberately apply lower standards of operation and safety.
7. **Avoid Excessive Corporate Influence over Governance** – States must co-operate to combat bribery in all its forms and eliminate corporate influence on public policy.

8. **Protect Food Sovereignty over Corporations** – States must ensure that their people maintain sovereignty over their own food supply and also take steps to prevent genetic pollution of agricultural biological diversity by genetically engineered organisms.

9. **Implement the Precautionary Principle and Require Environmental Impact Assessment** – States must require corporations to take preventive action before environmental damage or health effects are incurred and also require the companies to undertake environmental impact assessments for activities that may cause significant adverse environmental impacts.

10. **Promote Clean and Sustainable Development**

States are ultimately responsible for public welfare, and they must not abdicate this responsibility to the private sector. Unfortunately states are increasingly doing just this, by relying on voluntary agreements, and by failing to develop international instruments to prevent transnational corporations from slipping through the holes in the net of national legislation. The few voluntary initiatives with which some corporations are willing to comply such as Global Reporting Initiative, the OECD Guidelines and the UN Global Compact are just not enough. Corporations benefit from a global market but are not held globally accountable. Therefore, current moves to ensure sustainability require an international instrument of corporate responsibility, accountability and liability. Corporate crime committee don all continents across a range of industrial activities in various sectors e.g. chemicals, oil, mining, military clearly point towards the need for greater control, monitoring and accountability of corporate activity in a globalised economy. The purpose behind this research is to wriggle out of the legal dilemma when the criminal culpability of a

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48 Supra Note 24
juristic person is in question (i.e. with respect to international crimes) and to provide for a clear, definite and transparent legal structure to judge the same. National criminal laws, especially of developing and under developing states are unable to address the issues adequately and the same has been emphasised above. Perpetrators of at least those crimes which have attained the status of international crimes under a relevant international instrument must be prosecuted under international criminal law.

Right of individuals to constitute trade, religious and charitable associations has been recognised early in the development of the Roman Law. The Roman entities were called *universitates personarum* which included the Roman state and other religious, administrative, financial or economic scopes and *univesritates rerum* which included entities with charitable scopes. Upon creation by authorisation, the entities had their own identity, owned property separate from their founders and had independent rights and obligations. In 12th – 14th century Pope Innocent IV created the basis for the maxim *societas delinquere non potest* by claiming that unlike individuals who have will power and a soul, can recieve the communion, and are subject of God’s and Emperor’s punishments. *Universitas* are fictions that lack a body and soul and therefore cannot be punished49.

A body corporate does not really have a *corpus* and therefore it cannot be subjected to corporeal punishment in the event of an offence being committed for and on behalf of it. A *Corpa Juris* cannot commit any unlawful act because that is anti-thesis to its legal existence which is by way of fiction. A company cannot technically authorise, ask, delegate or connive/ conspire with another to commit an unlawful act. A *corpa juris* cannot derive any benefit from an illegal act because it is

49  *Infra Note 298*
a neutral face; it can neither gain nor lose. If at all somebody gains, it is the shareholders who are technically entitled to the profits of the company but there is a complexity here also – the Company represents a division between ownership and management or decision making which makes it inequitable for the shareholders to be punished for the wrongs of the management specially when they have almost nil knowledge of the manner in which the day to day operations of the organisation are being carried out.

Nevertheless, the recent developments in criminal law are gradually reducing the distinction between the *Corpa Juris* and the actual defaulters who are the officials of the Company, for the purpose of judging the culpability of a corporate aggregate. In the event of an offence being committed by a Company, there is sound logic to hold that the Company benefited as much from the crime as did those who either committed it or those who facilitated the crime through concrete physical actions. This research is directed towards developing this logic into a sound legal principle.