

ISSN 2368-7266

Cahiers de recherche
(Université d'Ottawa. Centre de recherche et d'enseignement sur les
droits de la personne)

Working Paper Series
(University of Ottawa. Human Rights Research and Education Centre)



Transnational Corporate Crimes and
Dealing with the Issue of “Jurisdictional Veil”

Sharmila Mahamuni
Ph.D. Candidate in Law
University of Ottawa

HRREC_2016-05 | September 2016

Centre de recherche et d'enseignement sur les droits de la personne

Human Rights Research and Education Centre

613-562-5775 | HRREC@uOttawa.ca

cdp-hrc.uOttawa.ca



uOttawa

Transnational Corporate Crimes and Dealing with the Issue of “Jurisdictional Veil”

Sharmila Mahamuni

Transnational Corporate Crimes and Dealing with the Issue of “Jurisdictional Veil”

Sharmila Mahamuni*

Key words: Transnational, corporate crimes, jurisdiction, extraterritorial jurisdiction, enterprise liability, home state responsibility, harmonization of jurisdiction.

Abstract: Accounting for transnational corporate criminal liability has been one of the most challenging areas of international law in the era of globalisation. Many fundamental questions relating to the effectiveness of the regulatory legal framework remain unsettled in relation to the scope of corporate accountability for human rights violations amounting to international crimes. This paper argues that prosecuting transnational corporations for the violation of human rights activities abroad needs to be critically evaluated in the light of the prevailing jurisdictional and legal issues. In order to support the central argument, the paper seeks to initially examine the difficulty of attributing criminal liability to transnational corporations under current corporate laws. Further, it examines the challenges of regulating the conduct of transnational corporate behaviour under the existing framework of extraterritorial regulations. Later, it critically assesses the effectiveness of the current international legal framework in regulating transnational corporate crimes causing human rights abuse. In the final section the paper will explore the opportunities to deal with this issue, by critically evaluating the possibility of jurisdictional harmonisation to address the issue of the transnational corporate crimes and human rights violations; and finally by examining opportunities for the home state to regulate the TNCs’ extraterritorial behaviour to address the governance gap created by jurisdictional incompetency. In the absence of binding international legal regime and tribunal to regulate transnational corporations’ (TNCs) activities, the emphasis is on the domestic legal framework to lift the jurisdictional veil and prosecute TNCs for violation, for crimes amounting to human rights abuse.

* Sharmila Mahamuni is a doctoral candidate at Faculty of Law at University of Ottawa.

Introduction

The purpose of this paper is to outline the research proposal, to explore the jurisdictional framework in the domestic and international legal system while dealing with transnational corporate crimes. Regulating transnational corporate activities abroad has remained a formidable task for domestic legal systems across the world. There are many fundamental questions relating to the effectiveness of regulatory legal framework, which have remained unsettled in relation to the scope of corporate accountability for human rights violations amounting to international crimes.¹ The corporate involvement in the commission of international crimes can be categorized as: corporate actors who are directly involved in the commission of international crimes, and corporate actors' complicit in violation of international law.²

The issue of jurisdiction over transnational corporations refers to the exclusion of legal person from the jurisdiction of the International Criminal Court under the international criminal law, as well as non-binding standards are proposed in respect of corporate human rights accountability at the international level. Further, in terms of domestic law, when corporations operate transnationally it creates a regulatory dilemma. The parent company keeps 'distance by design'³ from its subsidiaries. In such situation TNCs can mobilize their operations from one jurisdiction to another, if they apprehend that legal proceedings can be instituted against them in a particular jurisdiction.⁴ While TNCs can become invisible and disappear beyond boundaries, either by taking

¹ Wolfgang Kaleck and Miriam Saage-Maaz, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges" (2010) 8 *Journal of International Criminal Justice* at 700.

² *Ibid* at n.702.

³ Surya Deva, "Regulation Corporate Human Rights Violations: Humanizing Business" (2012) (Routledge: Oxon) at 30 – 31.

⁴ *Ibid*.

a new form or new name,⁵ the victims of corporate human rights abuses amounting to crime remain frustrated without recourse to justice under criminal law because of the procedural limitations. The procedural limitations restrict the capacity of the courts and judicial tribunals to prosecute TNCs placed in different jurisdiction. The *Bhopal Gas Disaster* is a classic example of this kind.

The Bhopal plant was operated by Union Carbide of India Limited (UCIL), which was a subsidiary of Union Carbide Corporation (UCC), based in the United States. UCIL manufactured pesticides and insecticides containing methyle-isoscynate (MIC) (which is a highly dangerous and toxic gas, and can cause dangerous reaction on the human beings if it is not handled with proper care and caution).⁶ On the night of December 2nd, 1984, a chemical reaction ruptured the MIC storage tank and discharged around forty-five tons of toxic gas across the city of Bhopal. This catastrophe affected nearly five hundred thousand lives.⁷ The incompetent infrastructure and legal system were greatly challenged by this disaster. As a parent company, the UCC was not subjected to the law of its home state (the United States), throughout the suit UCC relied on the principle of separate corporate personality, portraying itself at an arm's length vendor of technology to the Indian company and a passive investor.⁸ However, in reality UCC played an influential role in all the strategic decisions made by its subsidiary UCIL.⁹ Further, the UCC was

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Jamie Cassels, "The Uncertain Promise of Law: Lessons From Bhopal" (1991) 29(1) *Osgoode Hall Law Journal* at 3&4.

⁸ Jamie Cassels, "Outlaws: Multinational Corporations And Catastrophic Law" (2001) 31(311) *Cumberland Law Review* at 322.

⁹ Tim Edwards, "Criminal Failure and "The Chilling Effect": A Short History of the Bhopal Criminal Prosecutions" (2014) 41(1-2) *Social Justice* at 59 & 56.

also not subject to the law of its host state (India), as it was beyond the jurisdiction of the host state to hold the parent corporation responsible. Moreover, it was also not subjected to international law, as there is no specific international regulation to address this issue.¹⁰ The criminal proceedings (in India) in this case were largely frustrated because of the procedural flaws which included long delays in trial. This exposed the incompetency of the existing regulatory mechanism in India, and lack of willingness of the Indian government to initiate extraterritorial legal action against the TNC (Union Carbide Corporation in the United States) for the gross human rights violation.¹¹ Despite of this catastrophic disaster which ruined thousands of lives in and around Bhopal, causing gross human rights violation by TNC, the battle of victims for justice still continues after more than three decade, today the question still unanswered, that if a situation like Bhopal was to occurs today is Indian legal infrastructure receptive to face such a challenge?

On the background of this case study, this paper argues that prosecuting transnational corporations for the violation of human rights during the course of its activities abroad needs to be critically evaluated in the light of the jurisdictional and legal issues. The argument, calls for critical evaluation of the challenges and opportunities associated with regard to the prosecution of transnational corporations, within the domestic and international legal frameworks. It is argued that, it is necessary to lift the “jurisdictional veil” along with corporate veil, so as to hold TNCs criminally liable for human rights abuse, and prosecute them.

First, the research proposes to discuss the conceptual framework in relation to piercing the ‘jurisdictional veil’. Second, examine the inherent difficulty of attributing criminal liability to

¹⁰ Cassels, *supra* note 8 at 314.

¹¹ Edwards, *supra* note 9 at 72 & 73.

transnational corporations under current corporate laws. Third, the research proposes to critically assess the effectiveness of the current international legal framework in regulating transnational corporate crimes causing human rights abuse. Fourth, the research will consider the challenges of regulating the conduct of transnational corporate behaviour under the existing framework of extraterritorial regulations. Fifth, the research proposes to critically evaluate the possibility of jurisdictional harmonisation to address the issue of the transnational corporate crimes and human rights violations. Finally, this research examines opportunities for the home state to regulate the TNCs' extraterritorial behaviour to address the governance gap created by jurisdictional incompetency.

1. Contextualizing 'Jurisdictional Veil'

Jurisdiction is said to be one of the most contested areas involving conflict between enterprise and entity.¹² In theory jurisdiction is not restricted by territorial boundaries, especially where basic human rights are violated.¹³ Fafo study notes that, chances of perpetrators escaping accountability for the breach of international criminal law has shrunk dramatically because of the wide spread web of complementary jurisdiction at international and domestic level.¹⁴ Further, most of the jurisdiction permit prosecution of legal persons for criminal offences, including international crimes.¹⁵ However, it is important to consider that, different jurisdictions have

¹² Mulchinski, *supra* note 23 at 5.

¹³ Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations at 155.

¹⁴ Anita Ramasastry and Robert Thompson, "Commerce, Crime and Conflict: Legal Remedies for Private Actor Liability for Grave Breaches of International Law – A Survey of Sixteen Countries" (Report 536, Fafo 2006) at 16 & 17.

¹⁵ *Ibid* at 15.

varying standards attributing criminal liability to corporate entities.¹⁶ Some of these varying standards may raise prosecutorial restraints in case of transnational corporate criminal proceedings such as, corporate manslaughter or corporate negligent homicide. These restraints tend to place more hindrances in the prosecution proceedings than permissibility of the jurisdiction to hold legal persons accountable.¹⁷ The prosecutorial restraints for transnational offences mainly involve dealing with the challenges like, mutual assistance and extradition.¹⁸

Even when the victims and the states, choose civil remedy over criminal trials, law does not guarantee justice for transnational corporate human rights abuse. The courts in common law jurisdictions have the discretion to dismiss the proceedings on the basis of doctrine of *forum non conveniens*. Moreover, even where the, 'real and substantial connection' between the parent and the subsidiary is obvious, the courts have dismissed the case on the basis of this doctrine. For instance, in Bhopal Gas Disaster the litigation against Union Carbide Corporation was dismissed by the courts in United States on the grounds that, New York was an inappropriate forum for trial of the action.¹⁹ Similarly, in the Anvil Mining case, the Quebec Court of Appeal rejected the plaintiffs plea for "forum of necessity", where the courts have the discretion to accept jurisdiction over a case in exceptional circumstances in case, "there is no other forum in which the plaintiff can

¹⁶ Ramasastry, *supra* note 14 at 155.

¹⁷ *Ibid.*

¹⁸ Kimberly Prost, "Breaking Down The Barriers: Inter-National Cooperation In Combating Transnational Crime", www.Oas.Org/Juridico/Mla/En/Can/En_Can_Prost.En.Html

¹⁹ Cassels, *supra* note 8 at 325. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal India in Dec. 1984, 634 F. Supp.842 (S.D.N.Y.1986).

reasonable seek relief”.²⁰ Notably, the Quebec Supreme Court dismissed two suits²¹ on the basis of *forum non conveniens*.²² Although all these cases demonstrate the challenges in civil litigation, which is outside the scope of this research, the jurisprudence developed through such case laws reflects general limitations of the current judicial system to act against TNCs for egregious violation of human rights abroad.

The practical obstacles and challenges which places limitations on the judicial system to prosecute TNCs, and the arbitrary discretion of the courts to decide the appropriateness of the forum, results in the development of a systemic legal barrier. This systemic legal barrier in the current context of transnational corporate accountability and judicial limitations is conceptualized as ‘jurisdictional veil’ for the purpose of this research. The jurisdictional veil hinders the process of seeking justices for the victims of human rights violation by TNCs. This jurisdictional veil often turns to the advantage of corporate behaviour abroad, and TNCs thus continue to escape the clutches of legal accountability.

Peter Mulchinski argues that, “the courts must be not only prepared to pierce the corporate veil between the parent and the subsidiary to establish liability, but also to pierce the ‘jurisdictional veil’ between them and seek to make law of the forum apply to the foreign based unit of the enterprise”.²³ TNCs commit crimes irrespective of the jurisdictional boundaries, and however, the justice for victims is tied at the hands of jurisdictional limitations of inherent to a specific domestic

²⁰ Penelope Simons, “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56(2) *Canadian Business Law Journal* 167 : Ottawa Faculty of Law Working Paper No. 2015-21. *Van Breda v Village Resorts Ltd*, 2010 ONCA 84, para 100 (Sharpe JA). *Association canadienne contre l’impunité (ACCI) c Anvil Mining Ltd*, 2011 QCCS 1966, rev’d [2012] JQ no 368 (QCCA), leave to appeal to SCC refused, 34733 (November 1, 2012) [Anvil Mining] at paras 96-103.

²¹ *Ibid.*

²² Simons, *supra* note 20 at 33.

²³ Peter Mulchinski, “Multinational Enterprises and the Law” (Oxford: Blackwell Publishers Ltd., 1999) at 109.

legal system. In this regard, the research further provides for a detailed examination of three fundamental challenges in the legal system which needs to be addressed to hold TNCs accountable for the acts committed by them abroad.

2. Corporate Legal Structure: Attribution to the Transnational Corporate Crime

The metaphysical existence of the corporate entity, makes it problematic to attribute crimes to transnational corporations under current corporate law. The concept of *corporate mens rea*²⁴, evolved in the twentieth century in English courts, and was followed by other common law jurisdictions which assumed that corporations cannot be held liable unless, an individual within the organisation is identified to have mental state to commit the offence with necessary responsibility and authority in the organisation. Therefore, *corporate mens rea* depends upon identifying 'controlling mind' within the organisation. This principle came to be known as the '*identification doctrine*'. Steven Tombs and David Whyte, argue that the doctrine of identification

²⁴ See Steve Tombs & David Whyte, "The Corporate Criminal: Why corporations must be abolished" (London: Routledge, 2015) at 82-91. The eighteenth and nineteenth the state of individual's mind – *mens rea* – was key concept in attributing criminal liability. In the process of foregrounding the concept of *mens rea*, and attributing it to liberal individuals as its primary object, the social cause of crime or 'motive' was eliminated. As a result of this the notion of 'collective' crimes, which would otherwise apply to partnerships and corporations were absented from the new economy of punishments. Steve and Tomb considered that this embedding of liberal individual as central is paradoxically important to understanding how the law conceptualizes corporations, as this development can be traced back to the period of industrial development. In this regard it is observed that, Courts in England has started renouncing the possibility of corporate criminal liability since seventeenth century. However, further in the nineteenth century there were concerted attempt across a range of offences to 'differentiate' corporate crime from 'real' crime. Different mental states captured by *mens rea* are intention; knowledge; recklessness; or criminal negligence. The later three states can be theoretically applied to corporations sometimes, if not always. In case of corporate crimes if an act or omission is intended to injure or kill, then it is, often the case which risks to workers or the public might be taken without any clear intention to kill or injure. Nevertheless, these risks are taken in the knowledge that harm is likely to occur. However, corporate crimes which involve recklessness or criminal negligence are considered less serious than those involving clear intent. Steve and Tomb argue that as the *mens rea* is an individualizing concept prioritises criminal *acts*, rather than criminal *omissions*. Thus within a corporate boardroom these factors remove the potential of crime, as it is often hard to identify the action of action on the part of boardroom, or a series of negligent or reckless acts occurring at different points in the hierarchy of the organisation, than it is to identify a particular *act* that led to a crime or a conspiracy to commit a series of criminal acts.

can be understood as an extension of the notion of corporate personality since it establishes the corporations as separate entity from the directors and managers who make decisions on behalf of the corporation. Thus the criminal law recognises de facto corporate veil to attribute liability for corporate violations, through regulatory or administrative law.²⁵ The de facto corporate veil reflects the strict liability concept which replaced the requirement of *mens rea*. Today, this liability is often featured in the regulatory offences. This enabled prosecution of corporations rather than manager or directors acting on its behalf. Tombs and Whyte further, point out that the criminal corporate veil has become an inevitable part of regulatory law today.²⁶

The complex corporate structure of transnational corporations designed under domestic corporate laws is built upon two fundamental doctrines, separate legal personality, and limited liability. These two principles bring with it legal complexities attached to the fictive nature of the corporate personality. This includes ownership of all sorts of legal liabilities, including crime.²⁷ The concept of separate legal personality has evolved to confer legal personality, rights and obligations to corporations as accorded to natural persons, so as to facilitate ownership of property, legal action or contractual agreements. It relates to the corporation's separateness from its members and managers by viewing it as an independent legal person, who can be found directly and indirectly liable in its own rights for civil and criminal acts.²⁸ As a consequence of the corporation

²⁵ *Ibid* at 91-92.

²⁶ *Ibid* at 95.

²⁷ Janet Dine, "Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?" (2012) 3 *Journal of Human Rights and the Environment* at 46.

²⁸ Rachel Nicolson and Emily Howie, "The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective" (Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes) at 11. Available on : <http://www.hrlrc.org.au/files/icj-paper-e-howie-and-r-nicolson-final-0207.pdf>.

being a separate legal person, corporate law provides that shareholders are not directly liable for the debts and obligations of the corporation, and that the corporation is responsible for the obligations arising out of its business. Similarly, limited liability doctrine pre-defines the risk of the investors by capping the risk of their investment in the corporation.²⁹ The limited liability does not eliminate the risk for shareholders completely, but shifts it to other stakeholders, such as employees and creditors. Consequently, corporate law by providing limited liability mechanism strikes a balance in favour of shareholders and those claimants against the corporations.³⁰ For that matter, the group of claimants against whom the corporate law seeks to shield the interest of the corporate shareholders would also include victims of transnational corporate crimes whose human rights violated. Interestingly, Harry Glasbeek notes that an important dimension of the corporate personhood and limited liability doctrines is that, separate companies can be established to limit the losses of the owners in cases where the social cost of the business is high. Tombs and Whyte argue that, another way of thinking about liability in this regard, relates to the protection for owners and by erecting an invisible barrier which effectively separates the real people who own the corporation from the corporation itself – ‘corporate veil’.³¹

The construction of multinational corporations (MNCs /TNCs) is possible because, the legal system regards one company holding shares in another, exactly the same way a human individual shareholder does. The current legal framework does not take into consideration that, accumulation of power represented by a large number of companies are related by interlocking shareholdings. Due to this fact, many companies are organised in a group structures wherein the

²⁹ Van Duzer, J. Anthony, “The Law of Partnerships and Corporations”, (2009) (Irwin Law: Toronto) at 118.

³⁰ *Ibid* at 119.

³¹ Tombs & Whyte *supra* note 24 at 85.

control is exercised over a number of subsidiaries through the shares held by a 'parent company'.³² Corporate law fails to recognise and define the character of today's modern corporation, and its transnational behaviour. In general, the legal regime does not recognise the integrated nature of the multinational enterprise³³, which as a whole could otherwise have enterprise liability. In respect of corporate accountability Harry Glasbeek argues that, corporate law provides no remedy to challenge corporate decisions, such as, decisions affecting workers and the trade unions. As such, labour law remedies are available for limited matters because of the legal imperative to keep corporate logic intact. In this regard, Glasbeek illustrates a situation where, as a legal matter the corporate employer's decision to close manufacturing plant is conceded in the eyes of law, even if this corporate decision leads to workers losing their jobs.³⁴ Similarly, most of such situations are dealt outside the purview of corporate law, including corporate accountability for human rights violation. However, to deal with corporate human rights violation it is inevitable to have integrated regulatory framework.

TNCs may legitimately take advantage of the doctrine of corporate separation to avoid the underlying liability issues.³⁵ Corporate enterprises with limited liability are considered to be one of the important features of the most developed legal systems in the world.³⁶ The doctrines of separate legal personality and limited liability can be challenged, by the doctrine of "piercing the corporate veil". The courts have the ability to, 'pierce the corporate veil', and look within the

³² *Ibid.*

³³ Mulchinski, *supra* note 23 at 1.

³⁴ Harry Glasbeek, "Wealth By Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy" (2002) (Between The Lines: Toronto) at 69.

³⁵ *Ibid.*

³⁶ Nicolson & Howie *supra* note 28 at 11.

corporate entity and, where necessary, hold a director, shareholder or related responsible person for the action of the corporation.³⁷

Rachel Nicolson and Emily Howie discuss the relationship between, piercing the corporate veil and international crime. According to them, where the actions of a subsidiary overseas cause harm, claimants may choose to seek redress from a controlling entity (parent company). This may be desirable, either because the parent company exercised meaningful control over the actions of the subsidiary, or because in practice the controlling entity is better resourced to compensate claimants for harm done by another entity within the corporate group. As Nicolson and Howie claim, corporate legal structures are frequently, and legitimately, used to isolate liability for high-risk activities to a subsidiary or affiliate, and thereby protect the corporate group.³⁸

In response to the challenges represented by the complex legal structure of transnational corporations, some scholars have proposed developing a legislative framework to recognize corporate group responsibility. Helen Anderson makes a case for legislation to be enacted to pierce the corporate veil on corporate groups, rather than leaving it to the common law (courts). Anderson argues that this would not only overcome the uncertainty of veil piercing, but would also provide effective deterrence and reliable compensation regime, by minimizing litigation costs. Further, it would also send a signal to the courts that it is appropriate to pierce the corporate veil.³⁹ Janet Dine argues, the root cause of the problem is that MNCs have no legal existence per se. Therefore, it is necessary to draft a law that encapsulates the complex range of legal structures of

³⁷ *Ibid* at 18.

³⁸ *Ibid* at 19.

³⁹ Helen Anderson, "Piercing the Veil on Corporate Groups in Australia: The Case for Reform" (2009) 33 *Melbourne University Law Review* at 367.

MNCs, by recognising enterprise liability.⁴⁰ Construction of enterprise liability will allow the whole MNC to be sued in aggregate. Dine illustrates the Albanian company law model⁴¹, which effectively incorporates MNCs accountability for environmental responsibility and human rights infringement at national level.⁴² Dine proposes national law as a solution to address the central problem of extraterritoriality and ‘jurisdictional arbitrage’. Jurisdictional arbitrage here relates to the problematic situation created by a parent company, as a result of the MNC group structure within which each company is separate entity. Each corporate entity is insulated by the operation of the corporate veil which isolates the parent company from the core group,⁴³ by still remaining at the centre of the group.

3. International Legal Framework

International legal framework play an important role in regulating international human rights issues, however, it is important to examine the effectiveness of the current international legal framework to regulate transnational corporate crimes causing human rights abuse.

During the process of drafting the Rome Statute, the French delegation had proposed to include legal persons within the jurisdiction of ICC. However, due to the lack of consensus between the parties over this issue, French proposal was withdrawn.⁴⁴ Decision to expand the jurisdiction of

⁴⁰ Dine, *supra* note 27 at 46, 47, 48.

⁴¹ This model draws influence from the German law on group liability, Dine, *supra* note 8 at 66.

⁴² Dine, *supra* note 27 at 44.

⁴³ *Ibid* at 65.

⁴⁴ Andrew Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lesson from the Rome Conference on an International Criminal Court” in KAMMINGA, M.T. & ZIA-ZARIFI, S. (eds.) *Liability of Multinational Corporations Under International Law* (the Netherlands: Kluwer International, 2000) at 146 & 157.

ICC to legal persons, would have proved to be a stepping stone towards prosecuting TNCs for human rights abuse.

Complementarity is the founding principle of the ICC because of which ICC plays a limited role in exercising jurisdiction over international crimes. This means ICC will exercise its jurisdiction when the national courts are unwilling or unable to so.⁴⁵ The preamble of the Rome Statute places emphasis on prosecuting international crimes at the national level.⁴⁶ In this regard Wanless notes that, national jurisdictions are the guardians of the international criminal law, which is enhanced by the widespread acceptance of universal jurisdiction over certain international crimes.⁴⁷ However, it is interesting to note that, although most of countries have incorporated international criminal law into their domestic statutes, without distinguishing between natural and legal persons,⁴⁸ Anita Ramasastry and Robert Thompson (in FAFO survey) indicates that prosecutions in this regard were negligible.⁴⁹ According to Anita Ramasastry the reason behind fewer prosecutions might be largely related to the willingness of the states to exercise criminal jurisdiction over TNCs for human rights violation. Further, Ramasastry argues that, expanding ICC's jurisdiction to include legal persons could be considered as one of the ways to deal with state reluctance on this issue. Ramasastry also proposes that if ICC's jurisdiction is not amended to

⁴⁵ W.Cory Wanless, "Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act" (2009) 7 *Journal of International Criminal Justice* at 205.

⁴⁶ See Rome Statute of International Criminal Court (1998) Doc. A/CONF.183/9. Available on: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

⁴⁷ Wanless, *supra* note 45.

⁴⁸ Anita Ramasastry and Robert Thompson, "Commerce, Crime and Conflict: Legal Remedies for Private Actor Liability for Grave Breaches of International Law – A Survey of Sixteen Countries" (Report 536, Fafo 2006) at 16.

⁴⁹ *Ibid* at 28.

include legal persons then, it may be more realistic to create binding obligations on states through treaties to govern the conduct of TNCs.⁵⁰

Various multi-stakeholder and intergovernmental initiatives in the direction of developing such obligations (although these are not binding). These include the Global Compact, the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Principles of Corporate Governance, the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, and the now defunct United Nations Commission on Transnational Corporations Draft Code of Conduct.⁵¹

The UN Guiding Principles on Business and Human Rights set out international human rights law obligation on the states to *protect* human rights of individuals within their territory and subject to their jurisdiction. It requires the states to exercise due diligence to ensure that third parties do not violate human rights. Further states are encouraged under the Guiding Principles to enforce domestic human right laws and to periodically evaluate such laws and remedy any gaps.⁵² Similarly, OECD Guidelines rely on National Contact Point to ensure implementation of its

⁵⁰ Ramasastry, *supra* note 13 at 156.

⁵¹ Virginia Harper Ho, "Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?" (2013) *Columbia Journal of Transnational Law* at 123. Zerk, *supra* note 20 at 145-146.

⁵² See UNHCR, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework : Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises,, John Ruggie (2011). UN Doc A/HRC/17/31; Penelope Simons and Audrey Macklin, "The Governance Gap: Extractive industries, human rights, and the home state advantage" (New York : Routledge, 2014) at 93-94.

provisions, and ILO Declaration repeatedly urges the states to take measures or adopt policies to implement the labour obligations.⁵³

In this regards Andrew Clapham proposes, not only these standards should be applied to MNCs, but that criminal jurisdiction itself needs to be taken more seriously to deal with this issue. Clapham argues that criminal law has the capacity to deter acts of legal persons such as MNCs, and that the lack of international jurisdiction is no bar to the enforcement of the substantive obligations that international criminal law places on MNCs.⁵⁴ It may be possible to pierce jurisdictional veil under the international regulatory framework, either by extending ICC's jurisdiction over legal persons, or by imposing binding obligations through treaty bodies, however, in this regards securing state consensus is one of the primary challenges.

4. Extraterritorial Regulations & Piercing Jurisdictional Veil

This section proposes to outline the rationale under which extraterritorial regulations currently operate to regulate transnational corporate behaviour, and further investigates the challenges of piercing jurisdictional veil. Under the international law, the state has the capacity to make substantial and bona fide non-territorial connections to justify its extraterritorial jurisdiction.⁵⁵ States enjoy a degree of extraterritorial jurisdiction over activities beyond its territorial boundaries under the customary international law. However, John Currie notes that, these customary rules governing jurisdiction do not always provide for absolute and exclusive jurisdictional rights in

⁵³ Surya Deva, "Regulation Corporate Human Rights Violations: Humanizing Business" (2012) (Routledge: Oxon) at 59.

⁵⁴ Clapham, *supra* note 44 at 195.

⁵⁵ Surya Deva, "Corporate Human Rights Violations: A Case for Extraterritorial Regulation" in LUETEGE. C. (ed.), *Handbook of the Philosophical Foundations of Business Ethics*. (Dordrecht; New York: Springer, 2012 at 1082.

favour of a single state, rather international law evaluates the relative merits of the competing claims to govern the outcome of a particular case.⁵⁶ Further Currie points out that, state reaction to jurisdictional conflicts in the context of criminal liability are more frequent and strong, because most states consider the connection between the exercise of penal jurisdiction and the maintenance of a public order as the core of the jurisdictional competence implied in state sovereignty. This is because some of the texts in relation to state jurisdiction under international law seek to approach criminal jurisdiction and civil jurisdiction distinctly.⁵⁷

International Law Commission (ILC) notes, the assertion of extraterritorial jurisdiction by a state is an attempt to regulate conduct of a person, property or acts beyond its borders, by means of national legislation, adjudication or enforcement, which affect the interest of the state in the absence of such regulation under international law.⁵⁸ According to ILC, some of the principles of jurisdiction which may be asserted under contemporary international law to justify the extraterritorial jurisdiction of the State include :

- “(a) the “objective” territoriality principle;
- (b) the “effect doctrine;
- (c) the protective principle;
- (d) the nationality principle; and
- (e) the passive personality principle.”⁵⁹

⁵⁶ John Currie, “Public International Law” (2008) (Toronto: Irwin Law) at 291.

⁵⁷ *Ibid.*

⁵⁸ See “Report of the International Law Commission on the Work of its Fifty-Eighth Session”, UN GAOR, 61st Session, Supplement No. 10 (A/6/10) (2006) at 229. Available on :

<http://legal.un.org/docs/?path=../ilc/reports/2006/english/annexes.pdf&lang=EN> at 229

⁵⁹ *Ibid* at 231.

Further it is noted that, the common element underlying these various principles for the exercise of extraterritorial jurisdiction by a state under international law is, the valid interest of the State in asserting its jurisdiction in a particular case on the basis of a sufficient connection to the persons, property or acts concerned.⁶⁰

Any state may exercise jurisdiction with respect to certain international crimes is more controversial even where it has no particular connection to the perpetrator and the victims of the *locus situs* of the crime. The *universality principle* allows a state to exercise extraterritorial jurisdiction with respect to a crime committed by a foreign national against another foreign national outside its territory. However, State exercises such jurisdiction in the interest of the international community rather than its own national interest.⁶¹ Thus *universality principle* is of particular relevance in respect of gross human rights abuses, as it gives the States the right to assert jurisdiction over certain very serious violations (and the perpetrators of those violations) wherever in the world those crimes have taken place. Arguably, war crimes, crime against humanity and genocide, which are explicitly criminalized under the Rome Statute are subject to universal jurisdiction. Jennifer Zerk notes that, as indicated in the FAFO study domestic offences have the potential to be applied extraterritorially, either on the basis of nationality or universal jurisdiction principle.⁶² Thus, it is possible for the courts to pierce jurisdictional veil for prosecuting TNCs, for human rights violation by asserting these jurisdictional principles. Surya Deva argues, *universality principle* applies to natural persons in relation to human rights, and there seems to be

⁶⁰ *Ibid* .

⁶¹ ILC Report *supra* note 58.

⁶² Jennifer Zerk, "Corporate liability for gross human rights abuses : Towards a fairer and more effective system of domestic law remedies" (2013). A report prepared for the Office of the UN High Commissioner for Human Rights at 42. Available on : <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

no apparent reason as to why this principle should not be extended to violations done by legal entities.⁶³ In this regard, Deva argues that, extraterritorial regulation in respect of MNCs is not only legally defensible under the principles and practices of international law, but is also justifiable on policy grounds. This relates to the state's duty to respect and protect human rights at municipal level. The extraterritorial measures are legitimate and justified when they seek to promote human rights.⁶⁴ However, to meet these goals, collective will of international community is necessary. Extraterritorial regulation of the home state is complementary to municipal regulation of the host state.⁶⁵ Extraterritorial regulations if applied by the home state and host state in co-operation with each other, on the basis of *jus cogens* norms to regulate TNCs criminal behaviour.

Surya Deva recommends that, although the principle of *separate legal entity* is relied on to contest the exercise of the extraterritorial jurisdiction, the state may rely on the enterprise principle to consider all the companies of a group as one enterprise to regulate activities of overseas subsidiaries extraterritorially.⁶⁶ For instance, the way Albanian Company Law has sought to recognise and incorporate the group liability. Dine notes, one of the most important feature of this legislative reform is that, it recognised significant relationship between the companies based on the flow of money rather than its structure. This concept includes, "relationships such as franchising or other kinds of supply or distribution, outsourcing of certain enterprise functions or quality-assurance systems which 'at the surface' are using contractual instrument, which in 'in reality' build organisations that may be treated according to group parameters".⁶⁷

⁶³ Deva, *supra* note 55 at 1084.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 1085.

⁶⁶ *Ibid* at 1086.

⁶⁷ Dine, *supra* note 27 at 66.

Further, Deva argues, although extraterritoriality is a "situation in which state powers (legislative, executive or judicial) govern relations of law situated outside the territory of the state in question", it remains to be determined, to what extent it is possible, and appropriate for states to extend their powers beyond their own territory in order to prosecute breaches of human rights committed by businesses.⁶⁸

Interestingly, some jurisdictions criminally sanction certain corporate conduct that in another jurisdiction constitutes only a regulatory offence. However, now many domestic legislations increasingly provides for both: a corporation may be charged for committing a true crime and committing a regulatory offense in relation to the same event.⁶⁹ Sarah Seck argues that the global governance tools in the international realm should be designed to include both criminal punishment and regulatory tools to regulate corporate behavior, which focus on preventing harm.⁷⁰ It is worth noting that, states have already resorted to extraterritorial regulation in respect of drugs, bribery, terrorism, slavery and child sex trafficking.⁷¹ Despite the fact that extraterritorial laws are being progressively developed and applied in these areas, Deva and Zerk both acknowledge the limitations of extraterritorial legislations. It is important to consider that, the presence of the defendant in the jurisdiction for a prosecution proceeding is necessary. Zerk notes, although the corporations might be regarded as being present in the jurisdiction for the purposes

⁶⁸ Hervé Ascensio, "Contribution to the work of the UN Secretary-General's Special Representative on human rights and transnational corporations and other businesses: Extraterritoriality as an instrument" (2010) Available on : <http://business-humanrights.org/sites/default/files/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf>.

⁶⁹ This may be further attributed to the persuasiveness of the idea of a regulatory enforcement pyramid developed by John Brainwaite and Ian Ayres. Sarah Seck, "Collective Responsibility and Transnational Corporate Conduct" in ISSAC, T. & VERNON, R. (eds.) *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) at 147-148.

⁷⁰ *Ibid* at 148-149.

⁷¹ Deva, *supra* note 55 at 1084.

of prosecution based on universal jurisdiction,⁷² nevertheless, prosecuting extraterritorial criminal case involves practical, investigative and evidentiary challenges. It is extremely difficult to prosecute extraterritorial crimes without practical support from the state in which the crime was committed.⁷³ Although, Deva acknowledges that extraterritorial regulation is not necessarily the most suitable or effective and efficient framework, but merely one of the options which could, and should, be tried by home states to tame the activities of MNCs.⁷⁴ On hand, enforcement of extraterritorial regulations, it is a possible option to pierce jurisdictional veil for prosecuting TNCs for human rights violations abroad, whereas on the other hand, it raises issues as to the willingness of the states to enforce regulations extraterritorially. The states are concerned with the political consequence of the foreign courts than the legality of a jurisdiction.⁷⁵

5. Harmonization of Jurisdiction A Possible Opportunity to Regulate TNC Crimes

Jurisdictional harmonization as one of the potential solutions to prosecute transnational corporate entities for violation for human rights. According to De Sousa Santos, the process of globalisation has three main components: “a new international division of labour; changes in the inter-state system; political form of modern work system and the debate over whether or not there has emerged global culture”.⁷⁶ In this context, Celia Wells argues that national sovereignty

⁷² Jennifer Zerk, “Corporate liability for gross human rights abuses : Towards a fairer and more effective system of domestic law remedies” (2013). A report prepared for the Office of the UN High Commissioner for Human Rights at 42. Available on :

<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

⁷³ Jennifer Zerk, “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas” (2012) 59 *A Working Paper of the Harvard Corporate Social Responsibility Initiative* at 142.

⁷⁴ Surya Deva, “Acting Extraterritorially To Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell The Cat?’” (2004) 5 *Melbourne Journal of International Law* at 63.

⁷⁵ Ramasastry, *supra* note 13 at 153.

⁷⁶ De Sousa Santos, B., “Towards a New Common Sense : Law, Science and Politics in the Paradigmatic Transition.” (London : Routledge, 1995) at 252.

is not an insuperable obstacle to the creation of transnational regime.⁷⁷ Creation of such transnational regime can be related to harmonisation of jurisdiction and possible piercing of the jurisdictional veil. Further Wells claims, as states can, and do, subordinate their domestic legal regimes to international standards when it suits their interests.⁷⁸ De Sousa Santos calls this 'sovereignty pooling'⁷⁹. It must be noted that, states sign and respect international treaties, amend their national law to confirm international commitments and expectations, harmonise regulatory practices and policies to facilitate trade, and permit the development and expansion of private legal regimes to accommodate the needs of transnational corporations.⁸⁰ To further support the argument of harmonization of jurisdiction reference can be made to the European Union. For instance, the Brussels Convention on the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters provide for harmonization of jurisdiction among the Member States of the European Union.⁸¹ Although this discussion throws light on issues of civil jurisdiction, it may be treated as an important point of reference in determining liability of parent company. In this regard the Brussels Convention adopts the domicile principle as the basis of jurisdiction. Under Art. 53 of the Convention, "the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private

⁷⁷ Celia Wells, "Corporations and Criminal Responsibility" (OUP, UK: 2002) at 141.

⁷⁸ *Ibid.*

⁷⁹ *Ibid* at 254.

⁸⁰ *Ibid.*

⁸¹ Mulchinski, *supra* note 23 at 2.

international law.”⁸² This Article simplifies the jurisdiction issue and allows the parties to expedite the substantive question of parent liability for its alleged control over its overseas subsidiary.⁸³

Further, the Convention on the Protection of the European Communities’ Financial Interests requires the members to provide various forms of liability against legal persons for confiscation and money laundering, including liability for active corruption⁸⁴. Members of the EU would have to introduce criminal liability for enterprises in cases of government fraud concerning subsidies and similar crimes.⁸⁵

In this regard Peter Mulchinski argues, the state-centered model of international business regulation can be displaced, if the States agree to develop new harmonised standards of international economic regulation, and create new conflict avoidance procedures. However, he also warns that competing systems of economic regulation administered by the state will continue to generate conflicts of jurisdiction in cases involving the activities of MNEs.⁸⁶ Nevertheless, it may be noted that based on the two Convention referred above, it is may be possible to develop a model to implement common standards of criminal liability in respect of legal persons at transnational level. Standardizing criminal liability by building collective platform for jurisdictional and legal may be possible through a treaty body or constituting a, “Special Transnational Forum” to address the issue.

⁸² See Convention on the Protection of the European Communities’ Financial Interests. (1995) Doc. 95/C 316/03 Available on: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127\(03\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(03)&from=EN)

⁸³ Mulchinski, *supra* note 23 at 12.

⁸⁴ Active corruption: an offence committed by a public official who gives or promises a bribe. Passive corruption: an offence committed by an official who receives a bribe.

⁸⁵ Convention on the Protection of the European Communities’ Financial Interests *supra* note 69.

⁸⁶ Peter Mulchinski, “Multinational Enterprises and the Law” (Oxford: Blackwell Publishers Ltd., 1999) at 157.

6. Home State Responsibility to Regulate Transnational Corporate Crimes

Finally, this research examines the responsibility of the home state to address the governance gaps, to deal with TNCs' extraterritorial behaviour. Sarah Seck contends that, the Special Representative has described extraterritorial jurisdiction as the "elephant in the room" about which "polite people" prefer not to talk, however, the real elephant about which even the Special Representative is unwilling to talk is, the imperative to recognize the existence of the home-state obligations to exercise jurisdiction to prevent and remedy harm by transnational corporate actors.⁸⁷ Although the policy framework by Prof. John Ruggie, recognizes the fundamental nature of the state duty to protect rights, still there remains an unresolved issue of the extent to which the home states can exercise extraterritorial jurisdiction.⁸⁸ Therefore, it is necessary to examine the potential role of national criminal laws of developed states, which are typically home states of TNCs, in enhancing accountability for violations of individual rights occurred abroad.⁸⁹

There may be several advantages of conducting legal proceedings in the host state, like, better access to evidence and to witness testimonies. Additionally, if the proceedings are conducted in the host states they are within the proximity of the scene of the crime, which better contributes to the social and political discourse important to deal with human rights abuses.⁹⁰ Regardless of these advantages, Wolfgang Kaleck & Miriam Saage-Maaz note that, systemic flaws in the judicial system such as corruption, inadequacies of laws or direct political intervention occur more frequently in the host states (especially developing countries), than home state of the company,⁹¹

⁸⁷ Seck, *supra* note 79 at 142.

⁸⁸ *Ibid* at 141.

⁸⁹ Jan Wouters and Cedric Ryngaert, "Litigation for Overseas Corporate Human Right Abuses in the European Union: The Challenge of Jurisdiction" (2009) 40 *The George Washington International Law Review* at 968.

⁹⁰ Kaleck & Saage-Maaz, *supra* note 1 at 715.

⁹¹ *Ibid*.

which can adversely impact prosecutorial proceedings against TNCs. A recent report on, “Parent Company Accountability” suggests that the victims of human rights abuse must be able to recover against a parent company located in the home country when the remedies are unavailable against the subsidiary in the country where the harm occurred.⁹²

France and Switzerland are the two countries, in which recent attempts have been made to establish liability on the part of the parent company for acts of subsidiaries or entire corporate enterprise in the certain situations. The bill introduced March 2015, in France, creates a presumption of liability on the part of parent corporations for their subsidiaries’ torts abroad unless the parents engage in human rights “due diligence” regarding acts of those subsidiaries. Further, if the due diligence were conducted, only then it would be possible for the parent corporation to distance from the presumption of liability.⁹³ The bill requires large French-headquartered firms (with more than 5,000 employees in France and 10,000 globally) to publish a *plan de vigilance* (due diligence framework) on how their activities and suppliers abroad will respect human rights, environmental and anti-corruption norms. Non-compliance would result in a civil fine of up to €10 million. However, the revised bill dropped the ideas of criminal liability and placed a reverse onus on defendant firms.⁹⁴

In September 2014, the Foreign Affairs Committee of Switzerland’s Lower Chamber passed a motion calling for Swiss companies operating abroad to require human rights and environmental

⁹² Gwynne Skinner, “Parent Company Accountability: Ensuring Justice for Human Rights Violations” (2015) A report by The International Corporate Accountability Roundtable, at 10. Available on : <http://icar.ngo/wp-content/uploads/2015/06/ICAR-Parent-Company-Accountability-Project-Report.pdf>

⁹³ *Ibid* at 12.

⁹⁴ Jolyon Ford, “Business and Human Rights Bridging the Governance Gap” (The Royal Institute of International Affairs, Chatman House 2015) at 16.

due diligence. Although, this motion was narrowly defeated in the Lower Chamber, a coalition in Switzerland is gathering signatures for a referendum to be submitted, which requires large corporations to engage in due diligence, risk assessment, the development of measures to prevent possible human rights violations and environmental damages, comprehensive reporting on such policies and actions.⁹⁵

Similarly, the *US Foreign Corrupt Practices Act of 1977* provides criminal penalties for businesses that engage in corruption, including its subsidiaries' action when they engage in bribery, and non-disclosure of records and accounting. Further, in the United States with regard to business and human rights, there have been several legislative enactments to ensure companies that perform due diligence with regard to their supply chain.⁹⁶ For instance, Section 1502 of the Dodd-Frank Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173), requires companies to report to SEC their efforts regarding due diligence of their supply chain and custody of minerals, especially in respect of companies doing business in Burma are to file a report with Department of State regarding human rights. Additionally, California's enactment of the Transparency and Supplies Chain Act requires certain companies to disclose efforts of human trafficking and slavery in their supply chain.⁹⁷ Interestingly, United States has federal criminal statutes in the area of human rights that apply extraterritorially against businesses, for genocide, war crimes, torture, and forced recruitment of child soldiers⁹⁸. A pending Senate Bill, the Civilian Extraterritorial Jurisdiction Act of 2014 expands federal criminal jurisdiction over

⁹⁵ Skinner, *supra* note 81 at 12.

⁹⁶ *Ibid* at 12-13.

⁹⁷ *Ibid* at 13.

⁹⁸ 18 U.S.C. § 2442 (2012).

federal contractors and the employee who commit certain criminal offenses abroad, including sexual assault and torture.⁹⁹

However, there are several instances where the home state initiatives to regulate the transnational activities of corporate national have failed to become law.¹⁰⁰ The Corporate Code of Bill of 2000 (Australian Bill), relating to the home state model of extraterritorial regulations was found to be, “impracticable, unworkable, unnecessary and unwarranted” by the Parliamentary Committee. This bill was targeted to cover ‘trading or financial corporation formed within the limits of the Commonwealth’ if it ‘employs or engages the services of 100 or more persons in a country other than Australia’, and to the holding, subsidiary and sister concerns of such a corporation. This Bill mandated the corporations to comply with international standards relating to the environment, health and safety, and employment and human rights.¹⁰¹ Further, this bill was revised and tabled in 2004.¹⁰² The scope of the bill was broadened to apply to corporations operating outside the Australian territory.¹⁰³ But other examples of failed legislations include, Canada (Bill C-300)¹⁰⁴, United States (Corporate Code of Conduct Act)¹⁰⁵, and United Kingdom (The Corporate Responsibility Bill)¹⁰⁶. In this regard Sarah Seck notes, obligations extend to three organs of the state executive, legislative, and judicial, which is recognized under the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft*

⁹⁹ *Ibid* at 27.

¹⁰⁰ Penelope Simons and Audrey Macklin, “The Governance Gap: Extractive industries, human rights, and the home state advantage” (New York : Routledge, 2014) at 260.

¹⁰¹ Deva, *supra* note 74 at 37, 39, 52, 53.

¹⁰² *Corporate Code of Conduct Bill 2004*.

¹⁰³ Simons & Macklin, *supra* note 100 at 267.

¹⁰⁴ See Bill C-300, *An Act Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries*, 3rd Session, 40th Parl, 2010-11.

¹⁰⁵ Corporate Code of Conduct Act, HR4596, 106th Cong (2000)

¹⁰⁶ The Corporate Responsibility HC Bill (2001-02) [145].

Articles)¹⁰⁷.¹⁰⁸ In this regard, it becomes unclear why any jurisdictional limitation makes sense in the business and human rights context.¹⁰⁹ Arguably, although direct state responsibility for TNC's conduct is possible, however, it is noted that the current "prevailing perception" is that the state "will be responsible for the conduct of its own organs or officials, but not for the conduct of non-state actors that is wholly private in nature. Nevertheless, the State can be held responsible for its own violations of a separate duty to regulate the private conduct."¹¹⁰

Simons & Macklin propose a model that advocates home state governance regime based on mandatory mechanisms of assessment, monitoring and disclosure. They deflate the political arguments against legal infeasibility of home state regulations in respect of extraterritoriality and separate legal personality of the corporate entity.¹¹¹ The home state regulatory framework with extraterritorial effect that is less 'invasive' on the host state sovereignty¹¹² can provide a potential opportunity to pierce the jurisdictional veil to regulate TNCs behavior abroad.

Conclusion

The legal complexities which emerged in the *Bhopal Gas Disaster* case, and incompetency of the host state and home state to deal with challenges of the situation, called for critically evaluating jurisdictional and legal issues. This research seeks to critically evaluate these systemic barriers in prosecution of TNCs. The thesis statement of this research is, piercing the jurisdictional veil is

¹⁰⁷ See International Law Commission's Report on "Responsibility of State for Internationally Wrongful Act" (2001)". UN Doc. A/56/49(Vol. I)/Corr.4.

¹⁰⁸ See *supra* note 79 at 161.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* at 162.

¹¹¹ Simons & Macklin *supra* note 100 at 273.

¹¹² *Ibid* at 275.

inevitable so as to prosecute transnational corporate entities for the human rights violations they trigger abroad. The concept of piercing of jurisdictional veil is central to the issue of prosecuting TNCs for crimes. It is argued that piercing of jurisdictional veil is as inevitable as piercing of corporate veil to meet the ends of justice in the era of globalization. Separation of ownership from control creates conceptual difficulties in corporate law.¹¹³ This traditional legal structure on which corporate entities are constructed fosters the *criminogenic* behavior of TNCs. The issue of prosecuting TNCs for human rights abuse may find its answer in all jurisdictions by substantially amending and enhancing the legal framework, by looking beyond separate legal personality and limited liability doctrines. Further, failure of the corporate law to appreciate the modern TNC character, and its further failure to recognize enterprise liability attributes towards non-prosecution of TNCs for crimes committed by them abroad.

The extraterritorial regulations, which are largely state-centric, have its own limitations and are not self-sufficient to regulate TNCs behavior abroad. Moreover, the extraterritorial regulations need to be supported by the international legal framework to be effectively enforced.¹¹⁴ In this regard, it may be concluded that in the absence of binding international legal regime and tribunal to regulate TNCs' activities, the emphasis is on the domestic legal framework to lift the jurisdictional veil and prosecute TNCs for violation for crimes amounting to human rights abuse. Finally, it is worth concluding that, the home state can provide for effective the option to pierce the jurisdictional veil, by legislating regulations having extraterritorial effect.¹¹⁵

¹¹³ Glasbeek, *supra* note 34 at 79-80.

¹¹⁴ Deva, *supra* note 74 at 65.

¹¹⁵ Simons & Macklin, *supra* note 100 at 275.

