



“A STUDY OF CRIMINAL LIABILITY CORPORATIONS IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW”

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ABSTRACT

International criminal law is a branch of international law aimed at prohibiting specific types of activity that the international community considers to be serious violations, as well as holding offenders of such conduct criminally liable for their actions. Genocide, war crimes, crimes against humanity, and aggression are the main topics covered. There are also crimes against international law that are not covered by international criminal law, such as the Rome Statute and ad hoc military tribunals. Prosecuting foreign crimes is an important part of the process of changing societies into democratic society that respect human rights. Victims of human rights violations are calling for investigations and convictions of leaders who have committed crimes and perpetrated mass political or military massacres. The prosecution of such criminals can play a critical role in restoring victims' dignity and restoring trust in society.

KEY WORDS: *Criminal Justice System, International Community, Corporate Criminality, European Continental Law, Criminal Law.*

1.1 INTRODUCTION

Our criminal justice system is challenged or irritated by corporate criminality. It is because of this trait that corporate crime is such a difficult problem to solve. For prosecutors and judges tasked with determining criminal liability, the evolution of corporate criminal liability has become a critical issue. In the common law world, established tort law principles led the English courts to recognise corporation criminal culpability for statutory offences when mens rea was not necessary in the middle of the last century.

Many European Continental Law countries have been unable or unwilling to include corporate criminal liability into their legal systems. The fact that crime has switched from almost entirely individual criminals to corporate entities in recent years has prompted us to consider the prospect of expanding criminal law concepts. Another area where the criminal justice system needs to be reviewed is the new manifestations of crime and the multinational nature of criminal activity. When dealing with artificial entities, this issue becomes more difficult. Simultaneously, crime has become more transnational, with a worldwide influence, as the business sector has become more involved¹.

¹ Akdeniz, Y, 'Cybercrime', in *E-Commerce Law & Regulation Encyclopaedia* (2003).

In criminal law jurisprudence, the issue of imposing criminal culpability on a business for criminal offences committed by its directors, managers, officers, and other personnel while conducting corporate operations has attracted a lot of attention. The prospect of establishing criminal culpability on a business is predicated on its legal independence. In today's environment, corporate actions have a huge impact on society. In their daily actions, they not only have a beneficial impact on people's lives, but they also have a negative impact on people's lives, which falls under the category of crimes. For example, the Uphar Cinema tragedy or multi-billion dollar scams and scandals, particularly white collar and organised crime, may fall into this category and require immediate attention, as in the case of the Uphar Cinema tragedy, which was recently settled by the Supreme Court after many years of deliberation².

Since the last two centuries, large-scale organisations have been forming all over the world and gaining a dominant position. They're all over the place. They have an impact on nearly every part of our lives. Parallel to this covert or not-so-subtle control, companies can also become well-known criminals when they focus entirely on financial gain while ignoring social responsibility. However, because corporations are non-human entities, it is difficult to link criminal behaviour to them using current liability concepts. As a result, additional referendums are required to hold them accountable for their unlawful intents and actions in the eyes of the law.

The first attempts to impose corporate criminal liability were made by common law countries such as England, the United States, and Canada, which had witnessed a big contribution and a very important role in the economy due to the start of the industrial revolution in these countries earlier. Despite an earlier aversion to punishing corporations, the English courts began to recognise corporate criminal culpability in 1842, when a corporation was penalised for failing to perform a statutory duty³. There were several grounds for this apprehension. One, the corporation was regarded to be a legal fiction, and it could only carry out acts that were clearly listed in the corporation's charter, according to the rule of *ultra vires*. Second, how might the corporation be physically prosecuted and punished in court? These factors are still relevant today. The law has progressed in many areas, but global recognition of criminal culpability has yet to reach its pinnacle. Public international law, often known as "Classical" international law, defines states' interactions, rights, and obligations. Criminal law is concerned with the prohibitions imposed on individuals by individual states, as well as the penalties for breaking such laws. Although its sources are those of international law, its effects are penal sanctions inflicted on individuals, making international criminal law a hybrid of the two⁴.

Corporate criminal liability arose from the enforcement of individual criminal responsibility for the corporation's illegal activities in both civil and common law jurisdictions. That is, in the first instance, company directors, officials, and lastly employees were held accountable for corporate wrongdoings. Finally, the corporation's criminal liability has been extended as a result of this. As punishment ideas have evolved,

² Tyler 2006 quoted in a "Psychological Perspective on Punishing Corporate Entities", *Regulating Criminal Liability* edited by Donminik Brodowski, Manuel Espinoze de los Monteros de la Pana, Klans Toedemann and Joachim Vogel Editors – Springer 2014.

³ Alexander, L, 'Criminal Liability for Omissions: An Inventory of Issues' in S Shute and A Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002).

⁴ Allens Arthur Robinson, 'Corporate Culture' as a basis for the Criminal Liability of Corporations, A report for the United Nations Special Representative of the Secretary General on Human Rights and Business February 2008.

criminal culpability for legal entities other than humans has become possible. For a variety of reasons, holding companies as a whole, rather than just their constituent members, criminally liable is critical. For starters, corporations can be set up in such a way as to avoid legal accountability. Individuals cannot hide behind corporate activities, and the corporate entity as a whole cannot hide behind the criminal liability of individual members, thanks to the recognition of corporate legal personality and the imposition of criminal liability on the corporate body. Second, recognising that the entire corporate entity is criminally accountable allows for more effective legal and moral punishment of improper corporate behaviour. As a result, corporate criminal liability based on legal personality fosters the adoption of higher standards, more responsible business behaviour, and deterrent from future malfeasance. Third, recognising the corporate entity as having legal personality for criminal law purposes assures that effective mechanisms of punishment are available.

1.2 CORPORATIONS UNDER INTERNATIONAL CRIMINAL LAW

Even though corporations can be considered "persons" in some legal situations, they cannot readily be considered criminals. It has been difficult to prosecute corporations for crimes requiring mens-rea, or "particular intention." The law has attempted to tie corporate criminal culpability to the purpose of people within the organisation for such crimes. However, organisational theory of corporate decision-making shows that borrowing purpose from individual corporate actors may not be fruitful, because some corporate behaviours can never be traced back to the intent of any single individual. This provides a framework to replace the traditional practise of imputing criminal intent to corporations directly from individuals⁵. To put it another way, a theory must be constructed based on which it can be safely determined in a given circumstance that the Corporation/legal person had the criminal intent to conduct the offence complained of. This approach is consistent with the concept that corporations and legal entities are not only vicariously accountable for criminal acts done by their executives, but can also be held culpable in their own right. This chapter will spend some time enumerating some of the principles that can be used to establish criminal responsibility based on a corporation's "purpose." Individual and corporate standards for proving guilt are drastically varied. If both are to be tried in the same court (for example, the International Criminal Court), the standards for determining responsibility must be as plain and unambiguous as feasible.

The question of corporate accountability in international criminal law stretches back to the postwar Nuremberg and control council trials, which many believe to be the origin of international criminal law. The Krupp 225 and I.G. Farben 226 cases, both involving industrial businesses, are of particular interest for the present purposes. The Krupp case was the prosecution of Alfred Krupp and nine other Krupp industrial firm officials, all of whom were found guilty of accusations connected to the use of slave labour during WWII, among other things. During WWII, the business played a crucial role in wartime activities, presenting an inextricable component of German policy for occupied countries such as France, Norway, and Poland, according to the trial. Notably, the tribunal ordered that all of Krupp's property, both public and private, be forfeited as part of the penalty⁶.

1.3 INTERNATIONAL CRIMINAL LAW

⁵ Alschuler Albert W, Two Ways to Think About the Punishment of Corporations, American Criminal Law Review 46, 2009, 1366-1367

⁶ Andrew Weissmann, A New Approach to Corporate Criminal Liability, American Criminal Law Review [Vol. 44:1319], 2007.

Despite the fact that some precedents of international criminal law can be discovered before to the First World War, it was only after the war that a truly worldwide criminal tribunal was envisioned to trial perpetrators of crimes committed during that time. As a result, the Treaty of Versailles mandated the establishment of an international tribunal to try Wilhelm II of Germany 164. Following WWII, the Allies established an international tribunal to investigate not only war crimes, but also crimes against humanity committed by the Nazi dictatorship. The significance of "crimes against humanity" resides in the international community's acknowledgement of international crimes committed not just in physical war zones, but also in acts that violate mankind's collective sacredness⁷.

International criminal law is derived from the same sources as international law. Treaties, customary international law, and general principles of law recognised by civilised nations are the primary sources of international law, according to Article 38(1) of the International Court of Justice's 1946 Statute; and, as a secondary measure, judicial decisions and the most highly qualified juristic writings. No. 166 Because the premise of individual criminal culpability and national criminal law are the bedrock of international criminal law, it is vital to note that it draws extensively from national criminal law systems. This is a problem that is effectively dealt with by legal systems. For the sake of international law¹⁶⁷, international criminal law has adopted the concept of criminality from local laws. On the other side, public international law is concerned with the rights of individual states.

The International Criminal Court (ICC), which is a permanent tribunal that prosecutes persons for genocide, crimes against humanity, war crimes, and aggression, is today's most important institution¹⁶⁸ for the purposes of ICL. It was established on July 1, 2002, when its foundation treaty, the Rome Statute¹⁶⁹ of the International Criminal Court, became effective, and it can only prosecute crimes committed after that date. The court can only exercise jurisdiction in circumstances where the accused is a national of a state party, the alleged crime occurred on the territory of a state party, or the UN Security Council refers a situation to the court. Its purpose is to supplement existing national judicial systems; it can only exercise jurisdiction when national courts refuse or are unable to investigate or prosecute such crimes. Individual states are thus given primary authority for investigating and punishing crimes¹⁷⁰.

The purpose of studying ICL principles is to analyse their relevance and applicability in determining a legal person's culpability under the international criminal law framework, such as criminal liability of a multinational business or entity liability. Another issue that needs to be addressed is the required standard for determining a corporation's culpability when it is not directly involved in an international crime, such as crimes against humanity or genocide, but is assisting and abetting the forces that are actually committing such crimes by providing material and logistical support. This 'standard' would be included in the ICL principles if the ICL's jurisdiction was expanded to encompass prosecution of 'legal person.' It is critical to establish such a criterion because, under the existing ICL, which recognises only four basic crimes as international crimes, entity culpability in those crimes is more likely to be indirect than direct. Indictment for indirect participation in a crime would necessitate the establishment of an objective threshold beyond which it can be confidently inferred that the 'thing' had truly criminally participated in a 'crime.' A discussion of the study done by the International Commission of Jurists (located in Geneva) is particularly pertinent in this regard. The Commission's Report establishes the level that a corporation must adhere to, beyond which the corporation enters the danger zone, resulting

⁷ Beale Sara Sun, Is Corporate Criminal Liability Unique?, American Criminal Law Review 44, 2007, 1503-1504

in the inference that it has participated in the commission of an international crime. Later, the Report will be debated⁸.

1.4 DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY

Corporate criminal responsibility has its roots in ancient law, and it became the subject of doctrinal debates around the turn of the twentieth century. The introduction and growth of the concept of corporate criminal culpability have been profoundly influenced by the history, laws, economy, and politics of each country. As a result of this effect, various forms of corporate criminal culpability emerged. The concept of corporate criminal culpability has evolved differently under civil law regimes than it has under common law systems. At the same time, corporate criminal liability has evolved differently under civil law or common law systems to reflect the historical and socio-economic realities of different countries.

The historical development of corporate criminal responsibility demonstrates that it is consistent with criminal law concepts and the nature of corporations. Furthermore, the evolution of corporate criminal liability theories demonstrates that corporate criminal responsibility is an essential "public policy bargain." The deal weighs the benefits of legal recognition of a corporation, such as limited liability for corporate shareholders and the ability of a group of investors to act through a single corporate form, against the pressures of law compliance and crime prevention on the managers of the resulting corporate entity." Even though the concept of corporate criminal liability was not acceptable at the time, the inception, development, and application of theories of corporate criminal liability may be traced back to the Roman Era.

Corporate liability in criminal law refers to the extent to which a corporation can be held accountable for the conduct and omissions of the natural persons it employs. It is sometimes seen as a form of criminal vicarious liability, as opposed to situations in which the wording of a statutory offence expressly binds the company as the primary or joint principle with a human agent.

Corporate criminal responsibility has a pragmatic history. The fundamental ruling approving the strange practise of holding corporations criminally accountable in the United States specifically reasoned that prohibiting the practise "would virtually take away the only method of effectually governing the subject-matter and addressing the injustices targeted at." Given the lack of alternative feasible forms of remedy, corporate criminal responsibility became a practical requirement. Similar thought influenced the fast adoption of corporate criminal liability in Europe several decades later.

1.5 RESEARCH METHODOLOGY

The current research is both diagnostic and analytical. The study material was gathered from a variety of primary and secondary sources, including pertinent statutes, commentaries, text, books, law journals, periodicals, newspapers, magazines, and web sites, among others.

The majority of this research is analytical in nature, involving the use of both pure and practical research to better understand the concepts and underlying issues in evaluating corporate criminal responsibility. By looking into the origins and development of corporate

⁸ Beale Sara S. and Safwat Adam G., What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability, Buffalo Criminal Law Review 89, 2004, 113-115.

liability, the researcher has investigated and analysed criminal law concepts. In addition, the report contains a comparison of advances in other countries on the same topic. The review of case law and case study were critical components of this research project. Various international documents relating to the theme and study of the topic to legal documents adopted at the national and international levels have been reviewed in order to determine the necessary amendments to India's existing legal framework for developing principles for identifying corporate criminal liability as well as the means and methods to address the problem.

1.6 HYPOTHESIS

The commission of a crime can be carried out by a corporation. Depending on the situation, the motive could be money or power. For years, the law has been split on whether or not a firm without a soul or a body should be held liable for crimes. In today's world, corporations can be involved in a wide range of crimes, from financial irregularities to violent crimes of varying degrees of severity. Accepting companies' complicity in crime, some jurisdictions have developed liability principles based on the attribution of actus reus and mens rea to corporations. There is still a need to define corporate criminality and set criminal penalties that treat corporations as wrongdoers. Currently, the criminal justice system must deal with rising scenarios in which corporations are increasingly affecting individuals and society as a whole through nefarious acts. Corporations, on the other hand, play a role in organised crime, posing a new challenge to the criminal justice system. The criminal justice system is now unprepared to cope with such scenarios. The growing presence of multinational firms necessitates the implementation of efficient international procedures. The industrial disasters and environmental degradation caused by illegal activity pose a direct threat to human survival and environmental preservation. In light of current corporate operations, a rethink of the criminal justice system is essential, specifically taking into account the criminological and penological aspects. To deal with corporate criminal acts and activities, distinct and specific policies must be devised.

1.7 INTERNATIONAL PERSPECTIVE OF CORPORATE CRIMINAL LIABILITY

There may be different organisational types and command and control chains. The intricacy of the corporate structure presents challenging questions about who bears responsibility for the repercussions of illegal behaviour committed by persons acting on behalf of the organisation. This is especially true when the corporation and its stockholders stand to gain financially from the illicit activity. In the framework of criminal law, all modern systems share the core idea that individuals who commit a crime in the corporation's interest should be held criminally liable. Should the corporation as a legal entity be held legally liable for criminal activities undertaken to advance corporate purposes, and to what extent and in what ways?

Modern legal systems do not always include corporate criminal culpability. Brazil, Bulgaria, Luxembourg, and the Slovak Republic, for example, do not recognise any type of corporation criminal liability. While some nations, such as Germany, Greece, Hungary, Mexico, and Sweden, do not allow for criminal responsibility, they do have regimes in place that allow for administrative fines to be placed on corporations for illegal conduct committed by certain workers⁹.

The countries that do impose some sort of criminal liability on companies take different

⁹ Cristina De Maglie, Centennial Universal Congress of Lawyers Conference-Lawyers and Jurists in the 21st Century: Paper: Models of Corporate Criminal Liability in Comparative Law, 4 Wash. U. Global Stud. L. Rev. 547, 552 (2005).

approaches to the form and scope of that obligation. The most popular models involve 'derivative' responsibility, in which the organisation is held responsible for the actions of individual offenders. The vicarious culpability, or respondeat superior, model, which is used in federal criminal law in the United States and in South Africa, is one example. Individual workers or agents' crimes are imputed to the corporation under this model if they were committed in the course of their duties and were intended, at least in part, to benefit the corporation. Another variant is the 'identification' model, which is used in the United Kingdom and other British Commonwealth countries to impute individual senior officers and employees' crimes to the corporation on the basis that their state of mind (and their knowledge, intention, recklessness, or other culpable mindset) is the same as the corporation's¹⁰.

There is also the 'extended identification' strategy, which is similar to the 'identification' approach. This model, which is mostly found in continental Europe, keeps the focus on the conduct of high-ranking officers and staff while also incorporating a duty of supervision, albeit whether that duty is due by the organisation or its officials individually differs by nation. Recently, there has been a greater emphasis on an alternative concept of liability that focuses on the corporation's own conduct or omissions. Rather than being accountable for the acts of individual perpetrators, a business is liable under this model³⁸ because its 'culture,' policies, procedures, management, or other qualities encouraged or caused the offence to be committed. This organisational' liability paradigm is well-exemplified by Australia.

1.8 CRIMINAL CORPORATE LIABILITY - DETERRENCE AND RETRIBUTION

None of the conventional aims of criminal law allow the use of agency principles of vicarious responsibility in situations when a corporation has taken all reasonable steps to ensure that its workers' behaviour is lawful. The criminal law's purposes are met when a business can be expected to do nothing more than what it has already done.

This strategy makes sense and is supported by logic. Consider this: even if the Corporation is found to be prima facie guilty of a criminal violation by the DOJ, the Deferred Prosecution Agreement kicks in, which is essentially an offer to the Corporation to clean up the rot in its organisation. This is normally accomplished by requiring the Corporation to implement compliance processes and, in some cases, by imposing fines. Thus, if the Corporation has already implemented compliance processes or systemic checks to avoid illegal activities by its officers and employees, there is little justification for continuing to prosecute the Corporation and forcing it to enter into a DPA¹¹.

Deterrence is generally divided into two parts: particular and general deterrence. The term "specific deterrence" refers to incapacitating a criminal in order to prevent future behaviour in that person. In the case of a real person, incapacitation usually takes the form of imprisonment, which may include limits on liberty or supervised release. Of course, a corporation does not have the choice of going to prison. Specific deterrence of a company, on the other hand, could take the form of the company being dissolved, the company being barred from engaging in certain businesses permanently or for a period of time, or the corporation, like an individual, being subjected to a probationary period during which its conduct is restricted and monitored by a court. The effect of a specific defendant's

¹⁰ James Gobert —The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?! (2008) 71 MLR.

¹¹ Julian Harris —The Corporate Manslaughter and Corporate Homicide Act 2007: unfinished business?! (2007) 28 Comp Law 321 at 322.

punishment on other members of society who might be enticed to engage in similar behaviour is referred to as general deterrence. When it comes to corporate criminal behaviour, general deterrence is especially effective. The criminal law also functions as a means of retribution. What behaviours are considered "criminal" is a cultural judgement of what is outside the confines of acceptable societal behaviour. A corporation that crosses that line may face the same repercussions as an individual. However, there is a distinction to be made between corporate and individual vengeance. When a corporation is judged criminally liable for an employee's criminal activities, punishment necessitates first determining what the corporation did or did not do that merits criminal penalties. When a company encourages an employee to commit a crime, the analysis is straightforward. But what about the corporation that done everything it could to avoid such behaviour? Imposing corporate liability where a company has taken all reasonable precautions to prevent and detect criminal behaviour by its employees advances none of the criminal law's purposes. If anything, the conviction sends the opposite message to companies with efficient compliance programmes: that no good deed goes unpunished¹².

The case for changing the law is compelling. A corporate criminal culpability standard based on whether the corporation took all reasonable means to avoid and identify employee misconduct would strongly encourage significant and required self-regulation. A corporation would have compelling motivations to put in place an effective compliance programme, both to deter criminal behaviour in the first place and to employ as a shield if criminality did occur. Under the current legal system, a corporation receives no legal benefit for even the best internal compliance programme if a crime is committed. The fear that businesses may construct only "show" procedures to deceive courts and regulators is unfounded. Any attempt to pass off a bogus programme as a legitimate one would put the company in jeopardy of obstructing justice. Prosecutors and judges are now being asked to evaluate the efficacy of such compliance programmes in the context of delayed criminal proceedings.

1.9 CORPORATE CRIMINAL LIABILITY IN USA

The US legal system was the first to impose criminal culpability on 'Legal Persons.' Attaching criminal culpability refers to holding a juristic person or a corporation accountable for the actions of its officials, whether they are Directors or any other officer tasked with managing the corporation's activities, or even a lower-level employee. Corporations, as entities, can be prosecuted and convicted in the United States for crimes committed by individual directors, managers, and even low-level employees¹³. The United States' strategy to dealing with corporate misbehaviour is a reflection of their traditional concept of defending market economic freedom, which is reflected in virtually all laws dealing with corporate wrongdoing. The idea of convicting a company of a crime had been largely dismissed until the eighteenth century. Those sentiments began to soften in the United States during the nineteenth century, as companies in American society began to grow and their potential for harm became apparent. As the Industrial Revolution dramatically transformed the role of huge corporations in American life by the turn of the twentieth century, the necessity for some mechanism to regulate and punish corporate misconduct became all the more apparent. The Industrial Revolution, the growth of the regulatory state, and the Supreme Court's seminal 1909 decision in New York

¹² Markus D. Dubber, —The Promise of German Criminal Law: A Science of Crime and Punishment, 6 German Law Journal 1049 (2005)

¹³ Vikramaditya Khanna —Corporate Crime Legislation: A Political Economy Analysis, 82 Wash U LQ 95 at 101).

Central & Hudson River Railroad v. United States²⁷⁰ are all mentioned in most histories of American corporate criminal responsibility. The Elkins Act, a federal regulation regulating railway rates that placed criminal culpability on corporations that violated the statute's demands, was affirmed by the Supreme Court in *New York Central*. The Supreme Court, by finding that a corporation might be tried for a crime under a theory of respondeat superior, sanctioned a technique that prosecutors had been using with growing frequency for more than fifty years. Recognizing that all federal criminal statutes apply to "any person" who breaches them, and that Congress had defined "person" to include "corporations" for the purposes of the US Code more broadly, federal prosecutors began applying the criminal code to corporate conduct. Federal prosecutors prosecuted corporations with individual offences such as intentionally mailing obscene materials, scheming to carry liquor onto Indian land, violating the Espionage Act, and manslaughter in the years following *New York Central*. Furthermore, as described in previous chapters, the United States' common law system played a crucial role in recognising the notion of corporate liability, in which attorneys and judges worked together to broaden the scope of offences. The importance of studying US criminal law in relation to corporate liability is based on how prosecutors (rather than courts) deal with the accused 'corporation' or 'company.' The threat of indictment alone is daunting: a criminal charge guarantees a rapid market reaction, the removal of leadership, millions of dollars in legal bills, and, of course, the chance of conviction. A conviction would result in not just any criminal fines imposed, but also "collateral consequences" – financial and reputational ramifications that can and do force businesses out of business. In addition to criminal laws, the US governs business behaviour primarily through administrative means. What makes American laws so distinctive is that, in addition to administrative and civil requirements, they inflict severe criminal culpability. It's also worth mentioning the US government's proactive strategy, which ensures that corporate governance plays a vital role in avoiding corporate crimes. Both aspects of the strategy taken by US law, namely Deferred Prosecution Agreements and the Sarbanes–Oxley Act of 2002, are described further below¹⁴.

1.10 CONCLUSION

Corporations' existence and functioning are no longer limited to national bodies in today's globalised globe. Liberal acquisition and merger policies have resulted in the emergence of big corporations in the shape of multinational corporations. It is difficult to control and prevent corporate criminal culpability in this circumstance, if there are differences or gaps in the legal framework prevalent in multiple nations. Transnational organised crime is on the rise on a large scale, with the corporate potentially playing a direct or indirect role. As a result, there is a need to bring about uniformity at the international level, both in terms of substantive and procedural law, as well as mutual collaboration in terms of detection, investigation, determining guilt, and treatment, among other things. Even though extraordinary efforts are being made to combat numerous global crimes, situations involving corporate criminal culpability require special attention.

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¹⁴ Rohit Jaiswal, *Criminal Liability of Corporate Bodies- A report submitted by Singhanian and Partners, LLP, 2012, published by International Law Office, available.*

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