

## CRIMINAL LIABILITY OF LEGAL PERSONS UNDER INTERNATIONAL LAW – RETROSPECTION AND CURRENT STATUS

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**Abstract:** *Based on historical analysis of the development of international criminal law, it could be concluded, that there was no notion of the criminal liability of legal persons on the international level, despite the fact, that international criminal tribunals were dealing with such issue – author focuses namely on the Nuremberg Tribunal's criminal organisations, the Yugoslavian Tribunal's joint criminal enterprise and the jurisdiction of the International Criminal Court. This was changed by decisions of the Special Tribunal for Lebanon, which sentenced a legal person for the first time in the international criminal justice history. This decision was reflected also in the work of the International Law Commission, namely in the Draft Articles on Crimes against Humanity. The International Law Commission deals with the liability of legal persons for crimes against humanity and formulates, that it is up to the states if they will establish civil, administrative or criminal liability for their acts.*

**Keywords:** *International criminal law, liability of legal persons, international law commission, crimes against humanity*

### INTRODUCTION

Traditionally there was no notion of the individual's legal subjectivity in the field of international law. The first and for a long time only one exception was the crime of naval piracy, which universal criminal nature was in generally accepted from the 16<sup>th</sup>–17<sup>th</sup> century. But on the other hand, such subjectivity was not explicitly considered as rejected under the law, rather the international law was quiet on this issue.<sup>1</sup>

Apart from the mentioned exception, the legal subjectivity of an individual was first accepted on the regional level by the Central American Peace Conference of 1907 on basis of which the Central American Court of Justice was created. This was a change because it is considered to be a first international judicial institution to which the individuals had direct access.<sup>2</sup> Therefore the individuals were direct subjects (addressees) of international rules of both substantial and procedural form.

An important milestone was the Versailles treaty (1919) that recognised the criminal liability of individuals for conduct proscribed by the international law.<sup>3</sup> Such explicit recognition of individual's legal subjectivity is to be found also in the PCIJ's advisory opinion in

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<sup>1</sup> See also KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Wolters Kluwer, 2017. pp. 77–78.

<sup>2</sup> SHAW, M. N. *International Law*. Cambridge: Cambridge University Press, 2003. p. 233. Art. 2 of the Convention for the Establishment of a Central American Court of Justice (1907) "(...) individuals of one Central American country may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not (...)".

<sup>3</sup> Art. 227–230 of the Versailles treaty (1919).

*Danzig Railway Officials* case,<sup>4</sup> where PCIJ noted that international law indeed could prescribe duties and rights for individual persons.

The issue of the individual's legal status in international law is closely bound with the development of the international human rights law and the international criminal law after the Second World War. From the field of international criminal law, an indisputable breaking point is the creation of the International Military Tribunal in Nuremberg (henceforth also only "IMT") and from the field of international human rights law, it is the chain of international documents from the Universal Declaration of Human Rights (1948) or the International Covenant on Civil and Political Rights (1966) to the regional treaties such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, also called the European Convention on Human Rights). Some of these treaties, including the London Agreement (1945) to which the Charter of IMT was attached, contain also the procedural norms (of the judicial or extrajudicial form) that serve to help to enforce substantial norms, which also applies directly to the individuals.

Concerning the development in these distinct fields of international law, it could be concluded, that the individual already and indeed is a subject of the international law, and not only in the substantial field but also in the field of the procedural law. On the other hand, what also should be noted is that its international subjectivity is limited to the field of criminal law and to the field of human rights.<sup>5</sup>

The international human rights law is founded on the notion of human dignity, hence is typically connected with natural persons, however, this statement is not exhaustive. In international law, there are regimes of human rights protection that covers also legal entities (legal persons). The discussion about the legal status of the legal persons within the system of international human rights law is ongoing and active. There are discussions about their legal status not only in the sense of protection of their rights but also about their responsibility to follow human rights standards and hence about the possible liability in case of their violation.<sup>6</sup>

## 1. THE VIEW OF INTERNATIONAL CRIMINAL LAW AND JUDICIARY IN GENERAL

Such intensive discussion on the status of legal persons, as in case of the human rights law, was not present in the field of international criminal law yet. The bodies of international criminal justice held liable for crimes under international law only natural persons.

### 1.1 International Military Tribunal in Nuremberg

That does not mean that the issue of legal persons did not exceed into the field of international criminal law at all. Even the Charter of International Military Tribunal in

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<sup>4</sup> *Danzig Railway Case*, PCIJ, Series B, No. 15 (1928); 4 AD, p. 287.

<sup>5</sup> See also KLUČKA, J. *Medzinárodné právo verejné*. Bratislava: Iura Edition, 2011. p. 83.

<sup>6</sup> See also VAN KEMPEN, P.H.P.H.M.C., Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR, Vol. 14.3 *Electronic Journal of Comparative Law*. 2010, Vol. 14.3, [online]. [2020-09-24]. Available at: <<http://www.ejcl.org/143/art143-20.pdf>>.

Nuremberg (henceforth only “the IMT Charter”) mentioned in its art. 6<sup>7</sup> the power of the IMT to try and punish persons who committed crimes under international law (as defined in the IMT Charter) whether as individuals or as *members of organisations*, that were declared as a *criminal organisation* under the art. 9 of the IMT Charter.

If the IMT declared distinct organisation as criminal, then competent national authorities were able (according to art. 10 of the IMT Charter) to accuse an individual (natural person) and the national authorities were bind by the legal opinion of the IMT about the “criminal nature” of such organisation.<sup>8</sup>

The accused organisations were the Leadership Corps of the Nazi Party, the Gestapo, the S.D., the S.S., the S.A., the Reich Cabinet, and the General Staff and High Command of the German Armed Forces. From these, the IMT declared as criminal the first three. Some of these organisations were legally independent legal subjects (of public law), while others were organisational parts of legal persons.

The IMT declared some organisations as criminal, that however does not mean, that it held them criminally liable.<sup>9</sup> It did not impose any sentence to a criminal organisation. Concerning the effects of its judgement, it could be concluded that it was a case of collective criminal liability applied against their distinct members (if other conditions were fulfilled also),<sup>10</sup> not a case of criminal liability of a legal person.

The notion of criminal liability of legal persons in case of Nuremberg justice should be therefore rejected. No of these accused organisations was sentenced for a crime. The IMT considered the criminal organisations rather as a group that was created to commit crimes. Intending to avoid unwanted implications of broadly defined collective criminal liability, the IMT’s attitude in its judgement was restrictive and it did not consider the membership of all formal members of a distinct criminal organisation as criminals.

The IMT in its judgement, aside from the reasoning why it declared distinct organisation criminal, paid attention also to the specification of individuals in cases of which their membership was not criminal. In general, the IMT did not consider as criminal membership of persons such as administrative personnel etc. Specific conditions and exceptions are to be found in relevant parts of the IMT’s judgement.<sup>11</sup>

Based on the IMT’s power the Control Council Law No. 10 was issued, that stipulated that even mere “*membership in categories of a criminal group or organization declared*

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<sup>7</sup> Art. 6 of the Charter of the International Military Tribunal in Nuremberg: “... power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes ...” Similarly also art. 5 of The International Military Tribunal for the Far East Charter “...power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences...”

<sup>8</sup> Art. 6 of the Charter of the International Military Tribunal in Nuremberg: “In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.”

<sup>9</sup> See also MRÁZEK, J. *K boji s mezinárodní zločinností*. Praha: Academia, 1979. p. 185.

<sup>10</sup> See note no. 8 above.

<sup>11</sup> The Judgment of the International Military Tribunal in Nuremberg. In: *Yale Law School* [online]. [2020-09-24]. Available at: <<http://avalon.law.yale.edu/imt/judorg.asp#leadership>>.

*criminal by the International Military Tribunal*<sup>12</sup> is a crime punishable by the death penalty.<sup>13</sup> For that reason, there was no need to establish liability for a particular criminal act (it is hence an example of *nulla poena sine culpa* principle outweighing in favour of the interest of *material justice* – to punish holocaust and other crimes committed during the Second World War). But even this national law that followed the judgement of the IMT was not defining any punishments against the organisations as such.

After the dissolution of the IMT and the International Military Tribunal for the Far East, there was a quite long silence in the development of the criminal liability on the international level. Further developments in the field of international criminal law on the level of international criminal tribunals could be seen only after the end of the Cold War when new bodies of international criminal justice were created for trying perpetrators of crimes in the civil war within former Yugoslavia and of the genocide in Rwanda in the last decade of 20<sup>th</sup> century.

## 1.2 International Criminal Tribunal for former Yugoslavia

International Criminal Tribunal for former Yugoslavia (henceforth also only “ICTY”) developed (especially in *Tadić* case) doctrine of the *joint criminal enterprise*. ICTY was in its argumentation referring also to the IMT’s judgement, which was used as evidence for an international customary rule that prohibits membership in the joint criminal enterprise.<sup>14</sup> Every member of such an enterprise is criminally liable as co-perpetrator, and not as aider (abettor).<sup>15</sup> However, the author thinks that this institute is more similar to the IMT’s institute of common plan or conspiracy (art. 6 of the IMT’s Charter) than to the institute of the criminal organisation (art. 10 of the IMT’s Charter).

The difference of the joint criminal enterprise, in comparison to the criminal organisation, is in that the joint criminal enterprise has informal (not legally formalized) character. ICTY in the *Tadić* case defined three conditions of the *actus reus* of the joint criminal enterprise,<sup>16</sup> where the difference could be seen also in that the joint criminal enterprise can be created spontaneously, and in the case of the criminal organizations, these had legal subjectivity or were parts of such legal persons, but in both cases, they were legally formalized entities.

Based on the previous outlook it can be concluded, that nobody of international criminal justice declared any legal person criminally liable and the opposite is true – they were aware only of criminal liability of natural persons, either in its individual or in its collective form (which is rather an exception, but can be found in the development of international criminal justice).

<sup>12</sup> Control Council Law No. 10 z 20.12.1945, art. 2, § 1, p. d). [online]. In: *Yale Law School* [2020-09-24]. Available at: <<http://avalon.law.yale.edu/imt/imt10.asp#art2>>.

<sup>13</sup> Control Council Law No. 10 z 20.12.1945, art. 2, § 2, p. a). In: *Yale Law School* [online]. [2020-09-24]. Available at: <<http://avalon.law.yale.edu/imt/imt10.asp#art2>>.

<sup>14</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, § 194.

<sup>15</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, § 191-193.

<sup>16</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, § 227. It is a form of abetting in a crime. Closer e.g. VÁLEK, P. *Klíčová rozhodnutí mezinárodních trestních tribunálů ve světle mezinárodního práva*. Praha: C. H. Beck, 2009. pp. 47–54.

This situation was not changed by the ICTY case law, because even in case of the joint criminal enterprise neither this was declared a criminal liable, what is more, it even does not have to be a legally formalized organisation of property or persons.

Another question is the possibility to declare criminally liable heads of legal persons (e. g. managers of a company) for crimes committed by their inferiors. In such cases, the institute of *superior responsibility* (also known as *command responsibility*) could be applied. Such a possibility is considered as a characteristic trait of international criminal law. Nevertheless, it can be applied, again, only against natural persons in charge of a legal person (company, corporation), not against a legal person as such.

### 1.3 International Criminal court

Explicit restriction of jurisdiction *ratione personae* in the statutes of International Criminal Court (art. 25 of the International Criminal Court's Rome Statute), International Criminal Tribunal for Rwanda (art. 5 of the ICTR Statute) or International Criminal Tribunal for former Yugoslavia (art. 6 of the ICTY Statute) should be considered as of procedural, not of substantive nature. The conclusion about exclusion or inclusion of legal persons hence should not be derived from it. Nevertheless, the fact that the criminal liability of legal persons was a part of the discussion during the formulation of the ICC Rome Statute, and its result was not to include legal persons, reflects rather the absence of universal consensus about such rule.

The reason why states decided to explicitly restrict ICC's jurisdiction to natural persons could be found in the fact, that many contracting states of the ICC's Rome Statute did not have the notion of criminal liability of legal persons in their national legal systems and therefore it would be questionable how they would deal with legal persons if they had an obligation to try and punish them in their criminal system. The states, in general, are not very enthusiastic towards changes in their legal systems, what the more, many of them hold doctrinal traditions for which criminal liability of legal persons is unthinkable.

It should not be forgotten that according to the complementarity principle, the criminal proceedings should be undertaken primarily on the national level, and only when national authorities are inactive, unwilling or unable to try perpetrators the jurisdiction of the ICC should apply. Therefore it is likely that their reasoning had not normative (about what the international law is) but a rather pragmatic character, due to their concerns about the effectiveness of enforcement of ICC's Rome Statute provisions or their unwillingness to modify their distinct national laws.

But concerning the development on the national level that took place after Rome Statute (1998) in the legal systems of many states, the pragmatic or practical reasons which lead to explicit narrowing of its jurisdiction *ratione personae* are weakened. Possible revision of the ICC's Rome Statute is, therefore, an option, even though this is just a hypothetical, purely academic statement, as currently there are no formal proceedings to take this course.

However, even in cases of other tribunals and other bodies of international criminal justice, that did not have their jurisdiction explicitly limited to natural persons, there is no case of a legal person's criminal liability. Abovementioned thus rather indicates nonexistence of such international rule. This statement, however, must be examined once again

in the light of the Special Tribunal for Lebanon's decision, which was the first international criminal tribunal that held a legal person criminally liable.

## 2 SPECIAL TRIBUNAL FOR LEBANON

The real and explicit change was brought into a discussion in the year 2016 when the Special Tribunal for Lebanon (henceforth also only “the STL”) issued the first sentence against a legal person.

Art. 1 of the STL's Statute (which was adopted based on an agreement between the UN and Lebanon) is limiting its jurisdiction *ratione materiae* to the crime of *terrorism*, respectively its jurisdiction *ratione personae* to the perpetrators of the terroristic attack from 14<sup>th</sup> February 2005.

Despite the fact that it has limited jurisdiction to the crime of terrorism, it extended its jurisdiction also over *contempt* and *obstruction of justice* in art. 60bis of its Rules of Procedure and Evidence based on the doctrine of *inherent competencies*. This doctrine is allowing for a court to exercise also a jurisdiction that is subsidiary or secondary to its primary jurisdiction if such exercise is necessary to ensure its function in areas for which the judicial body was primarily created.<sup>17</sup> The STL claimed, that it has the competence to try also crimes that are not explicitly mentioned in the Statute or in the Rules of Procedure and Evidence (which is a document adopted by the STL itself, not by the UN and/or Lebanon). The expression of its competence in the art. 60bis is a demonstration and not a source of its competence to try a contempt and obstruction of justice.<sup>18</sup> Therefore it dismissed objections raised against its jurisdiction in this case or the extension of its jurisdiction *ratione materiae* in its Rules of Procedure and Evidence.

The procedure went through two instances, where the view on the extension of the STL's jurisdiction was somewhat different. The judge of the first instance – *the Contempt Judge* (*le juge compétent en matière d'outrage*) in case no. STL-14-05 was of the abovementioned view, hence it considered the STL as competent to try offences against the administration of justice. Nevertheless, the Contempt Judge was of the view that art. 60bis and therefore the STL's jurisdiction covers only natural persons (in the light of the *societas delinquere non potest* principle) and not *corporate entities*, where he considered as necessary the expressive formulation made by authors of the STL's Statute.

However, the Appeals Chamber held the view, that the application of interpretation principle *in dubio pro reo* was not necessary, because it considered that the inherent competencies covered also the competency to try a legal person.

This decision was not adopted unanimously and the dissenting judge agreed with the Contempt Judge on that the STL has inherent competencies to try a contempt (extension of jurisdiction *ratione materiae*), but not against a legal person (extension of jurisdiction *ratione personae*).

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<sup>17</sup> Case no. STL-14-05. Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24. July 2014. §§ 29-30.

<sup>18</sup> Case no. STL-14-05. Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 02. October 2014. § 32.

Concerning the international law, the dissent pointed to the fact, that the international criminal law was closest to the establishment of criminal liability of legal persons in the case of IMT's *criminal organisations*, but even in this case, it was impossible to declare a legal person criminally liable, but only its members – natural persons.<sup>19</sup>

In this case, the STL did not end with the statement that the legal person could be criminally liable under international law, but it defined also the *conditions for criminal responsibility of legal persons* that have to be met. The burden of proof lies on the prosecutor, who must:

- a) *“establish the criminal responsibility of a specific natural person;*
- b) *demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and*
- c) *prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.”*<sup>20</sup>

However it has to be stated, that when the STL was formulating these conditions it was looking into the Lebanese criminal law, due to its hybrid character – the STL has to decide primarily on basis of the Lebanese law, which should be then confronted with and interpreted in the view of international law. Therefore the conditions of criminal liability could be different in the field of international law, or in other words, it cannot be concluded from this decision, that these conditions of criminal liability are necessary the same also under the international law and neither the STL was trying to say that these are international law rules and conditions.

In the distinct case where the argumentation of the STL was presented the legal person was not held liable under the conditioned mentioned above.<sup>21</sup> But in the second case of contempt before the STL another TV station was sentenced to a fine of 6 000 €. When the STL was considering the amount of fine, it took into account the principles of retribution and deterrence as well as the novelty of sentencing a legal person for contempt by an international tribunal, the foreseeability of the range of fines as set out in the Lebanese Law of Publications, as well as the separate penalty already imposed on an individual (natural person) – its journalist.<sup>22</sup>

Disputed was the amount of penalty (the prosecutor requested a fine of 127 000 €), not the other types of penalties. The art. 60bis is allowing to impose only a fine or imprisonment. The second is due to its character, obviously, not executable, thus not applicable in cases of legal persons. The STL did not close the question if the international law allows imposing other types of punishment (like mandatory surveillance or winding-up) hence

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<sup>19</sup> Case no. STL-14-05. Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 02. October 2014. Dissent § 17, 19.

<sup>20</sup> Case no. STL-14-05, Public Redacted Version of Judgment, 18. September 2015. § 72.

<sup>21</sup> Case no. STL-14-05, Public Redacted Version of Judgment, 18. September 2015.

<sup>22</sup> Case no. STL-14-06, Reasons for Sentencing Judgment, 05. September 2016. §§ 21, 24.

this question remains a subject to discussion.<sup>23</sup> The STL's decision, may indicate a start of a new trend on an international level. The multinational and supranational legal persons (corporations) should be aware of the possibility of their liability under international law. The attitude which took the STL can be accepted by following international criminal tribunals. The establishment of their criminal liability only on the national level can be confronted with difficulties, mainly in cases of the less powerful members of international community. Also with regard to this decision they should be more aware of this possibility.

The notion of criminal liability on international law is hence already formulated, however, there is still a long way for it to become a generally accepted institute of the international criminal law. This institute, however, could, with connection to the universality principle, form a powerful tool for the international community in its struggle against international criminality.

That is because the international criminal law sanctions are not based on the principles of civil law's restitution, compensation or satisfaction, but on principles of repression, protection or protection. The intensity of a criminal sanction is, therefore, unlike in case of civil sanction, not necessarily proportional to caused damage or injury (e.g. for a human right violation), but its proportionality is measured with regard to other aspects to fulfil the criminal law functions – that could lead to the imposition of significantly harsher sanctions for companies than they face in other branches of law, international law including.

### 3 INTERNATIONAL LAW COMMISSION

From the field of the development and codification of international law important in this area is an outcome of International Law Commission (hereinafter only “the ILC”) – the formulation of *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (also known as the Nuremberg principles, 1950). Within its content the art. 1 says:

*“Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”*<sup>24</sup>

In the ILC's report, the term *person* was understood in conformity with its understanding in the IMT's Charter and its judgement – as a natural person. Either as an individual perpetrator or as a member of an organisation, but the organisation itself was not considered as a person in a criminal law context. The ILC highlighted the opinion stated in the IMT's judgement, that crimes under international law are perpetrated by men, not by abstract entities. By abstract entities the IMT, as well as the ILC, meant a state and its bodies (hence legal persons of public law), however, this excludes logically also legal persons

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<sup>23</sup> With regard to discussion about penalties to legal persons see e. g. KAEB, C. The Shifting Sands of Corporate Liability under International Criminal Law In: *George Washington International Law Review*, 2016, Vol. 49, No. 2. pp. 386–396. Further examination of STL's argumentation and discussion about its findings is beyond the scope of this article and could be found e. g. in MAREČEK, L.: Criminal Responsibility of Legal Persons Introduced by the Special Tribunal for Lebanon In: *Pécs Journal of International and European Law*. Vol. 2017, No. 2. pp. 62–70. [online]. [2020-09-24]. Available at: <<http://ceere.eu/pjiel/wp-content/uploads/2018/01/04.pdf>>.

<sup>24</sup> *“Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.”*

of private law, who are also abstract entities.<sup>25</sup> This conclusion was not changed what is more, it was confirmed, also on other sessions of the ILC, in which it discussed the notion of persons liable under the international criminal law.<sup>26</sup>

The fact is that the ILC later (from 1963,<sup>27</sup> more intensively from '70s<sup>28</sup>) included in its work the consideration of a criminal liability not limited only to natural persons. To be specific it considered an extension of liability for crimes also to other entities – to states – where it formulated new concept – *the international crime* – which was eventually included into the Draft Articles on State Responsibility (2001) as the *Serious breaches of obligations under peremptory norms of general international law*.<sup>29</sup>

It is necessary to note that the ILC considered the responsibility of states as such which is applied through *attributability* (conditions are described in art. 4–11 of the Draft Articles on State Responsibility), in other words possibly also for the behaviour of legal persons. This behaviour does not need to be only a perpetration of a crime under international law – therefore a) it is not a criminal liability and b) the topic of discussion was not the liability of its bodies (respective public authorities) as such, all the more not the liability of legal persons of private law (private companies).<sup>30</sup>

Therefore the criminal liability of legal persons was not the main topic until year 2016, when the ILC on its 68<sup>th</sup> session started to explicitly discuss this issue and that was within the preparation of the *Draft Articles on Crimes against Humanity*.

The ILC included the obligation of the state to criminalise the crimes under international law on the national level and it concluded that the consensus was found on that it is a matter of state's discretion if it will choose the criminal, administrative or civil form of

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<sup>25</sup> *Report of the International Law Commission on its Second Session*, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), Extract from the Yearbook of the International Law Commission: 1950, vol. II. p. 374. To the issue see also Kelsen's theory, e.g. PORTMANN, R. *Legal Personality in International Law*. New York: Cambridge University Press, 2010. pp. 173–175.

<sup>26</sup> Compare the Draft Code of Offences against the Peace and Security of Mankind. *Report of the International Law Commission on its Third Session*, 16 May to 27 July 1951 Official Records of the General Assembly, Sixth Session, Supplement No.9 (A/1858). Extract from the Yearbook of the International Law Commission: 1951, vol. II. p. 134.; but also e.g. *Report of the International Law Commission on the work of its forty-second session*, Extract from the Yearbook of the International Law Commission: 1990 Document: vol. II(2) 1 May – 20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10. p. 13, 15., where the ILC wrote about crimes, that could be committed by individuals or groups, as well as the discussion on individual and collective criminal liability, where the conclusion was that the participation in organisation is an aggravating circumstance but not that the organisation itself is criminally liable. Further see also e.g. *Report of the International Law Commission Covering the Work of its Sixth Session*, 3, 28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693). Extract from the Yearbook of the International Law Commission: 1954, vol. II. p. 150.

<sup>27</sup> *Report of the International Law Commission on the work of its Fifteenth Session*, 6 July 1963, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509). Extract from the Yearbook of the International Law Commission: 1963, vol. II. pp. 244 and 259.

<sup>28</sup> *Report of the International Law Commission on the work of its twenty-fifth session*, 7 May–13 July 1973, Official Records of the General Assembly, Twenty-eighth session, Supplement No. 10. Extract from the Yearbook of the International Law Commission: 1973, Vol. II. p. 172.

<sup>29</sup> CRAWFORD, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. New York: Cambridge University Press. pp. 16–20, 35–38.

<sup>30</sup> ŠTURMA, P. *Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva*. Praha: Karolinum, 2002. pp. 11–16.

liability.<sup>31</sup> The art. 6 (8) applies only to legal persons and not to natural persons. Concerning natural persons, the legal obligation of states is to declare them criminally liable. States do not have such discretion to choose the form of liability as in case of legal persons.<sup>32</sup>

The art. 6 (8) of the Draft Articles on Crimes against Humanity reads as follows:

*“Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.”*<sup>33</sup>

The ILC adduced as a reason for such alternative formulation of the obligation in the article 6 (8) that the criminal liability of legal persons is indeed part of several states legal systems, however, such institute is still unknown for many other states,<sup>34</sup> hence it is still not a universally applied regime of liability of legal persons for their conduct.

The ILC is also of the view<sup>35</sup> than even on the level of the international criminal law such notion is not typical nor traditional. It noted that *“Nuremberg tribunal’s criminal organisations”* were not declared criminally liable, and criminally liable were declared only the natural persons. Neither other bodies of international criminal justice (other international tribunals) were not competent and did not declare any legal person as criminally liable, with exception to the STL.

It observes also that legal persons are not considered as criminally liable under a series of international treaties addressing crimes. These treaties rather allow states to determine the punishment, based on the circumstances of the particular offender and offence. However with exceptions as e. g. in the protocol amending the statute of the African Court of Justice and Human Rights.<sup>36</sup>

The ILC confirmed, that the term *“person”* should be interpreted in the usual meaning that it has in the criminal context and not in general as including legal persons. The ILC, therefore, divides the paragraph 8, where it uses the term *“legal persons”* explicitly, and other parts of the Draft Articles on Crimes Against Humanity, where the term *person* should be understood only as a natural person.<sup>37</sup>

<sup>31</sup> *Report on the work of the sixty-eighth session (2016)*, 2 May–10 June and 4 July–12 August 2016. General Assembly Official Records Seventy-first session Supplement No. 10 (A/71/10). pp. 245 and 248.

<sup>32</sup> See also *Report on the work of the sixty-eighth session (2016)*, 2 May–10 June and 4 July–12 August 2016. General Assembly Official Records Seventy-first session Supplement No. 10 (A/71/10). p. 265, or *Third report on crimes against humanity* By Sean D. Murphy, *Special Rapporteur* (A/CN.4/704). p. 16. Note that art. 6 (8) was in working version of the Draft Articles counted as art. 5 (7).

<sup>33</sup> *“Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.”* *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 14.

<sup>34</sup> *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 73.

<sup>35</sup> *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). pp. 73–74.

<sup>36</sup> *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). pp. 74–75.

<sup>37</sup> *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 73.

The current status of legal persons according to the ILC is that the states must declare them liable for crimes under international law, but this liability does not have to be a criminal one.

The formulations of the ILC implies also, that it is rather a rule addressed to states to try and sentence legal persons<sup>38</sup> and not a rule that is aimed directly to legal persons as such. In other words, legal persons are addressed by the international law indirectly through states' compliance and if the state will not obey the rule, only a state will bear liability, without direct effects to a subject of internal law – to distinct legal persons.

This conclusion is supported by the fact that it is upon a decision of a state if it will establish liability of legal persons of criminal, civil or administrative nature. Hence the criminal liability of legal persons is not derived directly from international law, otherwise, the state (with regard to the universality principle and obligation *aut dedere, aut judicare*) would have the obligation to establish the criminal liability, without the possibility of developing a liability under a different legal regime.

Moreover, the ILC about legal persons is not using term *crimes* but term *offences*. This term is in international criminal law used in two ways – as offences against the administration of justice, where the criminal liability derives directly from international criminal law, however they are covering the conduct not aimed against core values protected by international substantial law, but rather protecting the effectiveness of the international criminal procedure. The second way is in the description of incorporation obligations of states – to incorporate distinct crimes or definitions into their distinct national legal systems.

In this second case an individual is not direct, but indirect addressee of international rule, which is primarily addressed to states. Hence, its criminal liability cannot derive from international law. The author believes that this is the case also in art. 6 (8) of the Draft articles on Crimes against Humanity.

The formulation of art. 6 (1) could be noted, which says that “*Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.*”<sup>39</sup> The difference between art. 6 (8) and the other paragraphs of art. 6 (that are about natural persons) is in that, there is the obligation to incorporate crimes against humanity as offences under international law (as crimes), whether the art. 6 (8) gives states the discretion to choose appropriate measures, which could be not only of criminal but also of civil or administrative kind.

Furthermore, the ILC does not define the term “legal person”, therefore not only the form of liability but also its subjectivity will be determined upon the national law (with observance to good faith in fulfilling of their obligations) and not directly upon a rule of the international law.<sup>40</sup>

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<sup>38</sup> Compare *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 76.

<sup>39</sup> *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 13.

<sup>40</sup> Compare *Report of the International Law Commission Sixty-ninth session*, 1 May–2 June and 3 July–4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). p. 76.

In sense of aforesaid, it is not possible to speak about international criminal liability of legal persons. The question, how an international criminal tribunal should deal with this issue has not been resolved yet, however the author thinks that according to principles of international criminal justice (namely to *nullum crimen sine lege* and *in dubio pro reo*) an international criminal tribunal should not establish a criminal liability against a legal person until this question will be resolved clearly and explicitly.

## CONCLUSION

The limited legal subjectivity of individuals is today generally accepted and in some areas, like international human rights law, the legal persons are considered as a part of this term. Such a notion was not possible to be seen in the field of international criminal law.

Legal persons (and their organisational parts) were dealt with the IMT, but not in sense of establishing an individual criminal liability under international law. It cannot be said, that the IMT declared legal persons (so-called *criminal organisations*) as criminal liable, it was rather an overweighting of a *nulla poena sine culpa* principle towards collective criminal liability that derived from the IMT's Charter towards natural persons – members of such organisations – in adjacent national legislation.

The breaking point is the year 2016 when the sentencing judgement of the STL became final, which as a first international criminal tribunal which recognised itself as competent to establish a criminal liability of the legal person.

The STL was in the beginning reluctant to extend its jurisdiction *ratione personae* over legal persons, even though it was not so hesitant with its extension *ratione materiae* over contempt and obstruction of justice.<sup>41</sup> The final decision came from the STL's Appeals Chamber that extended its jurisdiction *ratione personae* with reference to Lebanese law as well as to general rules of interpretation.

Whatever situation was before the STL's decision, its decision could serve as an important impulse for further development of international criminal law. Other international criminal tribunals or international institutions will be in front of a question to accept or reject such argumentation and the existing notion of the criminal liability of legal persons on the international level.

This is not relevant to the ICC or other international criminal tribunals that have their jurisdiction explicitly narrowed to natural persons. But even concerning the fact, that the ICC's Rome Statute is a result of rather pragmatic and not normative considerations and to advantages that criminal liability of legal persons brings, the acceptance is plausible.<sup>42</sup>

<sup>41</sup> Case no. STL-14-05/PT/CJ – F0054/20 140724/ROO 1208-ROO 1242/EN/dm. § 65.

<sup>42</sup> SALAND, P. International Criminal Law Principles In: *The International Criminal Court: Making of the Rome Statute*. pp. 189 and 199. Cit. as in KAEB, C. The Shifting Sands of Corporate Liability under International Criminal Law. *George Washington International Law Review*, 2016, Vol. 49, No. 2. pp. 377–378.

To the open questions belongs the attributability of conduct, proving of *mens reus*,<sup>43</sup> what character or what form the penalties should have. Hence there is not only a question if the criminal liability of legal persons will exist in the international law, but also how and in what form these and many other related questions will be resolved.

Even from works of the ILC derives the conclusion, that a rule that establishes the criminal liability of legal persons is not unambiguously determined and the form of their liability (criminal, civil or administrative one) remains within a state's discretion. However, the fact that the (planned) obligation of the state to establish some kind of liability for committed crimes against humanity against legal persons remains indisputably a development within the field of international criminal law.

If the international community will decide to the way of establishing of criminal liability of legal persons, it will gain a powerful tool by which it will be able to influence the behaviour of multinational corporations that are increasingly more and more influencing the state of affairs in the international system.

Even today the liability of legal persons is becoming a norm in cases of human rights violations.<sup>44</sup> Violations of human rights in serious cases, as part of a widespread or systematic attack directed against the civilian population, could form a crime against humanity. It is only desirable if the multinational corporations will be aware not only of their social responsibility but also of potential criminal liability for such violations and the implications that follows from it like the application of the universality principle, with keeping in mind that criminal sanctions are harsher than sanctions in other fields of law.

From the principle of universality derives the obligation and right of all states of international community to try and sentence such persons. Among common sentences that are imposed on legal persons are e.g. forfeiture of property or winding-up of a company. According to this principle, any state is competent to impose such penalty, including a state of their domicile or a state in which is their property located. This is highly important since many multinational corporations are usually resident in the “global north” whereas the human rights violations from their side are in the “global south.”<sup>45</sup> In the hemisphere where are many members of the international community, that are incapable to enforce effective sanctions against them.

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<sup>43</sup> In French attitude court must find all elements of the offense in one individual as corporation lack minds, whereas in US corporations are seen as fully independent entity with personality of their own. See e. g. TRIPONEL, A. Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad. In: *Proceedings of the New York University 61<sup>st</sup> Conference on Labor*, p. 80. SKUPSKI, G. The Senior Management Mens Rea: Another Stav at a Workable Intergration of Organizational Culpability into Corporate Criminal Liability. In: *Case Western Reserve Law Review*, 2011, Vol. 62, No. 1. pp. 263–265. Cit. in KAEB, C. The Shifting Sands of Corporate Liability under International Criminal Law. In: *George Washington International Law Review*, 2016, Vol. 49, No. 2. p. 385.

<sup>44</sup> E. g. also in cited case *Kiobel v. Dutch Petroleum* the corporate liability concerned Royal Dutch Petroleum's alleged complicity in human rights violations in their extractive operations in Nigeria. See KAEB, C. The Shifting Sands of Corporate Liability under International Criminal Law In: *George Washington International Law Review*, 2016, Vol. 49, No. 2. p. 360.

<sup>45</sup> KYRIAKAKIS, J. Corporations before International Criminal Courts: Implications for the International Criminal Justice Project. In: *Leiden Journal of International Law*, 2017, Vol. 30, No. 1. pp. 231–232. The populations of “the global south” are today witnesses to prosecutions only of their own co-citizens or leaders and that is why international criminal justice (namely the ICC) is often accused of prejudice against Africa. By prosecution of such corporations the international criminal justice could gain higher legitimacy in the public view of “global south.”