

PRÁVO V PODNIKÁNÍ VYBRANÝCH ČLENSKÝCH STÁTŮ EU

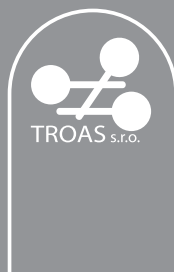
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ODPOVĚDNOST OBCHODNÍCH SPOLEČNOSTÍ PŘED MEZINÁRODNÍMI TRESTNÍMI SOUDY

LIABILITY OF COMPANIES BEFORE INTERNATIONAL CRIMINAL COURTS

Abstrakt: U odborné veřejnosti bývá účelnost trestní odpovědnosti obchodních korporací často zpochybňována, byť je i tak její zakotvení na úrovni vnitrostátního práva na vzestupu. Sporné však zůstává, zda lze i v rovině mezinárodněprávní tuto odpovědnost zakotvit a pokud ano, zda to lze vůbec očekávat. Historicky první případ dle mezinárodního práva, v němž byla dovozena trestní odpovědnost právnické osoby, představoval Norimberský proces před Mezinárodním vojenským tribunálem. Byl to však až Zvláštní tribunál pro Libanon, jenž dovedl trestní odpovědnost obchodní korporace dle mezinárodního práva. Vzhledem k tomu, že právní základ zřízení tohoto *ad hoc* soudu se neliší od jiných stálých mezinárodních trestních soudů, nelze ani v budoucnu podobné spory týkající se obchodních korporací vyloučit.

Abstract: The purposefulness of criminal liability of commercial companies is still questioned by many scholars. Nevertheless, it cannot be denied that such regulations are more and more frequent in domestic law. The question is whether such liability is also possible under international law and whether it is something that we should expect in the near future? The first case in which an international criminal court tried legal persons of domestic law was the Nuremberg Trial before the International Military Tribunal. None of them, however, was a commercial company. Since then, many international criminal courts have been established around the world. The first one that decided on the admissibility of judging commercial companies was the Special Tribunal for Lebanon. However, an examination of the regulation of its statutory jurisdiction shows that it is no different from several other international criminal courts. This leads to the conclusion that further cases of commercial companies being tried by various international criminal courts cannot be ruled out even without the need to amend their statutes.

Klíčová slova: *trestní odpovědnost obchodních společností, mezinárodní trestní soudy, odpovědnost obchodních společností před mezinárodními trestními soudy, Zvláštní tribunál pro Libanon, Mezinárodní vojenský tribunál.*

Key words: *criminal liability of companies, international criminal courts, liability of companies before international criminal courts, Special Tribunal for Lebanon, International Military Tribunal.*

Introduction

The rationale behind holding companies criminally liable (both under domestic and international law) is still strongly contested in legal literature.¹ Nevertheless there has been much progress in legislation of many states towards introduction of such liability.² In is quite popular in common law states. For example in the United States it began to spread since the judgement of the Supreme Court in the *New York Central* case. This approach also gains popularity in Europe.³ However, in international law until recently it seemed quite obvious that corporations do not bear international criminal liability, or at least that none of the modern international criminal courts had jurisdiction over juridical persons. In 2013 H. van der Wilt expressed the view that corporations still have no international criminal responsibility.⁴ The breakthrough came before the Special Tribunal for Lebanon, which was created to investigate and prosecute the assassination of the former Lebanese Prime Minister R. Hariri, along with more than 20 other people in the Beirut bombing of February 14, 2005 (Article 1 of the Statute of the Special Court for Lebanon). Since holding companies legally accountable for breaching against the standards of corporate social responsibility⁵ is problematic, international criminal liability may be an attractive alternative.

1. The International Military Tribunal

Before I discuss the breakthrough in the jurisprudence of the Special Tribunal of Lebanon, I want to mention the heritage of the International Military Tribunal and the Nuremberg trial, which opened the door to this possibility. In the Nuremberg trial, apart from judging the main war criminals, the International Military Tribunal, in accordance with its Charter,⁶ had a competence to declare whole organizations criminal (Article IX). In case of such declaration by the Tribunal, the competent national authorities had the right to bring individuals to trial for membership in such organization and the nature of those organizations was considered proved and couldn't be questioned (Article X). The purpose of this principle was to limit the number of trials.⁷ The accused organizations included NSDAP (Nationalsozialistische Deutsche Arbeiterpartei), SS (die Schutzstaffel der NSDAP), SD (Si-

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- 1 See for example FRANCIS, J. F.: Criminal Responsibility of Corporations. *Illinois Law Review*, No 8, 1923-1924, at 307; HASNAS, J.: The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability. *American Criminal Law Review*, No 46, 2009; KHANNA, V. S.: Corporate Criminal Liability: What Purpose Does it Serve? *Harvard Law Review*, No 7, 1996; KARSKI, K.: *Osoba prawna prawa wewnętrznego jako podmiot prawa międzynarodowego*. Warszawa 2009, at 216-217; HEINE, G.: *Odpowiedzialność prawno-karna podmiotów zbiorowych w prawie niemieckim*, [in:] ESER, A. ZOLL, A. (red.): *Prawo karne a problem zmiany ustroju politycznego*, Kraków 1998.
 - 2 This article builds on the chapter VI of ZIEMBLICKI B.: *Status korporacji transnarodowych w prawie międzynarodowym*. Warszawa: C.H. Beck, 2020.
 - 3 KEITH, N. WALSH, G.: International Corporate Criminal Liability, *World Focus*, Vol 8 No 3; SPISAROVÁ, S.: Přičitatelnost trestného činu právnické osobě. *Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k X. ročníku mezinárodní vědecké konference*, 1. vydání. Praha: TROAS, s.r.o., 2018.
 - 4 VAN DER WILT, H.: Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities. *12 Chinese Journal of International Law*, No. 12, 2013, 44.
 - 5 See for example SPISAROVÁ, S.: Společenská odpovědnost podnikatelů aneb slušné chování se vyplácí. *Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k XI. ročníku mezinárodní vědecké konference*, 1. vydání. Praha: TROAS, s.r.o., 2019.
 - 6 Annex to the Agreement on the Prosecution and Punishment of the major war criminal of the European Axis, signed in London, Aug. 8, 1945, by the United Kingdom, the United States, France and the Soviet Union.
 - 7 KARSKI, K. *op. cit.*, at 219.

cherheitsdienst des Reichsführers SS), and Gestapo (Geheime Staatspolizei), as well as the Reich government, NSDAP Assault Units – SA (die Sturmabteilungen der NSDAP), the General Staff and the Supreme Command of the Armed Forces. It is noteworthy that none of them still existed during the trial.⁸ The first four of them were declared by the Tribunal to be criminal organizations.⁹ All of the accused organizations were of political and military natures – not business entities. It should also be mentioned that the Allied Control Council decided that only the International Military Tribunal had the right to declare organizations criminal¹⁰ – military courts of Allied states did not (Article III of the Directive no 9 of the Allied Control Council)¹¹. Despite having such a competence by the Tribunal, and even having used it, it has famously stated, that “*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*”¹²

It should be noted that in the main Nuremberg trial for the first time the international court ruled on the criminal nature of juridical persons of domestic law (NSDAP, SS, SD, Gestapo) and also that in other Nuremberg trials people were judged and punished for criminal aspects of economic activity (*Flick, Krupp* and *IG Farben* cases).¹³ However, these two cases did not coincide, i.e. there has been no trial on the criminal nature of economic entities nor on criminal liability for belonging to them. It seems though, that it was possible and that there were no legal obstacles to such proceedings. Simply it was decided otherwise and one should keep in mind that it was a situation without precedence, therefore contained important elements of improvisation. This does not change the fact that the only competence of the International Military Tribunal in relation to juridical persons was to declare them criminal organizations. No penalties could be imposed against them. Moreover, none of the tried organizations existed at the time of the trial. The very reason for which juridical persons were judged was motivated by a pragmatic approach - the need to bring a large number of natural person to individual criminal liability. For this reason, conscious and voluntary membership in criminal organizations has become punishable. It should be emphasized that only the International Military Tribunal had competence to decide on the criminal nature of organizations, and the courts of individual states were not (neither did the International Military Tribunal for the Far East).

The importance of the above-discussed trial before the International Military Tribunal for the potential legal international criminal liability of multinational corporations should be appreciated. It was undoubtedly proceeding before an international criminal court. The defendants were juridical persons of domestic law, and from a formal point of view, there could have been economic entities among them, including multinational corporations. Ju-

8 Ibid, at 228.

9 Ibid, at 223.

10 Article II(1)(d) of the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

11 Directive no. 9 of the Allied Control Council, Developing Measures and Procedures Regarding Major War Criminals of European Axis, Enactments and Approved Papers of the Control Council and Coordinating Committee, Volume 1, Aug. 30, 1945.

12 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (the Blue Set), Military Legal Resources, vol. 22, 466 (Aug. 22, 2020) https://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html.

13 The United States of America vs. Friedrich Flick, et al. (US Military Tribunal, 1947); The United States of America vs. Carl Krauch, et al. (US Military Tribunal, 1948); The United States of America vs. Alfred Krupp, et al. (US Military Tribunal, 1948).

ridical persons under domestic law were not only tried, but half of them were convicted. It should also be mentioned, that the substantive legal basis of this judgment was not any treaty of international law previously adopted by the Third Reich, but the newly codified Nuremberg Principles,¹⁴ which stated the existence of norms on the responsibility for crimes of international law. Its wording in no way precluded the possible criminal liability of corporations under international law.

2. The Special Tribunal for Lebanon

The first goal in the preamble of the United Nations Charter¹⁵ to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind” was not realized. Therefore, over time, beginning in the 1990s, it became necessary to set up more international criminal courts: International Criminal Tribunal for the former Yugoslavia (1993), International Criminal Tribunal for Rwanda (1994), Special Court for Sierra Leone (2002), International Criminal Court (2002), Special Tribunal for Lebanon (2009), International Residual Mechanism for Criminal Tribunals (2012) and Residual Special Court for Sierra Leone (2013). Until recently none of them ever tried a juridical person and much less – an economic entity. The breakthrough occurred before the Special Tribunal for Lebanon in two cases - *New TV S.A.L.*, *Karma Mohamed Tahsin Al Khayat*¹⁶ and *Akhbar Beirut S.A.L.*, *Ibrahim Mohamed Ali Al Amin*.¹⁷ In both of them the court of first instance (Contempt Judge) ruled, that legal persons were not subject to its jurisdiction, and the Appeals Panel overturned those decisions.

It should be noted here that pursuant to Rule 60bis of the Rules of Procedure and Evidence¹⁸ the Tribunal had jurisdiction not only over persons involved in the assassination of the prime minister and his entourage, but also in cases related to obstruction of justice. In the first case, the TV station revealed secret personal data of witnesses in the trial, and also did not comply with the court’s order to remove the reports on the proceedings from its website and YouTube channel. In the second case, the publishing house also published classified data of witnesses. In both cases, in the first instance it was Judge Lettieri who delivered the decisions and in both cases he decided that the Tribunal had no right to rule on criminal liability of juridical persons. It is noteworthy that the first instance judgment in the second case was delivered after the judgement in the first case was already overturned by the Appeals Panel. Yet, the judge did not change his mind.

The rationale behind the decisions of the Appeals Panel was very interesting. It ruled that the spirit of law and not its literal wording should be decisive. According to the Rule 3 (A) of the Rules of Procedure and Evidence, the Rules should be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, with (i) the principles of

14 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I) New York, Dec. 11, 1946; Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, Yearbook of the International Law Commission 1950, vol. 2, 374–378.

15 United Nations Charter, San Francisco, Oct. 24, 1945.

16 *New TV S.A.L.*, *Karma Mohamed Tahsin Al Khayat*, STL-14-05/PT/AP/AR126.1 (Special Tribunal for Lebanon, Oct. 2, 2014).

17 *Akhbar Beirut S.A.L.*, *Ibrahim Mohamed Ali Al Amin*, STL-14-06/PT/AP/AR126.1 (Special Tribunal for Lebanon, Jan. 23, 2015).

18 Special Tribunal for Lebanon Rules of Procedure and Evidence.

interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure. However, according to Rule 3 (B) any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration. The court of first instance decided that the ambiguity as to jurisdiction over juridical persons exists and has applied Rule 3 (B). However, the court of second instance took the view that ambiguity did not exist. It stated that the rules of interpretation from the Vienna Convention on the Law of Treaties do not determine that the term “person” is limited to natural persons. On the contrary, it usually means both natural and legal persons in law.¹⁹ As for human rights, the Tribunal has pointed out that corporations (it specifically used the word “corporations”) are actually subjects of international law²⁰ and that judicial remedies are not barred against legal persons.²¹ As for international criminal law, it came to the conclusion that the Statute of the International Criminal Court does not constitute a codification of that area of law, and its lack of jurisdiction over juridical persons is not the only legally permissible option.²² Finally, regarding the Lebanese domestic law, the Code of Criminal Procedure did not regulate this issue, while the Criminal Code provided for the punishment of juridical persons.²³ As a result of the above analysis, the Tribunal recognized its jurisdiction over juridical persons.

In the case of *New TV S.A.L., Karma Mohamed Tahsin Al Khayat*, the Appeals Panel ruled in the above manner by a two-to-one majority, and a dissenting opinion was submitted by Judge Akoum. He argued that the spirit of the law is not *carte blanche*, allowing for any interpretation. Judge Lettieri, ruling in the second case (*Akhbar Beirut S.A.L., Ibrahim Mohamed Ali Al Amin*), took the opportunity to respond to the majority position of the court of second instance in the first case. He strongly criticized it, comparing it to the standards of adjudication in totalitarian systems. In this case, judges Hrdličková and Nosworthy, whose votes determined the decision in the first case, again sat on the Appeals Panel. The third judge, Chamseddine, also supported their position, so it was made unanimously.²⁴ Eventually the television station was acquitted and the publishing house was sentenced to a fine of EUR 6,000. The above cases are the first in which modern international criminal court ruled on criminal liability of juridical persons.

19 *New TV S.A.L., Karma Mohamed Tahsin Al Khayat*, para. 42, 44.

20 *Ibid.*, para. 46.

21 *Ibid.*, para. 48.

22 *Ibid.* para. 66.

23 *Ibid.* para. 68-69; VENTURA, M. J.: The Prosecution of Corporations before a Hybrid International Criminal Court, *African Journal of International Criminal Justice*, No. 1-2, 2016, 74-76 (2016); MAREČEK, L.: Criminal Responsibility of Legal Persons Introduced by the Special Tribunal for Lebanon, *Pécs Journal of International & European Law*, No. 2, 2017, 62-65.

24 VENTURA, M. J. *op. cit.*, at 76-77.

3. The Jurisdiction of Modern International Criminal Courts

It is true, that the consequences for companies in the first criminal cases of juridical persons before an international court were not serious. One company was acquitted and the other had to pay only EUR 6,000. But in a broader picture it was a dramatic change of approach to criminal liability of companies in international law. It is a clear signal, that companies are subjects to international criminal liability. What is particularly important is that the Statute of the Special Tribunal for Lebanon did not explicitly mention such liability. It did not differ in this regard from the statutes of some other international criminal courts. Article 1 of the Statute of the Special Tribunal for Lebanon regulates jurisdiction over “persons responsible for the attack of 14 February 2005”. Rule 60 bis of the Rules of Evidence and procedure regulates the “power to hold in contempt any person”. Similarly, the Statute of the Special Court for Sierra Leone, which is an annex to the Agreement between Sierra Leone and the United Nations of 16.1.2002, does not indisputably exclude the court’s jurisdiction over legal persons. Article 1 of the Agreement and article 1 (1) and (3) of the Statute regulate jurisdiction over “persons” and not “natural persons”. The same is true for the Statute of the Residual Special Court for Sierra Leone.²⁵ However, the liability of only natural persons may be suggested by the wording providing only for “individual criminal responsibility”.²⁶ What other purpose could such a wording have than to limit the jurisdiction of the Court to natural persons? Also in the Statute of the United Nations Mechanism for International Criminal Tribunals, the term “natural” was skipped and the jurisdiction simply applies to “persons”.²⁷ In practice, however, there was no case of a juridical entity being tried by the Special Court for Sierra Leone. In addition, if such a situation were to occur, the only penalty that the Court could impose would be forfeiture, and even that is doubtful, since the provision stipulates that this penalty is imposed in addition to the penalty of deprivation of liberty, which, after all, cannot be imposed on a juridical person (Article 9 paragraph 3 of the Statute).

It is only the Statutes of the International Criminal Tribunal for the former Yugoslavia²⁸ and International Criminal Tribunal for Rwanda²⁹ which explicitly limited the jurisdiction of the courts to natural persons. In the past the same was true for the International Military Tribunal for the Far East.³⁰ Also the International Criminal Court, which has the widest geographical coverage,³¹ has no jurisdiction over legal persons (Article 25 (1) of the International Criminal Court Statute), although it was not obvious during preparatory works on this treaty.³²

25 Article 1(1) of the Statute of the Residual Special Court for Sierra Leone (appendix to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Residual Special Court for Sierra Leone (2010)).

26 The title of Article 6 of the Statute.

27 Article 1(1-5) of the Statute of the International Residual Mechanism for Criminal Tribunals, Resolution 1966 (2010) adopted by the Security Council at its 6463rd meeting, on Dec. 22, 2010, U.N. Doc. S/RES/71966 (2010).

28 Article 6 of the Statute of the International Criminal Tribunal for former Yugoslavia, Resolution 827 adopted by the Security Council at its 3217th meeting on May 25, 1993.

29 Article 5 of the Statute of the International Criminal Tribunal for Rwanda, annex to the Resolution 955 adopted by the Security Council at its 3453rd meeting, Nov. 8, 1994.

30 Article 5 of the Charter of the International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946.

31 Although three of the most powerful states in the world (United States, China and Russia) did not submit to its jurisdiction.

32 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Part I: Draft Statute for the International Criminal Court, 1998, U.N. Doc. A/CONF.183/2/Add.1, 49.

In conclusion of this part, it must be said that because of the two recent decisions of the Special Tribunal of Lebanon, companies can no longer consider themselves immune from the jurisdiction of international criminal courts. Only some of them (for the former Yugoslavia, Rwanda and the International Criminal Court) explicitly exclude jurisdiction over legal persons. In other courts such liability is theoretically possible. And, ever since the adoption of the Nurnberg Principles, substantive international criminal law binds everyone. Tribunal for Lebanon also expressed the view that corporations do have international legal subjectivity at least in the area of international human rights. It is true that it referred to individual companies rather than whole multinational corporations, but it was already explained that (unfortunately still) law (both domestic and international) generally applies to such companies instead of whole corporations, therefore affects only parts of those corporations.

Conclusion

The rationale behind criminal liability of commercial companies is controversial and is contested by many researchers. However, the reality is that it is gaining popularity all over the world in domestic law. Until recently it seemed that international law did not follow this path and that companies cannot be held criminally liable before international criminal courts. The first such court which was capable of judging legal person was the International Military Tribunal in Nuremberg. None of those legal persons, which were brought to justice before that court, was actually a commercial company.

In the last three decades many new international criminal courts were established. Statute of none of them explicitly mentions jurisdiction over legal person, much less companies. However, one of them, namely the Special Tribunal for Lebanon, decided (on the appeal) that it does and actually did so already twice. That was not without controversies, as the court of first instance did not agree with this approach in either of the cases. These cases show that it may happen in the future that also other contemporary international criminal courts begin to interpret their jurisdiction as inclusive with respect to commercial companies. That would be a revolution in international criminal liability. The time will show whether it becomes the reality.



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