STATE CAPTURE IN THE INTEREST OF TELECOMMUNICATION COMPANIES? RESPONSIBILITY OF TRANSNATIONAL AND MULTINATIONAL TELECOMMUNICATION COMPANIES FOR CORRUPTION OFFENSES IN TRANSITIONAL COUNTRIES

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ABSTRACT

This Article deals with issues of stability clauses in foreign investment agreements connected with human rights violations.

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Furthermore, it deals with corruption scandals of transnational and multinational telecommunication companies in transitional periods. If large in scale, this can lead to state capture of the elite, who are shaping the laws and other regulations for their benefit in those countries. All of these issues will be addressed mainly from the perspective of criminal law. However, some aspects of civil liability are addressed as well.

I. INTRODUCTION

The international community announced corruption as a serious threat to the stability and security of societies; a threat undermining the institutions and values of democracy and jeopardizing sustainable development and the rule of law, as emphasized in the United Nations Convention against Corruption (UNCAC).[1] Corruption is also closely linked to other forms of crime, including transnational organized crimes as defined in the United Nations Convention against Transnational Organized Crime (UNTOC).[2] In the last fifteen years, numerous conventions have been adopted that provide important but incomplete remedies[3] to combat corruption offenses, such as the UNCAC, the African Union Convention on Preventing and Combating Corruption,[4] the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[5] the Inter-American Convention Against Corruption,[6] the Council of Europe Civil Law Convention on Corruption,[7] and the Council of Europe Criminal Law Convention on Corruption.[8] Nonetheless, considerable doubts have been raised

1. United Nations Convention against Corruption, Dec. 14, 2005, 2349 U.N.T.S. 41.

2. United Nations Convention against Transnational Organized Crime, Sept. 29, 2003, 2225 U.N.T.S. 209.

3. *See* SUNČANA ROKSANDIĆ VIDLIČKA, PROSECUTING SERIOUS ECONOMIC CRIMES AS INTERNATIONAL CRIMES 53–55 (2017); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257 (2007).

4. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5.

5. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105–43.

6. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724.

7. Council of Europe Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174.

8. Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173 [hereinafter Council of Europe Convention]; *see also* Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, E.T.S. No. 191 (extending the scope of the Council of Europe Convention to arbitrators in commercial, civil, and other matters, as well as to jurors, thus complementing the provisions of the Council of Europe Convention aimed at protecting judicial authorities from corruption). Parties to the

regarding each of these treaties' enforcement mechanisms.[9] This has led some to propose that grand corruption should be treated as a crime against humanity[10]—one that can be subject to universal jurisdiction or to jurisdiction of the permanent International Criminal Court (ICC), according to Article 7(1)(k) of the ICC Statute, understood as "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[11]

In any case, the international community has recognized that corruption poses serious threats to the stability and security of societies, undermining the institutions and values of democracy and jeopardizing sustainable development and the rule of law. After conflicts and political or economic transitions, trade occurs alongside international investment, which sometimes leads to serious, systematic, and widespread corruption (grand corruption)—especially if the ruling elite is not able or willing to successfully implement anti-corruption policies and laws. This is particularly visible in transitional periods.

Typical examples include the transitional periods that occurred in Central and Eastern Europe in the 1990s, when corruption and other serious and widespread economic crimes arose and then led to human rights violations.[12] Further examples of corruption cases that threaten the stability and security of societies include "taking advantage of

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Convention will have to adopt the necessary measures to establish, as criminal offenses, the active and passive bribery of domestic and foreign arbitrators and jurors. *See id.*

9. For monitoring mechanisms, see Convention against Corruption, *supra* note 1; *see also* Council of Europe Convention, *supra* note 8; Starr, *supra* note 3, at 39; Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 197–98, 202–03 (2005) (arguing that the OECD has been ineffective due to underfunding and widespread ignorance of their provisions and noting that the African Union Convention has no enforcement mechanism other than self-reporting).

10. Sunčana Roksandić Vidlička, *Transitional Justice Measures and Application of Law for Economic Crimes in Croatia: What Can Macedonia and Balkan Countries Learn Out of Them?*, 1409–5327 MACEDONIAN J. FOR CRIM. L. & CRIMINOLOGY 343, 382–419 (2017).

11. Rome Statute of the International Criminal Court art. 7(k), July 17, 1998, 2187 U.N.T.S. 3; *see also* Ilias Bantekas, *Corruption as an International Crime and Crime against Humanity*, 4 J. INT'L CRIM. JUST. 466 (2006); Starr, *supra* note 3, at 45; Vidlička, *supra* note 10, at 439; Sunčana Roksandić Vidlička, *Filling the Void: The Case for International Economic Criminal Law*, 129 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 851, 860 (2017).

12. For the reaction of criminal law systems that occurred after a system change or a transitional period, see ALBIN ESER & JÖRG ARNOLD, CRIMINAL LAW IN REACTION TO STATE CRIME: COMPARATIVE INSIGHTS INTO TRANSITIONAL PROCESSES (1999).

extraordinary periods 'in doing business' [like] war profiteers during armed conflicts."[13] As the World Bank further underlined:

> Corruption erodes trust in government and undermines the social contract. This is cause for concern across the globe, but particularly in contexts of fragility and violence, as corruption fuels and perpetuates the inequalities and discontent that lead to fragility, violent extremism, and conflict. Corruption impedes investment, with consequent effects on growth and jobs. Countries capable of confronting corruption use their human and financial resources more efficiently, attract more investment, and grow more rapidly.[14]

It is very hard to precisely determine the direct connection between corruption and GDP growth of a particular country, however, "corruption does have significant negative effects on a host of key transmission channels, such as investment (including FDI), competition, entrepreneurship, government efficiency, including with regards to government expenditures and revenues, and human capital formation."[15]

According to the OECD, corruption reduces efficiency and increases inequality. Estimates show that the cost of corruption equals more than 5% of the global GDP ($2.6 trillion, World Economic Forum) with over $1 trillion paid in bribes each year (World Bank).[16] The UN Secretary

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13. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 75; *see also* Corruption Perceptions Index 2018, TRANSPARENCY INT'L, https://www.transparency.org/cpi2018 [http://web.archive.org/web/20191119170223/https://www.transparency.org/cpi2018]. *See generally* MARK PYMAN ET AL., CORRUPTION AS A THREAT TO STABILITY AND PEACE (Transparency Int'l Deutschland 2014).

14. *Combating Corruption*, THE WORLD BANK (Oct. 4, 2018), https://www.worldbank.org/en/topic/governance/brief/anti-corruption [http://web.archive.org/web/20191119170719/https://www.worldbank.org/en/topic/governance/brief/anti-corruption].

15. *Issues Paper on Corruption and Economic Growth*, THE WORLD BANK 1, 1 (2013), https://star.worldbank.org/sites/star/files/oecd_issues_paper_on_corruption_and_economic_growth_2013.pdf [http://web.archive.org/web/20191119170936/https://star.worldbank.org/sites/star/files/oecd_issues_paper_on_corruption_and_economic_growth_2013.pdf].

16. Meetings Coverage, Security Council, Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data, U.N. Meetings Coverage SC/13493 (Sept. 10, 2018), https://www.un.org/press/en/2018/sc13493.doc.htm [http://web.archive.org/web/20191214183335/https://www.un.org/press/en/2018/sc13493.doc.htm].

General, Antonio Guterres, repeated this sentiment and noted that "the cost of corruption is at least 2.6 trillion US dollars, or 5% of the global GDP."[17]

As Paul Streeten pointed out, globalization can come "from above" in the form of multinational companies, international capital flows, and world markets, or it can come "from *below*," reflecting the concerns of individuals and groups throughout the world.[18] Therefore, "[t]ransitional, transnational, and international economic crimes that result in substantial loss of profit and violate human rights and are not prosecuted can have a major effect on overall economy, society and rule of law, the latter being particularly evident in transitional societies."[19] In some economic sectors, the privatization process was conducted in suspicious circumstances and in the shadow of corruption, financial crimes, and organized crime cases.[20]

Examining several major cases in eastern European countries, this Article focuses on transnational corruption cases committed in transitional periods by telecommunications companies. As foreign investments are particularly needed in transitional economies, they are kept under the rug for as long as possible. Corruption scandals that occur alongside those investments are undermining fair competition and decreasing overall economic stability, which demands special attention and detailed legal analysis.

The liberalized telecommunications industry is particularly vulnerable to corruption due to its "high revenue generation potential, its complex technical and governance structure and its deep interrelations between public and private sector components."[21] Furthermore, as Ewan

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17. PTI, *Corruption Costs $2.6 Trillion or 5% of Global GDP, Says U.N. Chief*, THE HINDU (Sept. 11, 2018, 12:12 IST), https://www.thehindu.com/news/international/corruption-costs-26-trillion-or-5-of-global-gdp-says-un-chief/article24923492.ece [http://web.archive.org/web/20191119171744/https://www.thehindu.com/news/international/corruption-costs-26-trillion-or-5-of-global-gdp-says-un-chief/article24923492.ece].

18. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 277 (2002) (emphasis added) (citing Paul Streeten, *Globalization and its Impact on Development Co-Operation*, 42 DEV. 9, 11 (1999)).

19. Vidlička, *supra* note 10, at 343.

20. *See, e.g.*, Litigation Release No. 22213, SEC, SEC v. Magyar Telekom Plc., Case No. 11-civ-9646 (S.D.N.Y.), SEC v. Straub et al., Case No. 11 civ 9645 (S.D.N.Y.) (Dec. 29, 2011) [hereinafter SEC Litigation Release].

21. Sofia Wickberg, *Overview of Corruption in the Telecommunications Sector*, TRANSPARENCY INT'L (Apr. 8, 2014), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Overview_of_corruption_in_the_telecoms_sector_2014.pdf [http://web.archive.org/web/20191119172155/https://knowledgehub.transparency.org/assets/uploads/helpdesk/Overview_of_corruption_in_the_telecoms_sector_2014.pdf].

Sutherland emphasizes, corruption in the telecommunications industry can obstruct people's access to these sorts of services by hampering fair competition and the proper regulation of prices, consequently making prices excessive and detached from actual costs.[22] Emmanuelle Auriol notes that "[p]rivatizations in [telecommunications] initially often come with exclusivity periods (i.e., temporary monopoly power)."[23]

Scott J. Wallsten's research on this phenomenon "focuses on the privatization of twenty telecom firms in fifteen developing countries," and the results show that "2/3 of the countries chose to allocate exclusivity periods for an average of 7.42 years."[24] As Wallsten concluded, "[G]ranting a monopoly in fixed local service would more than double the price investors pay for the firm[,]" and "[g]ranting an international long distance service monopoly would be even more valuable than a local monopoly."[25] "It is clear why an exclusivity period is so appealing to governments looking to raise revenue and to transaction advisors, whose compensation may depend on the sale price."[26] Wallsten concludes that "[a] monopoly is more valuable to its owners than is a firm operating in a competitive environment"; that is why the government may double the sale proceeds of the telecom firm by guaranteeing its monopoly status.[27] But, the increase in treasury revenue will cause the total welfare to suffer.[28] Granting monopoly concessions may reduce growth in the telecom network by a significant percentage.[29]

This situation led to many scandals accompanying privatizations of state-owned telecommunication companies that occurred in transitional periods, usually involving investors from developed countries acquiring ownership in developing ones.[30] The most well-known cases involve the role of Magyar Telekom, its former executives, and its parent company

22. Ewan Sutherland, *Corruption in Telecommunications: Problems and Remedies*, 14 J. OF POL'Y, REG. & STRATEGY FOR TELECOMM., INFO. & MEDIA 4, 7–8 (2012).

23. Emmanuelle Auriol, *Telecommunication Reforms in Developing Countries*, COMM. & STRATEGIES 31, 46 (Nov. 2005); *see also* Scott J. Wallsten, *Privatizing Monopolies in Developing Countries: The Real Effects of Exclusivity Periods in Telecommunications*, 26 J. OF REG. ECON. 303 (2004).

24. Auriol, *supra* note 23, at 46 (discussing Wallsten's research).

25. *Id.* (discussing Wallsten's research).

26. Wallsten, *supra* note 23, at 313.

27. *Id.* at 318.

28. *Id.*

29. *Id.*

30. *See, e.g.*, Sutherland, *supra* note 22, at 7, 9, 11–13; *see also* Ewan Sutherland, *Bribery and Corruption in Telecommunications: The case of Kenya*, 17 INFO 38 (2015).

(Deutsche Telekom) in bribing officials in Macedonia[31] and Montenegro.[32]

Investigations into the Swedish telecommunications company, TeliaSonera, led Swedish prosecutors to charge Gulnara Karimova (the daughter of Uzbekistan's president) with suspicion of bribery and money laundering for allowing TeliaSonera to enter the Uzbek market.[33] Furthermore, "[f]ormer chief executive Lars Nyberg and two other defendants are suspected of paying $350 million to Gulnara Karimova in return for a mobile-phone license in Uzbekistan and for the 'protection' of the Uzbek government."[34] Allegedly,

> In 2007, $358 million was paid by TeliaSonera to Takilant, a Gibraltar-registered firm and front for Gulnara Karimova. Prosecutors "suspect that Gulnara Karimova, who also served as a public official during the time period relevant for the case, was the one who orchestrated, controlled, and also was the one who primarily benefited from the procedure."[35]

In any case, as Peter Muchlinski underlined, "[B]y far the majority of [arbitral] cases [involving allegations of corruption] deal with infrastructure projects, like energy plants, telecommunication systems, or waste landfills. . . ."[36]

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31. For the purpose of this Article, the authors are using the name Macedonia when they refer to Northern Macedonia (former FYROM).

32. SEC Litigation Release, *supra* note 20.

33. *See* Wickberg, *supra* note 21, at 7–9.

34. RFE/RL's Uzbek Service, *Three Ex-Telia Executives Go on Trial in Uzbek Bribery Case*, RADIOFREEEUROPE RADIOLIBERTY (Sept. 6, 2018, 10:19 GMT), https://www.rferl.org/a/three-ex-telia-executives-go-on-trial-in-uzbek-bribery-case/29471774.html [http://web.archive.org/web/20191122175822/https://www.rferl.org/a/three-ex-telia-executives-go-on-trial-in-uzbek-bribery-case/29471774.html] ("The trio was charged in September last year after the Stockholm-based company agreed to pay nearly $1 billion in penalties to help settle the years-long corruption probe.").

35. Wickberg, *supra* note 21, at 7–8; *see also* Press Release, Deutsche Telekom, Deutsche Telekom Intends to Delist From the NYSE (Apr. 21, 2010), https://www.telekom.com/en/media/media-information/archive/deutsche-telekom-intends-to-delist-from-the-nyse-354048 [http://web.archive.org/web/20191122180317/https://www.telekom.com/en/media/media-information/archive/deutsche-telekom-intends-to-delist-from-the-nyse-354048] (noting that Deutsche Telekom delisted its shares from the New York Stock Exchange in 2010). Soon after, as stated in December 2011, the SEC filed a complaint against Deutsche Telekom and Magyar Telekom. Complaint, SEC v. Magyar Telekom, PLC, No. 11-cv-9646, 2011 WL 6821037 (S.D.N.Y. Dec. 29, 2011).

36. THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 592 (Peter Muchlinski et al. eds., 2008).

II. STATE-CORPORATE CRIME, STATE CAPTURE, AND STABILITY CLAUSES

Corruption seems to be widespread in countries of transition, especially in countries that are still developing. As Nicholas Lord underlines, narratives of transnational corruption should contemplate corporations operating transnationally in international commerce that use bribery for closing business or maintain contracts in overseas jurisdictions.[37] This behavior "often [occurs] in developing countries where this is culturally accepted or expected and where anti-corruption responses are under-developed."[38] Examples such as Siemens and Innospec augment his statements because these cases "highlight the sheer complexity and transnationality of transnational corporate bribery given that such large corporations operate in multiple jurisdictions and in high-level business transactions."[39] Countries in which Siemens gave bribes include transitional countries Nigeria, Russia, and Libya.[40]

Such practice could also be deemed state-corporate crime, a notion Kramer explained in 1990.[41] Corporate crime can be considered an:

> [I]llegal or socially injurious, social action that is the collective product of the interaction between a business corporation and a state agency engaged in a joint endeavor. Most commonly these crimes involve the active participation of two or more organizations, at least one of which is private and one of which is public.[42]

This sort of involvement requires an inter-organizational relationship between business and government that results in harmful consequences for society and the economy of the state in question.[43]

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37. NICHOLAS LORD, REGULATING CORPORATE BRIBERY IN INTERNATIONAL BUSINESS: ANTI-CORRUPTION IN THE UK AND GERMANY 32 (Routledge 2014).

38. *Id.*

39. *Id.*

40. *See* David Crawford & Mike Esterl, *Siemens Ruling Details Bribery Across the Globe*, WALL ST. J. (Nov. 16, 2007, 12:01 AM), https://www.wsj.com/articles/SB119518067226495200 [http://web.archive.org/web/20191125163028/https://www.wsj.com/articles/SB119518067226495200].

41. Wim Huisman, *Corporations and International Crimes*, *in* SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES 181, 183 (Alette Smeulers & Roelof Haveman eds., 2008).

42. *Id.*

43. *Id.*

Hence, when discussing corruption in the telecommunication sector in transitional countries, we are mainly referring to corporate state crimes that are not restricted to active actions but also include omissions. Omissions, therefore, can play an important role in corporate state crimes. They can be referred to as:

> [T]he nation-state-corporate harms committed by government agencies or caused by public policies that create an additional grouping of victims and forms of victimization that are traditionally overlooked or downplayed: victims of social, political and economic injustice; victims of racial, sexual and cultural discrimination; and victims of abuse of political and/or economic power.[44]

Furthermore, state-corporate crime can be divided into two of the most well-known forms: state-initiated and state-facilitated.[45] As Wim Huisman emphasizes:

> State-initiated crime occurs when corporations employed by the government engage in organizational crime at the instigation (or with tacit approval of) the government. State-facilitated crime is defined as the failure of government regulatory agencies to restrain deviant business activities, either because of a direct collusion between business and government or because they adhere to shared goals—the attainment of which will be hampered by aggressive regulation.[46]

In any case, corporations are powerful players with enormous annual budgets, and they often become the main perpetrators of corruption, as opposed to simply aids of public officials committing the crime.[47]

State-facilitated crime is considered much more dangerous because of the harm it causes, especially in cases of political corruption.[48] As

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44. Gregg Barak, *Towards an Integrative Study of International Crimes and State-Corporate Criminality: A Reciprocal Approach to Gross Human Rights Violations*, *in* SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES 63 (Alette Smeulers & Roelof Haveman eds., 2014).

45. Huisman, *supra* note 41, at 183; *see also* STATE-CORPORATE CRIME: WRONGDOING AT THE INTERSECTION OF BUSINESS AND GOVERNMENT (Raymond J. Michalowski & Ronald C. Kramer eds., 2006); Wim Huisman & Elies van Sliedregt, *Rogue Traders Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. INT'L CRIM. JUST. 803 (2010); Rick A. Matthews & David Kauzlarich, *The Crash of Valujet Flight 592: A Case Study in State-Corporate Crime*, 33 SOC. FOCUS 281 (2012).

46. Huisman, *supra* note 41, at 184.

47. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 76.

Friedrichs states, "The term 'political corruption' and the related act of bribery refers not only to unethical activity, but to crimes committed by state agents (that is, bureaucrats, officials, representatives, etc.) primarily for their own personal, political, material and non-material gain, 'rather than on behalf of a state goal.'"[49] Such actions qualify as occupational crimes because their intent is clearly not to promote the organizational goals of the government.[50] In most circumstances, only the individual will personally gain as a result of the political corruption, "although occasionally both state representatives and their organizational units benefit when the criminal activity is mutually compatible with both personal and organizational goals. Although state workers are the typical recipients of the benefits, private sector representatives usually provide the incentives."[51]

Wolfgang Naucke clearly articulates that the modern professional approach to the concept of political economic crime (in criminology referred to as "political white-collar crime" or "state-corporate crime") began with the economic criminal procedures at Nuremberg (e.g., the *I.G.Farben*, *Krauch*, and *Krupp* cases);[52] however, until recently, this area was left out from the development of international criminal law. According to Roksandić Vidlička, this exclusion is one of the main reasons why normative concepts regarding transitional and (international) political-economic crimes are underdeveloped in general.[53] Vidlička emphasizes the need for extensive studies of leading political white-collar crimes because there are some indications of, more or less, the same patterns and characteristics in the behavior of businessmen and state officials when committing serious (transitional)

48. *Id.* (emphasis added).

49. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 76 (citing David O. Friedrichs, *State Crime or Governmental Crime: Making Sense of the Conceptual Confusion*, *in* CONTROLLING STATE CRIME 57 (Jeffrey Ross ed., 2000)).

50. *Id.* (citing JAMES W. COLEMAN, THE CRIMINAL ELITE: THE SOCIOLOGY OF WHITE COLLAR CRIME 87 (St. Martin's Press 1985)).

51. JEFFREY ROSS, AN INTRODUCTION TO POLITICAL CRIME 85 (Bristol University Press 2012) (citing SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 86 (Academic Press 1978)). For a further division of state-corporate crime, see Ronald C. Kramer et al., *The Origins and Development of the Concept and Theory of State-Corporate Crime*, 48 CRIME & DELINQ. 263, 246 (2002) (explaining Quinney's use of division on occupational and corporate crime).

52. *See* ROKSANDIĆ VIDLIČKA, *supra* note 3, at 80–82 (citing WOLFGANG NAUCKE, DER BEGRIFF DER POLITISCHEN WIRTSCHAFTSSTRAFTAT 61–62, 80, 101 (Eine Annäherung 2012)).

53. *See id.* at 80.

economic crimes.[54] So, there is a need to effectively respond to these patterns through substantive criminal law.

As Naucke states, the abuse of economic power is a crime if such power has an effect on the personal freedom of many individuals and if it disturbs or destroys the social system, which should serve to protect the freedom of the individual.[55] According to him, the political element in grand economic crimes separates them out of the context of individual victims and places those acts in the context of crimes against the public legal order.[56] So, Vidlička concludes, if such practice occurs "on a systematic or widespread level and has serious consequences, there are no impediments to international criminal law and its involvement in combating these crimes[,]"[57] either through national or international prosecutions of those crimes as inhumane acts.

As emphasized in the Pricewaterhouse Cooper's Global Economic Crime Survey of 2014, economic crime is like a virus because of all the threats which can evolve from economic crime if it continues to spread.[58]

> Like a virus, economic crime adapts to the trends that affect all organi[z]ations. Especially impactful megatrends include the increasing reliance on technology and technology-enabled processes in all aspects of business, and the growing movement of economic energy toward emerging markets. . . . This year's survey confirmed that economic crime remains a fundamental fact of life for every segment of the global business community.[59]

As Dharma Raj Bhusal emphasized, a crime is a "shadow of civilization," and a financial criminal not only accumulates funds from illegitimate sources, but this activity also disrupts economic order and

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54. *See id.* at 81.

55. NAUCKE, *supra* note 52, at 62; *see also* ROKSANDIĆ VIDLIČKA, *supra* note 3, at 82.

56. NAUCKE, *supra* note 52, at 62.

57. *See* ROKSANDIĆ VIDLIČKA, *supra* note 3, at 80–82.

58. *Id.* (citing *Economic Crime: A Threat to Business Globally*, PwC's 2014 Global Economic Crime Survey, PwC (2014) [hereinafter PwC Crime Survey], https://www.pwc.at/de/publikationen/global-economic-crime-survey-2014.pdf [http://web.archive.org/web/20191123164355/https://www.pwc.at/de/publikationen/global-economic-crime-survey-2014.pdf] finding that survey respondents included 5,128 representatives from over 95 countries around the world. More than half of respondents (54%) were employed in organizations with more than 1,000 employees, and over one third of the survey population (35%) represented publicly traded companies. Thirty-seven percent of respondents reported that their organization had experienced economic crime during the survey period, an increase of three percentage points from the 2011 survey.).

59. *See* PwC Crime Survey, *supra* note 58, at 4–6.

presents various obstacles that impede development.[60] In addition, economic crimes contribute to "the degradation of social norms. This crime causes further chaos and disorder in society by creating wider gaps between the hard money earners and easy money earners."[61]

"Moreover, *economic crime can be committed not only against the state, but also against other businesses and individuals.*"[62] Abstractly, these crimes could be viewed as "*crimes against the economic order*, distorting or even destroying the regular mechanisms of the economy and the market."[63] Although the difficulty defining economic crimes has remained over the years, "the aforementioned conventions have helped national legislations become more harmonized; corruption offen[s]es are the best example for the possibility of regional and international codification."[64]

Of course, a precise definition of economic crimes can be problematic, due to the different economic systems that exist worldwide. In that regard, as Dustin N. Sharp underlines, this is especially challenging when attempting to define an offense that will fulfil a particular need in transitional societies, "because transition can also suggest a particular destination, it may dictate in part the exceptional measures necessary to reach the intended goal."[65] While according to Sharp, "blind spots of transitional justice mirror historic divisions and hierarchies within international human rights law," and, additionally, they "parallel the liberal international peacebuilding consensus in which Western liberal market democracy is assumed to be the wished-for end product of post-conflict reconstruction, and a 'package' of interventions is tailored to suit."[66]

Not only does the diagnosis affect the prescribed remedy, but our very notion of what it means to be healthy also helps determine the course or treatment. Thus, Paige Arthur queries, how might the

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60. Dharma Raj Bhusal, Economic Crime Law and Legal Practice in the context of Nepal (Jan. 7, 2009) (unpublished J.D. dissertation, Chemnitz University of Technology, Germany), https://monarch.qucosa.de/api/qucosa%3A19197/attachment/ATT-0/ [http://web.archive.org/web/20191123165122/https://monarch.qucosa.de/api/qucosa:19197/attachment/ATT-0/].

61. *Id.* at 13.

62. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 52–53 (emphasis added).

63. Bhusal, *supra* note 60, at 15 (emphasis added) (citing LEIF APPELGREN, EKONOMISK BROTTSLIGHET OCH NATIONALSTATENS KONTROLLMAKT 11 (Häftad bok, 2001)); *see also* ROKSANDIĆ VIDLIČKA, *supra* note 3, at 52–53.

64. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 54.

65. Dustin N. Sharp, *Introduction: Addressing Economic Violence in Times of Transition*, *in* JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 16 (Dustin N. Sharp ed., 2014).

66. *See id.* at 4.

transitional justice "toolbox" look different if the paradigmatic transitions in the 1990s were considered transitions to socialism rather than transitions to democracy, and largely Western forms of democracy at that?[67] Might there have been a greater emphasis on issues of distributive justice, including the need for progressive taxation in countries experiencing radical inequality, land tenure reform in countries where land-based conflict has been a driver of violence, and affirmative action in countries with historically marginalized classes? While one can only speculate, what can be said is that the notion of transition as a transition to liberal Western democracy and a free market surely had a limiting and narrowing effect on the "toolbox" that exists today.[68]

Roksandić Vidlička determines that Sharp is only partially correct, because "the discourse on economic, social, and cultural rights as well as on economic crimes is becoming increasingly prevalent in the narratives of transitional justice, although realpolitik is always present."[69]

In any case, these crimes, if widespread, can lead to state capture. State capture can be defined as the undue and illicit influence of the elite in shaping the laws, policies, and regulations of the state.[70] In essence, this form of capture is a manifestation of grand corruption.[71]

A. Stability (Stabilization) Clauses

Connected to the issues of state-economic and corporate crime, as well as to the narratives of state capture, is the existence of stability

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67. Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 359 (2009).

68. Sharp, *supra* note 65, at 16.

69. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 55; *see* William A. Schabas, *War Economies, Economic Actors, and International Criminal Law*, *in* PROFITING FROM PEACE: MANAGING THE RESOURCE DIMENSIONS OF CIVIL WAR 440 (Karen Ballentine & Heiko Nitzschke eds., 2005). Schabas underlines that corporations may find themselves—or their directors and managers—exposed to criminal prosecution as accomplices to an international crime. *Id.* This is an area that deserves further exploration. Thus far, legal entities cannot be held criminally responsible in front of the ICC because the Court only determines individual criminal responsibility, but legal entities could be held criminally responsible in front of national courts that *do* determine the criminal responsibility of legal entities. This does not mean that individuals from those companies cannot be indicted by the ICC if there is an opportunity to establish their individual responsibility.

70. Joel S. Hellman et al., *Seize the State, Seize the Day: State Capture and Influence in Transition Economies*, 31 J. OF COMP. ECON. 751 (2003).

71. Daniel Kaufmann, *Human Rights and Governance: The Empirical Challenge*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 373 (Phillip Alston & May Robinson eds., 2005).

clauses in special business agreements linked to investments in transitional societies. According to Katja Gehne & Romulo Brillo,

> Stabilization clauses are provisions in investment contracts that accommodate the risk of regulatory changes for investors. Given their nature of safeguarding individual interests of investors, stabilization clauses may cause tensions with interfering states' regulation in the public interest, including to protect human rights or more generally to work towards sustainable development.[72]

In recent years, development groups and human rights advocates have given stabilization clauses in investment contracts greater attention.[73] Professor John Ruggie, the U.N. Secretary General's Special Representative for Business and Human Rights, made the first comprehensive study of Stabilization Clauses and Human Rights.[74] Annalise Nelson, based on Ruggie's Report, emphasizes:

> [S]tabilization clauses are risk allocation tools, designed to increase the predictability of the regulatory environment in which the investor will be operating. . . . These clauses continue to pose some perplexing questions on the proper allocation of transaction's risk between an investor and a host state. . . . Stability clauses are used throughout the world and in a variety of industries, and are often used as a means to mitigate risks with respect to a host state's future fiscal regulations.[75]

Jernei Lentar Černić notes that "[s]tabilization clauses are those clauses in investment contracts between investors and host states that address changes of legislation in the host state throughout the period of

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72. Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, 143 HEFT 1 (2017) (internal citations omitted).

73. Annalise Nelson, *Investments in the Deep Freeze? Stabilization Clauses in Investment Contracts*, KLUWER ARB. BLOG (Nov. 9, 2011), http://arbitrationblog.kluwerarbitration.com/2011/11/09/investments-in-the-deep-freeze-stabilization-clauses-in-investment-contracts/ [http://web.archive.org/web/20191123171908/http://arbitrationblog.kluwerarbitration.com/2011/11/09/investments-in-the-deep-freeze-stabilization-clauses-in-investment-contracts/].

74. *Id.*

75. *Id.*

investment."[76] This is important from the perspective of foreign investments that contribute to the economic development of each country, and especially of developing countries.[77] In that regard, foreign investors rely on the "predictability and protection of contractual relationships."[78]

This explains the existence of stability clauses. However, it is also a sort of discrimination against domestic investors, especially keeping in mind "why an investing corporation should be absolved from observing domestic law, if every person is expected to know and comply with the law of the host state."[79]

There are many forms of stabilization clauses, and the most common form is free clauses and, more recently, economic equilibrium formulas.[80] Černič says that these clauses are typically "drafted to address change in laws or the risk of a change in government"; these stabilization clauses are divided into three categories: freezing, economic equilibrium, and hybrid.[81]

Full freezing clauses "freeze both fiscal and non-fiscal legislation in relation to investment for the duration of the project."[82] Černič continues stating:

> [E]conomic equilibrium clauses include protection against all changes in legislation, 'by requiring compensation or adjustments to the deal to compensate the investor when any changes occur'. . . . Stabilization in its insulating economic equilibrium includes a 'change in law' provision, whereas the managerial form includes such an interpretation and application of the clause which would be of benefit to the investor. 'Change

76. Jernej Letnar Černič, *Corporate Human Rights Obligations under Stabilization Clauses*, 11 GERMAN L.J. 210, 213 (2010); *see also* Andrea Shemberg, *Stabilization Clauses and Human Rights*, INT'L FIN. CORP. (May 27, 2009), https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization+Paper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5a9bba-jqeww2e [http://web.archive.org/web/20191123172515/https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization+Paper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5a9bba-jqeww2e] (defining "stabilization clauses" as those clauses in private contracts between investors and host states that address changes in the law of the host state during the life of the project).

77. Shemberg, *supra* note 76, at viii.

78. *See* Černić, *supra* note 76, at 215.

79. *Id.* at 215.

80. *Id.* at 214.

81. *Id.*

82. *Id.*

> in legislation' stabilization clauses usually require compensation if the newly introduced legislation negatively affects the value of the project.[83]

Finally, "[F]ull hybrid clauses safeguard 'against all changes in legislation, by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.'"[84]

On the other hand, Nelson differentiates two basic stabilization clauses: freezing clauses which do "exactly as they sound—they 'freeze' the law at the time the contract is executed for that particular investor"; the contract does not apply any future legislative or regulatory changes.[85] The second type of stabilization clause is the "economic equilibrium clause," which can be further subdivided into two forms: rigid economic equilibrium clauses and flexible equilibrium clauses.[86] According to Nelson, in a rigid economic equilibrium clause, "future changes in law would apply to the investor, but the host [s]tate would indemnify the investor for its compliance with the new legislation."[87]

Alternatively, a more flexible equilibrium clause allows the investor to go into negotiations with the host state with "the goal of recalibrating the original allocation of risks or losses/gains, based on the reality of the new legislation."[88] Furthermore, the Ruggie study discovered some significant results regarding the difference in the use of stability clauses based on the specific host state involved in the transaction.[89] The findings suggest a disparity in stability clause use in contracts between non-OECD-member states and OECD-member ones because "OECD states tend [to] use the clauses fairly consistently, and tend to limit the investor's protection from the application of new laws to only those laws that are arbitrary or discriminatory."[90] In OECD-member states, investors have to assume and accept the risk of the new laws of general applicability.[91] On the other hand, with respect to non-OECD-member states, stability clauses look very different. Some of them "are generic and across-the-board, precluding the application of or providing

83. *Id.* (internal citation omitted).
84. *Id.*
85. Nelson, *supra* note 73.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

compensation for compliance with *both* arbitrary/discriminatory new laws *and* bona fide new laws across a state's full regulatory spectrum."[92]

Some of these clauses can affect the sovereign regulatory power of a host state.[93] In some cases, as in the case of the *Mittal Steel's Mineral Development Agreement*, investors "revisit their contracts and reduce the scope of their stabilization clauses."[94] In that case, investors negotiated with Liberia's emerging transitional post-conflict government.[95] However, it is very hard to know the exact content of these clauses because of the confidentiality provisions.[96]

Furthermore, Nelson underlines that "even if the new regulation was non-discriminatory and of general application, the state could be penalized for applying it to the investor."[97] Of course, this is also an issue of great importance for arbitrators.[98] In the past, tribunals have typically upheld stabilizations clauses that involve *nationalization*; however, Nelson notes, it is yet to be seen "how a tribunal might respond to a freezing clause that would limit a state's capacity to regulate for the public good."[99]

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92. *Id.* (emphasis in original) ("Some of this differential treatment can be explained. Investors are particularly sensitive to risk allocation when it comes to big-scale long-term investments, particularly in developing countries. Obsolescence bargaining can be a justifiable fear, especially when the other party is an emerging economy. No investor wants to make a large up-front investment or rely on non-recourse funding without some reassurance that the host state will maintain a stable, predictable regulatory environment for their investment. This is particularly the case when the host state has an under-developed regulatory environment, where there could be changes in leadership, or where current governments—populist and undemocratic alike—inspire less than full confidence that they will refrain from opportunistic regulatory behavior in the future. At the same time, stabilization clauses—and particularly freezing clauses—can cut broadly in the investor's favor. Ruggie notes that there have been a number of cases in which a broadly-worded stabilization clause permitted the investor to avoid compliance with all new laws that might affect the investor—including regulations that promote a host state's environmental, social or human rights goals.").

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* (emphasis in original) ("[E]ven for less egregious freezing clauses, it's worth considering the propriety of forcing a developing state to pay for new legislation that is nondiscriminatory, of general application, and for the common good. Most likely, the remedy the investor would obtain for a breach of the stabilization clause would be lower than it would be if the investor had been able to persuade a tribunal that expropriation had occurred. Even then, it's worth questioning whether the penalty—and the regulatory chill it could lead to—makes sense.").

Some arbitrations found that nationalization violated contractual obligations in stabilization clauses and that investors had a right to compensation.[100] Černić uses *Libyan American Oil Co. v. Government of the Libyan Arab Republic* as an example of a case where "the stabilization clause was upheld and 'justified not only by the said Libyan petroleum legislation, but also by the general principle of the sanctity of contracts recognized also in municipal and international law.'"[101]

The favorable view of stabilization clauses in international arbitration can also be seen from the attitude of the tribunal in *AGIP v. Congo*, where the tribunal "sought to place stabilization clauses as part of international law," and the *LETCO v. Liberia* tribunal noted that these stabilization clauses should be respected.[102]

B. Stability Clauses and Human Rights Issues

Despite the utility of stability clauses to foreign investors, the connection between stabilization clauses and violations of fair competition rules is obvious, especially for domestic competitors and investors. Furthermore, there should be coherence between investors' rights and their responsibility to human rights and sustainable development. This issue led to the question of the contribution of international investment law to sustainable development and its positive effect on the rule of law and development of human rights in host countries. However, civil society groups claimed these clauses undermined the willingness and ability of Turkey, Georgia, and Azerbaijan to fulfill their human rights duties pursuant to international human rights law, particularly in areas such as nondiscrimination, health and safety, labor and employment rights, the protection of cultural heritage, and the environment.[103]

To find a solution to this problem, Černič underlined that "a special human rights clause could be included in the agreements and foreign investment contracts, which would advance protection and promotion of fundamental human rights in the investment context."[104] Also, corporations could achieve their goals, turn a profit, and at the same time protect and fulfill fundamental human rights.[105] Such clauses would ensure the balance between the rights of investors in investment contracts

100. Černić, *supra* note 76, at 214.
101. *Id.* at 214–15.
102. Gehne & Brillo, *supra* note 72, at 16–17.
103. Černič, *supra* note 76, at 220.
104. *Id.* at 227.
105. *Id.*

and agreements that outline fundamental human rights obligations.[106] Furthermore, Černić observes that these stability clauses are one way to "tackle the decrease in the rights and abilities of people faced with the consequences of such an investment."[107]

Also, the United Nations High Commissioner for Human Rights report emphasized that "states should ensure that investment agreements include 'the flexibility to use certain policy options to promote and protect human rights' and 'to implement special measures to protect vulnerable, marginalized, disadvantaged or poor people.'"[108]

Černić further provides some suggestions for how this issue can be regulated. He notes,

> First, the violation of fundamental human rights norms would have to be considered on a case by case basis. Second, investment often represents a rare opportunity of development for less-developed countries and, possibly, in the long-term perspective, both investors and the local population of the contracting party would benefit from them. The stabilization clause protects the stability and predictability of contractual relations.[109]

He suggests that the solution is in incorporating both "the stability of contractual relations and the corporate investors' international fundamental human rights obligations concerns" into the contract.[110] Černić thinks, and other authors agree, that such introduction of this human rights clause should be welcomed.[111]

A second possible resolution of this issue is integrating the OECD Guidelines on Multinational Enterprises as an attachment to the appendix

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106. *Id.*

107. *Id.*

108. *Id.* (discussing the United Nations Conference on Trade and Development, *State Contracts*, U.N. Doc. UNCTAD/ITE/IIT/2004/11 (2004)).

109. *Id.*

110. *See id.* ("Such an approach would aptly address both concerns relating to investment contracts. It would allow for respect of fundamental human rights without arguing for the nullity of stabilization clauses. Despite the historic deprioritisation of human rights obligations of corporations in investment contracts, the negative effects of globalization have brought them to the forefront of the discourse.").

111. *See id.* ("Amendments to the contract, or a more adequate interpretation of the contractual provisions, appear thus to be a better alternative to deal with the potentially problematic stabilization clauses in foreign investment contract. This is particularly the case given that it is highly unlikely that a state will bring the case to an arbitration body in relation to allegations of fundamental human rights violations by corporate investors.").

or an insertion into the text of an investment contract because "OECD Guidelines are one of the four parts of the OECD Declaration on International Investment and Multinational Enterprises."[112]

So it seems that the best solution would be a more specified and narrowly formulated stabilization clause, which would include some human rights guarantees.[113] Černić highlights that nullifying all stabilization clauses is not an appropriate solution.[114] Indeed, Černić is right when he argues that these clauses must balance investment values with non-investment values,[115] in order to ensure a balance between corporate rights and responsibilities.[116]

Therefore, investment agreements, especially those particularly relevant to national interest, should be more transparent—primarily, in the provisions containing a stability clause that could affect human rights, including fair competition rules. In our opinion, transparency would reduce the possibility of corruption.

III. CORRUPTION IN THE TELECOMMUNICATION SECTOR WITH SPECIAL REFERENCE TO MULTINATIONAL CORPORATIONS

The complexity and multitude of regulations in the telecommunications sector make it especially vulnerable to corruption, particularly when operating in countries with weak institutions.[117] These risks are illustrated by the prominent corruption cases involving major

112. *See id.* at 218, 227 ("[T]he Norway 2007 Model BIT in Article 32 includes a provision on Corporate Social Responsibility, which provides 'the Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact'. This approach would suggest that rather than to go for a big dramatic solution in the form of inclusion of the OECD Guidelines in the investment contracts, policy makers should concern themselves with a provisional solution to the problem.").

113. *Id.* at 228.

114. *Id.*

115. *Id.* at 229.

116. *Id.* (citing TORONTO CONFERENCE: INTERNATIONAL LAW ON FOREIGN INVESTMENT (International Law Ass'n 2006)).

117. *See generally* TRANSPARENCY INT'L, INVESTIGATING CORRUPTION IN THE MEDIA AND TELECOMS INDUSTRIES (Mar. 18, 2016), https://transparency.eu/wp-content/uploads/2017/02/Investigating-Corruption-in-the-Media-and-Telecoms-Report.pdf [http://web.archive.org/web/20191123174422/https://transparency.eu/wp-content/uploads/2017/02/Investigating-Corruption-in-the-Media-and-Telecoms-Report.pdf] (discussing corruption in the telecommunications industry from various perspectives).

industry players, including Alcatel-Lucent, TeliaSonera, and Magyar Telekom.[118] As stated by Sanford V. Berg et al.,

> The telecommunications industry has become one of the fastest-growing industries in many developing countries. It is also believed to provide substantial positive externalities to other businesses. Roller and Waverman find that a country's economic growth is positively related to its telecommunications infrastructure. However, corporate corruption, among many challenges facing public service institutions by developing countries, is one of the most pervasive and difficult ones to deal with.[119]

A. SEC – Montenegro and Macedonia (DT)

In December 2011, the U.S. Securities and Exchange Commission (SEC)[120] charged Magyar Telekom and its parent company, Deutsche

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118. *How Transparent are Telecommunication Companies?*, TRANSPARENCY INT'L PRIVATE SECTOR (Nov. 24, 2015), https://www.transparency.org/news/feature/how_transparent_are_telecommunications_companies [http://web.archive.org/web/20191123174720/https://www.transparency.org/news/feature/how_transparent_are_telecommunications_companies]; *see also* OECD WORKING GROUP ON BRIBERY, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION – PHASE 4 REPORT: GERMANY (June 14, 2018), http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf [http://web.archive.org/web/20191123175136/http://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf].

119. Sanford V. Berg et al., *Regulation and Corporate Corruption: New Evidence from the Telecom Sector*, MUNICH PERS. REPEC ARCHIVE 2 (Aug. 18, 2011) (internal citations omitted), https://mpra.ub.unimuenchen.de/32947/1/1011_Berg_Regulation_and_Corporate.pdf [http://web.archive.org/web/20191123175448/https://mpra.ub.uni-muenchen.de/32947/1/1011_Berg_Regulation_and_Corporate.pdf].

120. *See* SEC Litigation Release, *supra* note 20; *see also* Fritz Heimann & Gillian Dell, *Exporting Corruption? Country Enforcement of The OECD Anti-Bribery Convention Progress Report 2012*, TRANSPARENCY INT'L (2012), http://www.ti-j.org/2012_ExportingCorruption_OECDProgress_EN.pdf [http://web.archive.org/web/20191123180000/http://www.ti-j.org/2012_ExportingCorruption_OECDProgress_EN.pdf]; Adela Gjorgjioska, *The Case of the Macedonian Telekom: An Entangled Web of International Political and Business Corruption*, LEFTEAST (Dec. 28, 2015), http://www.criticatac.ro/lefteast/the-case-of-the-macedonian-telekom-an-entangled-web-of-international-political-and-business-corruption/ [http://web.archive.org/web/20191123180124/http://www.criticatac.ro/lefteast/the-case-of-the-macedonian-telekom-an-entangled-web-of-international-political-and-business-corruption/].

Telekom, with bribing "officials in Macedonia and Montenegro to win business and shut out competition in the telecommunications industry."[121] According to the SEC,

> Magyar Telekom's parent company Deutsche Telekom AG also [was] charged with books and records and internal controls violations of the Foreign Corrupt Practices Act (FCPA). Magyar Telekom agreed to settle the SEC's charges by paying more than $31.2 million in disgorgement and pre-judgment interest. Magyar Telekom also agreed to pay a $59.6 million criminal penalty as part of a deferred prosecution agreement. Deutsche Telekom settled the SEC's charges, and as part of a non-prosecution agreement with the Department of Justice agreed to pay a penalty of $4.36 million.[122]

Furthermore,

> The SEC alleg[ed] that three senior executives at Magyar Telekom Plc. orchestrated, approved, and executed a plan to bribe Macedonian officials in 2005 and 2006 to prevent the introduction of a new competitor and gain other regulatory benefits. Magyar Telekom's subsidiaries in Macedonia made illegal payments of approximately $6 million under the guise of bogus consulting and marketing contracts. The same executives orchestrated a second scheme in 2005 in Montenegro related to Magyar Telekom's acquisition of the state-owned telecommunications company there. Magyar Telekom paid approximately $9 million through four sham contracts to funnel money to government officials in Montenegro.[123]

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121. SEC Litigation Release, *supra* note 20.

122. *Id.*

123. *Id.*; *see also* DEP'T OF JUST., SUMMARIES OF FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT ACTIONS BY THE UNITED STATES (Feb. 25, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/03/19/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf [http://web.archive.org/web/20191203212314/https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/03/19/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf] ("On December 29, 2011, Magyar entered into a two-year deferred prosecution agreement with the Department. As part of this agreement, Magyar was required to pay a $59.6 million criminal penalty, as well as to continue implementing rigorous internal controls. On the same day, Deutsche entered into a two-year non-prosecution agreement with the Department and agreed to pay a $4.36 million criminal penalty. . . . As part of its settlement with the SEC, Magyar and Deutsche consented to

According to SEC allegations, in Montenegro, the intended goal of the alleged corruption was the provision of assistance of the Montenegrin government to Magyar Telekom in taking over minority shares of another company—Telekom Crne Gore.[124] Because of this assistance, Magyar Telekom (a Hungarian company) gained full control of the valuable company, its infrastructure, and its assets.[125]

In February 2017, all three defendants agreed to a settlement, which ended the antagonistic court battle in the Southern District of New York.[126] Defendant Morvai was the first to settle; without admitting or

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the entry of a permanent injunction against further violations of the FCPA and Magyar agreed to pay more than $31.2 million in disgorgement and prejudgment interest.").

124. For the current ownership structure of Montenegro Telecom company, Crnogorski Telekom a.d., see *Deutsche Telekom in Montenegro*, DEUTSCHE TELEKOM AG (2019), https://www.telekom.com/en/company/worldwide/profile/profile-montenegro-355844 [http://web.archive.org/web/20191214192304/https://www.telekom.com/en/company/worldwide/profile/profile-montenegro-355844]. Croatian HT d.d. is now the majority shareholder with 76.53%. Maja Garaca, *Hrvatski Telekom Buys 76.53% of Montenegrin Peer Crnogorski Telekom*, SEENEWS (Jan. 10, 2017, 13:27 EEST), https://seenews.com/news/hrvatski-telekom-buys-7653-of-montenegrin-peer-crnogorski-telekom-553629 [http://web.archive.org/web/20191214192704/https://seenews.com/news/hrvatski-telekom-buys-7653-of-montenegrin-peer-crnogorski-telekom-553629].

125. Dina Bajramspahić, *Investigating 'Telekom Affair' in the Parliament—Unrealistic Expectations and Realistic Limitations*, FRIEDRICH EBERT STIFTUNG 2 (Nov. 2012), http://media.institut-alternativa.org/2012/12/institute-alternative-investigating-telekom-affair-in-the-parliament.pdf [http://web.archive.org/web/20191203230408/http://media.institut-alternativa.org/2012/12/institute-alternative-investigating-telekom-affair-in-the-parliament.pdf]. A very similar practice is observed in the *INA—MOL* case when MOL (a Hungarian oil company) allegedly paid a bribe to the former Croatian prime minister for the assistance of the government of Croatia in taking over control of INA (a Croatian oil company) with minority shares. *See Podignuta Optužnica Protiv Ive Sanadera*, USKOK (2009), http://www.dorh.hr/PodignutaOptuznicaProtivIveSanadera01 [http://web.archive.org/web/20191214193139/http://www.dorh.hr/PodignutaOptuznicaProtivIveSanadera01].

However, in December 2016, the UNICTIRAL Tribunal in the *INA—MOL* dispute dismissed Croatia's claims based on bribery, corporate governance and MOL's alleged breaches of the 2003 Shareholders Agreement. *See* Hina Objavljeno, *Kako su tekla zbivanja oko INA-e posljednjih 13 godina? Netrasparentnost, korupcija, tužbe....*, JUTARNJI VIJESTI (May 18, 2016, 9:12 UT), https://www.jutarnji.hr/vijesti/hrvatska/kako-su-tekla-zbivanja-oko-ina-e-posljednjih-13-godina-netrasparentnost-korupcija-tuzbe..../4058004/. (The editors of the *Wayne Law Review* rely on the authors' expertise regarding citations to untranslated foreign-language publications.)

126. *See* BAKERHOSTETLER, 2017 FCPA MID-YEAR REPORT 1, 13 (2017), https://www.bakerlaw.com/webfiles/Litigation/2017/Alerts/FCPA-2017-Mid-Year-Update.pdf [http://web.archive.org/save/https://www.bakerlaw.com/webfiles/Litigation/2017/Alerts/FCPA-2017-Mid-Year-Update.pdf].

denying the accusations of bribery, he agreed to a $60,000 penalty.[127] Moreover, former CEO Straub and former chief strategy officer Balogh avoided trial by paying "a $250,000 penalty and a $150,000 penalty, respectively, while neither admitting nor denying the charges."[128] Both Straub's settlement and Balogh's settlement included "a five-year ban from serving as an officer or director of any SEC-registered public company."[129]

When Magyar Telekom and Deutsche Telekom signed the agreement settling the case, they "*neither admitted nor denied*" the allegations; therefore, these allegations should not be viewed as "explicit evidence of corruption[,]" but rather should be viewed as a warning to Hungary, Macedonia and Montenegro to conduct thorough and complete investigations about possible corruption during the privatization process of national telecommunication companies.[130]

As underlined by Markus Pohlmaann, Kristina Bitsch, and Julian Klinkhammer in 2016, internal investigations, DOJ investigations,[131] and SEC investigations[132] revealed that participation in bribery scheme was not limited to Magyar Telekom executives, but also included government officials, intermediaries, and even a government official's family member.[133] The goal of the Macedonian corruption scheme was "to resolve concerns about legal changes that jeopardized the market leadership of the company's subsidiary Makedonski Telekommunikacii AD Skopje (MakTel). Hungary, Montenegro, and Macedonia have been in the past and still are today Magyar Telekom's core business regions."[134] The report further reveals:

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127. *Id.*

128. *Id.*

129. *Id.*

130. Bajramspahić, *supra* note 125, at 2 (emphasis in original).

131. *See* Press Release, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2011-12-29-mt-dt-press-release.pdf [http://web.archive.org/web/20180908160232/https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2011-12-29-mt-dt-press-release.pdf]; Vidlička, *supra* note 10, at 343–62.

132. *See* SEC Litigation Release, *supra* note 20; *see also* Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y 83 (2010) (discussing corporate punishment).

133. Markus Pohlmann et al., *Personal Gain or Organizational Benefits? How to Explain Active Corruption*, 17 GER. L.J. 73, 88 (2016).

134. *Id.*; Magyar Telekom, Financial Reports – Archive, https://www.telekom.hu/about_us/investor_relations/financial_reports/archive (last visited Nov. 22, 2019).

> The Macedonian part of the corruption scheme began its course in early 2005 when the Macedonian parliament enacted an "Electronic Communication Law" to liberalize the Macedonian telecommunications market. This was going to be disadvantageous for the formerly sole supplier, Magyar Telekom and its Macedonian subsidiary MakTel. Alarmed at the new resolution, Elek S., Magyar Telekom's Chairman and Chief Executive Officer (CEO), Andras B., Director of Central Strategic Organization, Tamas M., Director of Business Development and Acquisitions, and Greek intermediaries in their function as "lobbying consultants" arranged a meeting with senior officials from both of the coalition parties of the Macedonian government at the end of January 2005 in Skopje. The executives "informed" the officials "that a third mobile license was not acceptable. On 25 May 2005, after some negotiations, executives resolved their concerns with two secret agreements, entitled "Protocol of Cooperation," between the executives and the senior government officials. . . .[135]

This case presents a typical example of transitional economic crime, e.g., it occurred during the privatization period of a country in transition and it involved a foreign, multinational corporation investing in the environment of the transitional country. Such practices (not these cases in particular) also led to development of soft law instruments. As proscribed in the UN Guiding Principles on Business and Human Rights and as Zerk underlines:

> [A]ll business enterprises have the same responsibility to respect human rights wherever they operate. . . . Some operating environments, such as conflict-affected areas, may increase the risk of enterprises being complicit in gross human rights abuses . . . . Business enterprises should treat this risk as a legal

135. Pohlmann et al., *supra* note 133, at 89 (internal citation omitted); *see* TRACE INTERNATIONAL, TRACE COMPENDIUM MAGYAR TELEKOM (Jan. 2, 2019), https://www.traceinternational.org/TraceCompendium/Detail/31?class=casename_searchresult&type=1 [http://web.archive.org/web/20191123220436/https://www.traceinternational.org/TraceCompendium/Detail/31?class=casename_searchresult&type=1] ("The aspect of absolute secrecy is particularly evident in the following quotes: 'At a meeting at the Holiday Inn in Skopje, Magyar Telekom Executive 2 [Andras B.], Magyar Telekom Executive 3 [Tamas M.], Greek Intermediary 2, Greek Intermediary 3, and various Macedonian officials discussed the Protocol of Cooperation and agreed to keep the existence and purpose of the agreement from others, including Magyar Telekom's auditors and the public.'").

> compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal liability. [136]

Today, criminal charges are pending against some of the public officials who accepted the bribe from Magyar telecom.[137] However, Germany officials dropped the criminal charges against the CEO of Deutsche Telecom, Mr. Obermann.[138] Therefore, these state corporate corruption scandals are far from ending, and there is no criminal law epilogue yet. Deutsche Telecom and Slovak Telekom also had cases in front of the European Court of Justice as described below.

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136. Office of the High Commissioner on Human Rights, *Guiding Principles of Business and Human Rights*, No. 23, U.N. Doc. HR/PUB/11/04 (2011); JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARD A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 56 (2013).

137. Beta, *Charges Filed Against Montenegro Telekom Chiefs*, N1 (June 19, 2018), http://rs.n1info.com/English/NEWS/a397660/Telekom-Montenegro-chiefs-indicted.html [http://web.archive.org/web/20191124173720/http://rs.n1info.com/English/NEWS/a397660/Telekom-Montenegro-chiefs-indicted.html]. It seems that:

> [N]o current or former government officials in Macedonia have been investigated over the case. Only four individuals have been charged by prosecutors in Skopje over the telecom affair. All are foreign citizens. The charges against one of them were recently dropped. The remaining three have never been brought before a court. The charges were filed in 2008.

Sinisa Jakov Marusic, *Macedonian Politicians Deny Telecom Bribe Claims*, BALKAN INSIGHT (Sept. 9, 2015), https://balkaninsight.com/2015/09/09/macedonian-politicians-deny-telecom-scam-claims-09-07-2015/ [http://web.archive.org/web/20191124174143/https://balkaninsight.com/2015/09/09/macedonian-politicians-deny-telecom-scam-claims-09-07-2015/]. In the United States, criminal and civil charges were dropped following a settlement involving penalties amounting to $95 million. Press Release, SEC, Telecom Executives Agree to Pay Penalties for FCPA Violations (Apr. 24, 2017), https://www.sec.gov/news/press-release/2017-81 [http://web.archive.org/web/20200110223250/https://www.sec.gov/news/press-release/2017-81].

138. Peter Maushagen & Nicola Leske, *Bonn Prosecution Drops Probe Against D. Telekom CEO*, REUTERS (Jan. 3, 2011), https://www.reuters.com/article/deutschetelekom-probe/update-1-bonn-prosecution-drops-probe-against-d-telekom-ceo-idUSLDE7020XO20110103 [http://web.archive.org/web/20191124174506/https://www.reuters.com/article/deutschetelekom-probe/update-1-bonn-prosecution-drops-probe-against-d-telekom-ceo-idUSLDE7020XO20110103].

B. European Court of Justice

The European Court of Justice (ECJ) heard a few cases regarding large telecommunication companies. For instance, the ECJ sentenced Deutsche Telekom AG (DTAG) for unfair competition in a decision adopted on May 21, 2003, which was produced to the DTAG on May 30, 2003.[139] The Commission received complaints, between March 18 and July 20, 1999, from roughly 15 companies—all of which happened to be competitors of the applicant; these complaint challenged the applicant's pricing.[140]

The Commission concluded that DTAG held the leading position on all the pertinent product and service markets,[141] and by such actions, the Commission held that DTAG had "infringed Article 82 EC by operating abusive pricing in the form of a 'margin squeeze' by charging its competitors' prices for wholesale access that are higher than its prices for retail access to the local network . . . ."[142] The Commission also concluded that DTAG "was abusing its dominant position on the relevant markets for direct access to its fixed telephone network which consisted in charging unfair prices for wholesale access services to competitors and retail access services in the local network, and is thus caught by Article 82(a) of the EC Treaty."[143] In the end, the Commission sentenced DTAG to a fine of 12.6 million euros.[144]

There was one similar case in front of the ECJ regarding DTAG and Slovak Telekom.[145] In 2014, the European Commission sanctioned DTAG and its Slovak Telekom unit for forcing out competition "by charging unfair wholesale prices in Slovakia."[146] This practice of eliminating competition for broadband services in the Slovak market continued for more than five years.[147] Both DTAG and Slovak Telekom

139. Case T-271/03, Judgment, Deutsche Telekom AG v. Comm'n of the Eur. Cmtys., 2008 E.C.R. 101, at ¶ 34.

140. *Id.* at ¶ 25.

141. *Id.* at ¶ 36.

142. *Id.* at ¶ 37.

143. *Id.* at ¶ 44.

144. *Id.* at ¶ 45.

145. Case T-851/14, Slovak Telekom v. Comm'n, 2018 E.R.C. 929.

146. Foo Yun Chee, *EU Court Cuts Deutsche Telekom Antitrust Fine by a Third*, WHBL (Dec. 13, 2018, 6:10 AM), https://whbl.com/news/articles/2018/dec/13/eu-court-cuts-deutsche-telekom-antitrust-fine-by-a-third/ [http://web.archive.org/web/20191124175315/https://whbl.com/news/articles/2018/dec/13/eu-court-cuts-deutsche-telekom-antitrust-fine-by-a-third/].

147. *Id.* The decision states:

> Slovak Telekom is the incumbent telecommunications operator in Slovakia. Deutsche Telekom AG, the incumbent telecommunications operator in

were sentenced to "a joint fine of 38.84 million euros[,]" and DTAG was also given an additional 31 million euro penalty.[148]

On December 13, 2018,[149] the companies challenged the EU decision at the General Court in Luxembourg.[150] Interestingly, the ECJ concluded that a "parent company's liability can exceed that of the subsidiary if there are factors which reflect the former's conduct for which it is held liable."[151] The ECJ reduced "the joint fine from 38.84 million euros to 38.06 million euros."[152]

> Germany and the company at the helm of the Deutsche Telekom group, acquired a 51% stake in the applicant on August 4, 2000, a shareholding which it held throughout the relevant period in this case. The remaining shareholding in the applicant was held by the Ministry of Economy of the Slovak Republic (34%) and the National Property Fund of the Slovak Republic (15%).

Slovak Telekom, 2018 E.R.C. 929, at ¶ 1.

148. Chee, *supra* note 146. "On October 15, 2014, the European Commission adopted Decision C (2014) 7465 final relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement . . . ." *Slovak Telekom*, 2018 E.R.C. 929, at ¶ 2. It was later "rectified by its Decision C (2014) 10119 final of December 16, 2014 and its Decision C (2015) 2484 final of April 17, 2015, which was addressed to the applicant as well as to Deutsche Telekom ("the contested decision")." *Id.* Deutsche Telekom sought to annul the contested decision, and it brought an action to do on December 24, 2014. *Id.* The contested decision stated that Deutsche Telekom was "in a position to exercise decisive influence over the applicant's commercial policy during the entire period under consideration," and that it had actually exercised that power. *Id.* at ¶ 49. Because both the applicant and Deutsche Telekom were part of the same enterprise, "both were held liable for the single and continuous infringement of Article 102 TFEU forming the subject matter of the contested decision." *Id.*

149. *See Slovak Telekom*, 2018 E.R.C. 929.

150. Chee, *supra* note 146.

151. *Id.*

152. *Slovak Telekom*, 2018 E.R.C. 929, at ¶ 481. Regarding the penalty for that infringement, the Commission shared that it referenced its Guidelines for fines under Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) (the 2006 Guidelines) to set the fine amount. *Id.* at ¶ 50.

> [T]he Commission applies a twofold adjustment to the basic amount. In the first place, it finds that when the infringement in question occurred, Deutsche Telekom had already been held liable for an infringement of Article 102 TFEU, on account of a margin squeeze in the telecommunications sector, in Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 [EC] (Cases COMP/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9), and that, when the decision was adopted, Deutsche Telekom held 51% of the applicant's shares and was in a position to exercise decisive influence over it. Consequently, the Commission finds that, for Deutsche Telekom, the basic amount of the fine should be increased by 50% on account of repeated infringement. In the second place, the Commission states that the worldwide turnover of Deutsche Telekom for 2013 was EUR 60 123 million and that, in order to give the fine sufficient deterrent effect, a coefficient multiplier of 1.2 should be applied to the basic amount. The product of that twofold adjustment, namely EUR 31 070 000, gives rise, under the first

IV. EMERGING QUESTIONS OF RESPONSIBILITY OF LEGAL ENTITIES AND STATE OFFICIALS

It is clear that multinational companies need the help of the host state government, or at least some of the state officials, to gain or maintain a monopolistic position. Such a link is understandable—especially in developing countries. The link can occur in different ways; e.g., companies could engage some of the elites in the particular country that can then influence the government to introduce certain laws or other regulations that benefit their interest, or at a lower level, corporations could just bribe state officials to make sure that special investment agreements would be concluded to protect its interests. So, "[W]ithout instigation, support or at least turning a blind eye from state officials, serious economic crimes, including corruption, that bluntly violate human rights could not have occurred."[153] In this connection, Gregg Barak discusses how:

> [T]he dialectical relationship of the *nation state and its agents and representatives as both protectors and violators* of international and state criminality require that a supranational criminology incorporates (as is fundamental to its study and analysis) not only the dynamic relations of a privatizing states, but also a praxis of research and activist intervention that strives to shape a global and universal agenda over a transnational state-corporate one.[154]

In that regard, the role of prosecuting multinational legal entities, alongside the prosecution of responsible state officials of the host state, is of outmost importance. As Shelton underlined, "Recent developments throughout the world, including failed states, economic deregulation, privatization, and trade liberalization across borders—components of what has come to be known as globalization—have led to the emergence of powerful non-state actors who have resources sometimes greater than those of many states."[155] Roksandić Vidlička emphasizes how "the *Van Anraat* and *Kouwenhoven cases*, as indicated in the ICJ Expert Panel Report on Corporate Complicity, show dogmatic and normative

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paragraph of Article 2(b) of the contested decision, to a separate fine imposed on Deutsche Telekom alone.

Id. ¶ 52.

153. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 21.

154. Barak, *supra* note 44, at 64 (emphasis in original).

155. ROKSANDIĆ VIDLIČKA, *supra* note 10, at 394 (citing Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273 (2002)).

problems that are encountered today when one faces the role of businessmen and corporations in committing crimes under international law."[156]

Furthermore, Huisman and Elies Van Sliedregt distinguish different types of possible involvement of corporations and businessmen in international crimes either through direct perpetrators using their employees and managers or as accomplices to the perpetrator(s) facilitating the criminal act by "providing logistical support and by passing on certain information" or by providing a regime or armed group with the necessary products or services for organizing or committing crimes under international law.[157] Indirect forms of involvement also occur and benefits the perpetration of crime under international law;[158] "silent approval" occurs when companies continue doing "business with dictatorial regimes . . . [and] contribute to the political legitimization and economic viability of such regimes."[159]

Huisman and Van Sliedregt used some of the findings of the South-African Truth and Reconciliation Commission as an example of this mode of perpetration.[160] This typology could be also applied in transitional economic crimes that lead to violations of human rights; some models of responsibility could be applied for offenses committed by multinational corporations, more specifically telecommunication companies for national crimes.

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156. ROKSANDIĆ VIDLIČKA, *supra* note 3, at 173.

157. Huisman & Van Sliedregt, *supra* note 45, at 816–17. The *van Anraat* case is an obvious example of this type of behavior. *See, e.g.*, Case 09/751003-04, Public Prosecutor v. Frans Cornelis Adrianus van Anraat, Dist. Ct. Hague (Dec. 23, 2005), http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/ [http://web.archive.org/web/20191124182710/http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/].

158. Huisman & Van Sliedregt, *supra* note 45, at 817 (referring to examples of "violent repression of protests against the companies' activity by the police or security forces of a certain regime or buying natural resources from warring factions.").

159. *Id.* According to Huisman & Van Sliedregt, this is most often the case. They provide the example of *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009). *Id.* at 816 n.55 ("Talisman Energy Inc. was charged with aiding and abetting human rights abuses and international crimes in Sudan for providing logistical support (airfields, roads) to the military in Sudan who committed crimes against civilians."); *see also id.* (describing Daimler AG v. Bauman, 571 U.S. 117 (2014), "[W]here twenty-two Argentinean residents claimed that they (or their family members) were kidnapped, detained and tortured by Argentinean state security forces acting at the direction of their former employer Mercedes Benz Argentina."); *see* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 347–49 (2001); ROKSANDIĆ VIDLIČKA, *supra* note 3, at 175.

160. Huisman & Van Sliedregt, *supra* note 45, at 817.

In most EU countries, there is a possibility of prosecuting legal entities. However, legal entities in Germany cannot be held liable for criminal offenses but can be held liable for administrative offenses.[161] Taking another transitional country as an example, in Croatia, legal persons may be held liable for criminal offenses. The law allowing this liability was introduced in 2004 when the Law on the Liability of Legal Persons for Criminal Offenses (LLLPCO) came into force.[162] Under Croatian law, there is no criminal responsibility for the state, nor for units of local and regional self-government, when acting *jure imperii.*[163] In other words, units of local and regional self-government can be held criminally liable when acting *jure gestionis.*

Responsibility of the legal person is based on the guilt of the responsible person.[164] A responsible person is a natural person who runs the business of the company or who has been entrusted with the responsibility of doing business in the area of activity of a legal person.[165] In theory, legal persons can be responsible for any criminal offense (of a responsible person) that violates any duty of a legal person or by which offense the legal person had accomplished or should have accomplished pecuniary gain for itself or for another.[166] Also, there is the possibility of making a special property claim of the injured party in criminal proceedings.[167] A similar regulation exists in Macedonia and Montenegro; as Derenčinović and Novosel argue, the Croatian regulation served as a model for the regulation in Macedonia and Montenegro.[168]

However, in general, legal persons can be liable for damages and tort claims, but not all Council of Europe countries have ratified both the Criminal and Civil Convention on Corruption.[169] For instance, Croatia

161. *See* Marc Engelhart, *International Criminal Responsibly of Corporations*, *in* THE REVIEW CONFERENCE AND THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT 175, 181 (Burchard et al. eds., 2010).

162. Law on the Liability of Legal Persons for Criminal Offenses, 2003 [hereinafter LLLPCO] (Official Gazette No. 151/2003) (Croat.).

163. LLLPCO art. 6, § 1–2.

164. LLLPCO art. 3, § 1.

165. LLLPCO art. 4.

166. LLLPCO art. 3, § 1.

167. Criminal Procedure Act, 2003 (Official Gazette No. 62/2003), Art. 51 §1 (Croat.).

168. Davor Derenčinović & Dragan Novosel, *Zakon o odgovornosti pravnih osoba za kaznena djela – prolazne dječje bolesti ili (ne)rješiva kvadratura kruga*, 19 HRVATSKI LJETOPIS ZA KAZNENO PRAVI I PRAKSU 585, 589 (2012) (Croat.). (The editors of the *Wayne Law Review* rely on the authors' expertise regarding citations to untranslated foreign-language publications.)

169. *See* COUNCIL OF EUROPE, TREATY OFFICE, CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 173 (2019) [hereinafter CRIMINAL CHART OF SIGNATURES], https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=nOEvyioK

ratified both the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.[170] However, Germany ratified the Criminal Law Convention in May 2017, which entered into force in September 2017,[171] but has not yet ratified Civil Law Convention.[172]

That would mean, for instance, if the aforementioned scandals occurred in Croatia, there could be several options for criminal and civil proceedings. First, there is a possibility that state officials are held criminally responsible for offenses against official duties proscribed in the Croatian Criminal Code (CCC);[173] e.g., abuse of position and authority (CCC Art. 291),[174] unlawful favoritism (CCC Art. 292),[175] passive bribery (CCC Art. 293),[176] active bribery (CCC Art. 294),[177] and

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[http://web.archive.org/web/20191124184625/https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=nOEvyioK]; COUNCIL OF EUROPE, TREATY OFFICE, CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 174 (2019) [hereinafter CIVIL CHART OF SIGNATURES], https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174 [http://web.archive.org/save/https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174].

170. *See* CIVIL CHART OF SIGNATURES, *supra* note 169; CRIMINAL CHART OF SIGNATURES, *supra* note 169.

171. CRIMINAL CHART OF SIGNATURES, *supra* note 169.

172. CIVIL CHART OF SIGNATURES, *supra* note 169.

173. Croatian Criminal Code, 2011 [hereinafter CCC] (Official Gazette No. 125/11).

174. CCC art. 291 provides:

> (1) A public official or responsible person who abuses his or her position or authority, oversteps the limits of his or her authority, or fails to perform a duty and thereby obtains for himself or herself or another an advantage or causes damage to another shall be punished by imprisonment from six months to five years.
>
> (2) If as a result of the criminal offence referred to in paragraph 1 of this Article a considerable material gain is obtained or considerable damage caused, the perpetrator shall be punished by imprisonment from one to ten years.

175. CCC art. 292 provides:

> (1) A public official or responsible person who on the basis of an agreement demonstrates favouritism towards an economic entity by adapting public procurement terms and conditions or who awards a contract to a tenderer whose tender is contrary to the terms and conditions set out in the bid documentation shall be punished by imprisonment from six months to five years.
>
> (2) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on a public official or responsible person who abuses his or her position or authority by demonstrating favouritism in the award of contracts or in taking on or negotiating deals toward his or her activity or the activity of persons with whom he or she is linked in terms of vested interests.

176. CCC art. 293 provides:

> (1) A public official or responsible person who solicits or accepts a bribe, or who accepts an offer or a promise of a bribe for himself or herself or another in return for performing within or beyond the limits of his or her authority an official or other act which should not be performed, or failing to perform an

trading in influence (CCC Arts. 295 and 296).[178] Companies, individual businessmen, or members of Management or Supervisory boards could

official or other act which should be performed shall be punished by imprisonment from one to ten years.

(2) A public official or responsible person who solicits or accepts a bribe, or who accepts an offer or a promise of a bribe for himself or herself or another in return for performing within or beyond the limits of his or her authority an official or other act which should be performed, or not performing an official or other act which should not be performed shall punished by imprisonment from one to eight years.

(3) A public official or responsible person who following performance or omission of an official or other act referred to in paragraph 1 or 2 of this Article solicits or accepts a bribe with respect thereto shall be punished by imprisonment not exceeding one year.

177. CCC art. 294 provides:

(1) Whoever offers, gives or promises a bribe to a public official or responsible person in order that he or she perform, within or beyond the limits of his or her authority, an official or other act which he or she should not perform, or fail to perform an official or other act which he or she should perform, or whoever intermediates in such an act of bribery of a public official or responsible person shall be punished by imprisonment from one to eight years.

(2) Whoever offers, gives or promises a bribe to a public official or responsible person in order that he or she perform, within or beyond the limits of his or her authority, an official or other act which he or she should perform, or fail to perform an official or other act which he or she should not perform, or whoever intermediates in such an act of bribery of a public official or responsible person shall be punished by imprisonment from six months to five years.

(3) The perpetrator of the criminal offence referred to in paragraph 1 or 2 of this Article who gives a bribe at the request of a public official or responsible person and reports the offence before it is discovered or before he or she finds out that the offence has been discovered may have his or her punishment remitted.

178. CCC art. 295 provides:

(1) Whoever, by taking advantage of his or her official or social position or influence, intermediates in order that an official or other act which should not be performed be performed, or that an official or other act which should be performed not be performed shall be punished by imprisonment from six months to five years.

(2) Whoever solicits or accepts a bribe, or accepts an offer or a promise of a bribe for himself or herself or another so that, by taking advantage of his or her official or social position or influence, he or she would intermediate in order that an official or other act which should not be performed be performed, or that an official or other act which should be performed not be performed shall be punished by imprisonment from one to ten years.

(3) Whoever solicit or accepts a bribe, or accepts an offer or a promise of a bribe for himself or herself or another so that, by taking advantage of his or her official or social position or influence, he or she would intermediate in order that an official or other act which should be performed be performed, or that an official or other act which should not be performed not be performed shall be punished by imprisonment from one to eight years.

be held liable for offenses against the economy; e.g., abuse of trust in business dealings (CCC Art. 246),[179] passive and active bribery in business dealings (CCC Arts. 252[180] and 253[181]), etc. As stated, if such

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CCC art. 296 provides:

(1) Whoever offers, promises or gives to another a bribe intended for him or her or a third party so that he or she would, by abusing his or her official or social position or influence, intermediate in order that an official or other act which should not be performed be performed, or that an official or other act which should be performed not be performed shall be punished by imprisonment from one to eight years.

(2) Whoever offers, promises or gives to another a bribe intended for him or her or a third party so that he or she would, by abusing his or her official or social position or influence, intermediate in order that an official or other act which should be performed be performed, or that an official or other act which should not be performed not be performed shall be punished by imprisonment from six months to five years.

(3) The perpetrator of a criminal offence referred to in paragraph 1 or 2 of this Article who gives a bribe at the request of the person referred to in Article 295 of this Code and reports the offence before it is discovered or before he or she finds out that the offence has been discovered may have his or her punishment remitted.

179. CCC art. 246 provides:

(1) Whoever violates in business dealings the duty to protect another's material interests accorded him or her by statute, administrative or judicial decision, legal transaction or relationship of trust and thereby acquires for himself or herself or a third party an unlawful material gain, thereby or otherwise causing damage to the person whose material interests he or she is responsible for shall be punished by imprisonment from six months to five years.

(2) If as a result of the criminal offence referred to in paragraph 1 of this Article a considerable material gain is acquired or considerable damage caused, the perpetrator shall be punished by imprisonment from one to ten years.

180. CCC art. 252 provides:

(1) Whoever solicits or accepts a bribe or accepts an offer or promise of a bribe for himself or herself or another in in order to favour a third party in business dealings on the occasion of the conclusion or execution of a contract or rendering a service, thereby causing damage to the person he or she represents or for whom he or she works, or whoever mediates in such an act of bribery shall be punished by imprisonment from one to eight years.

(2) Whoever solicits or accepts a bribe or accepts an offer or promise of a bribe for himself or herself or another in business dealings as consideration for the conclusion or execution of a contract or rendering a service, or whoever mediates in such an act of bribery shall be punished by imprisonment from six months to five years.

181. CCC art. 253 provides:

(1) Whoever offers, promises or confers a bribe to another in business dealings so that he or she or a third party would be favoured on the occasion of the conclusion or execution of a contract or rendering a service, thereby causing damage to the person he or she represents or for whom he or she works, or whoever mediates in such an act of bribery shall be punished by imprisonment from six months to five years.

practices led to serious, widespread, and systematic human rights violations, crimes against humanity could come into the play as well.[182]

As those crimes bring a substantial amount of illegal gain, how to determine damage compensation is an important question. In parallel or as an alternative, civil liability of state or legal entities could be established that leads to possible claims for damage compensation. As stated in Article 4 of the Explanatory Report of the Civil Law Convention on Corruption,

> In order to obtain compensation, the plaintiff has to prove the occurrence of the damage, whether the defendant acted with intent or negligently, and the causal link between the corrupt behavior and the damage. . . . Those who directly and knowingly participate in the corruption are primarily liable for the damage and, above all, the giver and the recipient of the bribe, as well as those who incited or aided the corruption. Moreover, those who failed to take the appropriate steps, in the light of the responsibilities which lie on them, to prevent corruption would also be liable for damage. This means that employers are responsible for the corrupt behavior of their employees if, for example, they neglect to organize their company adequately or fail to exert appropriate control over their employees.[183]

Furthermore, the damage referred to in paragraph 1(ii) of Article 4 of the Civil Law Convention, must fulfill certain conditions in order to give the right to compensation; damage, which is capable of justifying a claim for compensation, must be sufficiently characterized, particularly regarding the connection with the victims themselves.[184] As further noted in the Explanatory Report,

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(2) Whoever offers, promises or confers a bribe to another in business dealings as consideration for the conclusion or execution of a contract or rendering service, or whoever mediates in such an act of bribery shall be punished by imprisonment not exceeding three years.

(3) The perpetrator of the criminal offence referred to in paragraph 1 or 2 of this Article who confers a bribe at the request of a responsible person and reports the offence before it is discovered or before he or she finds out that the offence has been discovered may have his or her punishment remitted.

182. CCC art. 90.

183. Council of Europe, *Explanatory Report to the Civil Law Convention on Corruption*, C.E.T.S. 174, ¶¶ 42, 44 (Nov. 4, 1999) [hereinafter *Explanatory Report*], https://rm.coe.int/16800cce45 [http://web.archive.org/web/20191124220850/https://rm.coe.int/16800cce45].

184. Civil Law Convention on Corruption art. 4, Nov. 4, 1999, C.E.T.S. 174 [hereinafter CLCC]. Article 4 provides:

> [A]n adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption. Thus, for instance, "loss of profits" by an unsuccessful competitor, who would have obtained the contract if an act of corruption had not been committed, is an ordinary consequence of corruption and should normally be compensated.[185]

Regarding state responsibility, the Explanatory Report of the Civil Law Convention on Corruption provides the following:

> [A]rticle 5[186] requires each Party to provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their function, to claim for compensation from the [s]tate or, in case of a non-[s]tate Party, from that Party's appropriate authorities.[187]

Interestingly, such legislation exists already in a number of European States.[188] Furthermore, the Civil Law Convention on Corruption leaves each Party free to determine conditions, under its internal law, in which the Party would be liable, as Article 5 does not indicate such conditions.[189] So, "[C]onditions and procedures for filing claims against the [s]tate for damage caused by acts of corruption committed by public

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(1) Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:
(i) the defendant has committed or authorized the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
(ii) the plaintiff has suffered damage; and
(iii) there is a causal link between the act of corruption and the damage.
(2) Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

185. *Explanatory Report, supra* note 183, at ¶ 45.

186. CLCC art. 5 provides:
Each Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities.

187. *Explanatory Report, supra* note 183, at ¶ 48.

188. *Id.*

189. *Id.*

officials in the exercise of their functions, will be governed by the domestic law of the Party concerned."[190]

However, it is stipulated that Parties have "to provide 'appropriate procedures' to enable victims of acts of corruption by public officials to have effective procedures and reasonable time to seek compensation from the [s]tate (or, in the case of a non-[s]tate party, from that party's appropriate authorities)."[191] Also, such regulation "does not prevent Parties from providing in their internal law for the possibility of the reimbursement of any loss (including, for instance, the costs of defending the claim), for which [public or state officials] are adjudged to be responsible."[192] Neither provision of Art. 5 prevents "[p]arties from providing for the possibility for persons who have suffered damage as a result of an act of corruption to sue public officials." [193] Many European legal systems already allow this to occur.[194]

Furthermore, there is the possibility of establishing state liability for damages suffered by physical or legal persons, either domestic or foreign,[195] in the country where the tort occurred.

V. CONCLUSION

As Ewan Sutherland states, "[T]he high value of transactions in the telecommunications sector makes it susceptible to corruption on a grand scale. . . . The repeated engagement of operators and manufacturers with governments and their agencies is unavoidable in a sector where

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190. *Id.* at ¶ 49.

191. *Id.*

192. *Id.* at ¶ 50.

193. *Id.*

194. CHART OF SIGNATURES, *supra* note 169. It is worth mentioning that both Montenegro and Macedonia ratified this Convention. For Montenegro, it came into force in May 2008 and for Macedonia, November 2003. *See id.*

195. Antonia Mikecin, *Odgovornost Republike Hrvatske za štetu*, 5 FIP 159 (2017) (The editors of the *Wayne Law Review* rely on the authors' expertise regarding citations to untranslated foreign-language publications.); *see also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 79 (Cambridge University Press 2002) http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf [http://web.archive.org/web/20191214195716/http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf] (stating, in regards to state responsibility for damages, "Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations. Among these the Court instanced 'the outlawing of acts of aggression, and of genocide, as also . . . the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.").

licensing and regulation are seen as enduring features."[196] Furthermore, many of these countries have lax anti-corruption systems and ineffective governments, which reduces the likelihood that perpetrators will be caught and prosecuted for bribery.[197] The cases conducted by SEC and ECJ, as explained in this Article, against state-owned telecommunication companies in transitional countries show the worrisome pattern of illegal actions with disregard to the rule of law and the values of democratic societies, particularly to home countries of multinational companies.

Instead of promoting and enhancing the rule of law when investing in and supporting fair competition, it seems that companies in question do exactly the opposite. In these cases, it is of crucial importance that criminal or civil liability is established, and that the proceedings are conducted in the host or home country. Additionally, the damages should be paid to shareholders of those companies and to the host state. The latter does not preclude state liability for tort claims, especially if state officials were involved in such practices, as was emphasized in the Explanatory Report of the Civil Law Convention on Corruption.

196. Sutherland, *supra* note 22, at 13.
197. *Id.*