Ratification of the United Nations Convention against Corruption (UNCAC) Policy on 'Trading in Influence' as a New Instrument of Criminal Law for Combating Corruption in Indonesia

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Abstract

The UN Convention Against Corruption (UNCAC), which took place in Mexico in 2003, is an agreement that includes the prohibition of various actions considered corrupt practices. One of these actions is "trading in influence," as stipulated in Article 18 of the UNCAC. Indonesia was forced to ratify anti-corruption policies and criminal law instruments, which resulted in Law No. 7 of 2006. Trading in influence is one of those actions criminalised under the United Nations Convention Against Corruption. The crime of trading in influence is non-mandatory This article explores significant aspects of comprehending "trading in influence" as a criminal law tool to combat corruption in Indonesia. This was due to the increasingly complicated manifestation of anti-corruption in the international community. The article analyses and compares the international understanding of corruption offences with their implementation in Indonesia. While exploring the relationship between the tenets of international criminal law and those of Indonesian criminal law, it will also look into how international criminal law is applied in Indonesia.

Keywords: trading in influence, criminal law, anti-corruption

I. Introduction

In Indonesia and the rest of the world, several rules control the eradication of corruption. The UN Convention against Corruption (UNCAC), which took place in Mexico in 2003, is an agreement that includes the prohibition of various

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actions considered corrupt practices. One of these actions is "trading in influence," as stipulated in Article 18 of the UNCAC.[3] Indonesia was forced to ratify anti-corruption policies and criminal law instruments, which resulted in Law No. 7 of 2006. This was due to the increasingly complicated manifestation of anti-corruption in the international community.

Several significant cases processed by the Corruption Eradication Commission (KPK) can be categorised as "trading in influence." In the Mega Project Hambalang and beef import quota bribery cases, those involved wielded decision-making power without having any direct responsibilities or roles in the project.[4] Despite ongoing investigations and prosecutions related to "trading in influence," there are still uncertainties among Indonesian investigators and prosecutors regarding the application of Article 18 of the UNCAC. These doubts are related to discussions on whether the ratified UNCAC can be enforced directly.

This article explores significant aspects of comprehending "trading in influence" as a criminal law tool to combat corruption in Indonesia. The article analyses and compares the international understanding of corruption offences with their implementation in Indonesia. While exploring the relationship between the tenets of international criminal law and those of Indonesian criminal law, it will also look into how international criminal law is applied in Indonesia. It will also go through the history and specifics of how criminal law is formulated in international accords. The essay will also discuss the criminal law provisions, such as the prohibition on "trading in influence," that are included in the draft law for Indonesia on the eradication of corruption.

[3] Abu-Shanab, E. A., Harb, Y. A., Al-Zoubi, S. Y. *Government as an Anti-Corruption Tool: Citizens Perceptions.* INTERNATIONAL JOURNAL OF ELECTRONIC GOVERNANCE, Vol. 6, 2013, pp. 232- 248.

[4] Hiariej, Eddy O.S, 2012, Pembuktian Terbalik Dalam Pengembalian Aset Kejahatan Korupsi, Pidato Pengukuhan Jabatan Guru Besar Pada Fakultas Hukum Universitas Gadjah Mada, Senin 30 Januari 2012.

II. Comparison between the Idea of Corruption as a Global Crime and the Relationship between Global Crime Legislation and Indonesia's Implementation of the Law

The concept of internationalisation of crime is centred on identifying specific actions as international crimes. The establishment of such actions as international crimes can occur through international legal practice, doctrine, or custom. The codification of international crimes in treaties typically falls into two main categories. The first category includes treaties that explicitly declare specific actions as illegal under international law.[5] The second category includes treaties that do not explicitly declare specific actions as crimes but require signatory countries to prosecute or extradite those who commit such actions based on their national laws.

Bassiouni (2013) outlines five distinct behavioural elements that would classify an action as an international crime. The first element pertains to prohibited behaviour that considerably impacts international interests, particularly peace and security. The second element relates to prohibited behaviour that poses a threat to values shared by the global community, including actions that history has deemed as being against human conscience.[6] The third element pertains to prohibited conduct with transnational consequences that involve or impact more than one country during the planning, preparation, or commission of the offence, either through the diverse citizenship of the perpetrators or victims or through the use of tools that cross national boundaries. The fourth element involves behaviour that endangers the protection of international interests or those protected internationally. The fifth and final element concerns behaviour that violates international interests that require protection but do not meet the threshold referred to in the first and second elements. However, the nature of the

[5] Bantekas Illias and Nash Susan, 2007*, International Criminal Law*, Third edition, Routledge Cavendish, London And New York

[6] Karabaza, I., Kozhukhova, T. *Overcoming Corruption as the Basis of Effective Public Governance and Sustainable Economic Development of the Country*, Baltic Journal of Economic Studies, Vol. 4, No. 1, 2018, pp. 181- 187.

behaviour justifies its prevention and suppression through international criminalisation.[7]

According to Article 30 of UNCAC, corruption is classified as an international crime that falls under the category of treaties that do not explicitly state prohibited actions as international crimes. Instead, participating countries are required to prosecute or extradite perpetrators of such actions based on national law. Corruption behaviour undermines international interests and can be combated through international criminalisation by considering the elements of transnationality in the planning, preparation, or execution of the crime; involving the perpetrators or victims of different nationalities; or using equipment that transcends national borders.[8]

International criminal law and national criminal law are intertwined and can be viewed through monism and dualism theories.[9] According to the monist theory, international law and national law are part of the same legal system, with international law applying to individuals collectively and national law applicable to individuals. In contrast, the dualist theory sees international law and national law as separate legal systems, with states subject to international law and individuals to national law.

However, the relationship between international and national criminal law is unique because it applies only to individuals, unlike international law, which can apply to individuals and states. This conflicts with the monist and dualist theories, which assume that international law is binding on individuals collectively or states as subjects of international law.[10] Hence, the relationship between international and national criminal law is complementary, with both

[7] Pompe W.P.J, 1959, *Handboek Van Het Nederlandse Strafrecht, Vijfde Herziene Druk, N.V. Uitgever*s – Maatschappij W.E.J.Tjeenk Willink, Zwolle

[8] Mauro, P. *Corruption and Growth*. Quarterly Journal of Economics, Vol. 110, No. 3, 1995. pp. 681 – 712. ISSN 0033-5533 [15] Nye, J. S. Corruption and Political Development: A Cost-Benefit Analysis. American Political Science Review 67:2, 1967, p. 963. ISSN 0003-0554

[9] Moldogaziev, T. T., Liu, C. *Public Sector Corruption and Perceived Government Performance in Transition. Governance*, Early View June 2020. (Online). 2020. https://doi.org/10.1111/gove.12519

[10] Rose-Ackerman, S. *Corruption and Government. International Peacekeeping*, Vol. 15, No. 3, 2008, pp. 328-343

necessary for enforcing criminal law. When a country ratifies a convention identifying an act as an international crime, it can supplement its national criminal law.

International criminal law is heavily influenced by international law and criminal law, and its principles can be categorised into general and specific principles.[11] The principle of pacta sunt servanda, one of the oldest and most fundamental principles of international criminal law, comes from international law. This principle requires parties to abide by their agreements as if they were laws. Another general principle is the civitas maxima, also known as the imperium romanum or the principle of the Roman Empire. It posits that there is a universal legal system recognised by all nations that must be respected and enforced. The principle of civitas maxima is consistent with the monist theory, which regards international law and national law as a unified system, with international law having superiority over national law.

III. Background and Characteristics of Criminal Law formulation in International Conventions

Six impacts of corruption underlie the internationalisation of corruption. First, corruption is seen as damaging to democracy. For example, the issue of money politics always arises in public officials' elections in Indonesia, from village head elections to presidential elections, not to mention political party leadership elections. Second, corruption is seen as damaging to the rule of law. It is well-known that every word, sentence, and even comma and period in drafting legislation in the Indonesian House of Representatives has a monetary value.

A considerable amount of money is poured into drafting a bill by business owners in the Indonesian House of Representatives to produce legislation that favours them. The motivation is simple: to ensure that the resulting law benefits business owners. Another impact of corruption on the rule of law is the justice mafia, which undermines law enforcement.

[11] Treisman, D. *The causes of corruption: a cross-national study,* Journal of Public Economics, 2000, Vol. 76, No. 3, pp. 399- 457. ISSN 00472727

Third, corruption can disrupt sustainable development. This is because the money that is corrupted should be used for future generations who have the right to enjoy that development. The fourth impact of corruption is damaging to the market.[12] The problem of bribery is prevalent in the procurement of goods and services, leading to unhealthy competition among companies competing for tenders. Fifth, corruption can damage the quality of life because if it is not corrupted, state budgets can be used to adequately fund education and public health services. The sixth and final impact of corruption is seen as violating human rights. This is related to the right to a decent life for society, which is neglected because the state does not have enough funds to improve the welfare of the people due to corruption.

The United Nations Convention against Corruption (UNCAC) has specific objectives based on the six impacts of corruption. These objectives are, firstly, to prevent and effectively eliminate corruption. This requires collaboration among anti-corruption institutions and the establishment of mechanisms to protect those who report alleged corruption. The second goal of the convention is to foster worldwide cooperation and technical support, which includes returning assets acquired through corrupt acts. This cooperation is not limited to convention state parties but may also involve countries that have yet to ratify the convention. The third objective is to promote honesty, responsibility, transparency, and proper management in the public sector.

When analysing the UNCAC as a whole, the convention's structure can be summarised as follows: The first focus is on preventive measures against corruption, which includes measures to prevent corruption in the public sector, such as managing personnel, finances, and procurement. It also includes non-public sector measures such as public involvement in anti-corruption efforts and access to institutions. The second focus is on criminalisation and law enforcement. The third focus is on international cooperation. The fourth focus is

[12] Fiorino, N., Galli, E., Petrarca, I. *Corruption and Growth: Evidence from the Italian regions, European Journal of Government and Economics*, 2012, Vol. 1, No. 2, pp. 126-144. ISSN 2254-7088

on asset recovery. The fifth focus is on technical assistance and information exchange. Finally, the sixth focus is on implementing the convention effectively.

IV. Characteristics of Crime Formulation in International Conventions

Unlike other treaties, the UNCAC does not define corruption precisely. Instead, Chapter III of the UNCAC lists eleven actions regarded as criminal acts of corruption and concentrates on criminalisation and law enforcement. Bribery of national public authorities is the first of these behaviours, as mentioned in Article 15. When a public official is directly or indirectly promised, offered, or given a benefit, it is done to sway their decisions or dissuade them from performing their official obligations. It also includes the act of a public official directly or indirectly seeking or accepting a reward in return for doing or refraining from performing official obligations.[13]

Additionally, the UNCAC classifies bribery of foreign public officials and representatives of public international organisations as the second act (Article 16). In order to obtain or maintain business or other unfair advantages in the conduct of international business, this includes providing a benefit directly or indirectly to a foreign public official or an official of a public international organization with the intent to influence the official to act or refrain from acting concerning their official duties.[14] A foreign public official or a representative of a public international organisation is likewise prohibited from asking for or accepting a benefit for themselves, another person, or a legal entity in exchange for acting or refraining from acting in the performance of their official duties. Article 17 of the UNCAC outlaws public officials' misappropriation, embezzlement, or diversion of property. This occurs when public officials use their positions to take possession of valuable items, funds, securities, or any other property entrusted to them for personal gain or the benefit of others or entities.

[13] Volejníková, J., Linhartová, V. *Macroeconomic aspects of corruption*. Saarbrücken: LAP Lambert Academic Publishing AG & Co. KG, 2014. 72 p. ISBN 978-3-659-52992-4.

[14] Abu-Shanab, E. A., Harb, Y. A., Al-Zoubi, S. Y. *Government as an Anti-Corruption Tool: Citizens Perceptions.* International Journal of Electronic Governance, Vol. 6, 2013, pp. 232- 248.

Additionally, "trading in influence" is a crime covered by UNCAC Article 18. In order to abuse their perceived or actual power in administrative or public authority matters, public officials or anybody else may be unfairly favoured through the promise, offer, or provision of any unfair advantage. Similarly, according to this article, soliciting or taking an ill-gotten gain from a public servant or any other individual for the same reason, whether directly or indirectly, is likewise considered corrupt.

The fifth act criminalised under the UNCAC is an abuse of function, as stated in Article 19. One of the acts criminalised as corruption under the UNCAC is the abuse of power (Article 19). This involves a public official intentionally using their position or authority to perform an act that is against the law or refraining from performing a duty that is required by law, with the intention of obtaining an undue advantage for themselves or others. Another act criminalised under the UNCAC is illicit enrichment, as outlined in Article 20. This refers to a significant and intentional increase in a public official's assets that their lawful income cannot reasonably explain.

Article 21 of the UNCAC forbids supplying or providing an undue advantage to a person in a leading or working position within a private sector entity to induce them to breach their obligations. The private sector also includes accepting or asking for an unfair advantage for oneself or another in return for breaking their obligations.

An individual who works for or leads in any role for a private sector organisation is prohibited from purposefully misappropriating assets or funds while engaging in economic, financial, or commercial operations under UNCAC Article 22. In the private sector, this is frequently referred to as embezzlement.

The act of money laundering, which involves deliberately converting or transferring property that is the proceeds of crime to cover up its illegal origin or assist other parties implicated in the crime to dodge legal repercussions, is prohibited by Article 23 of the UNCAC. The nature of the asset, its origin, location, planned purpose, ownership, or related rights may also be concealed or misrepresented.

The tenth is concealment, defined as the deliberate act of concealing or hiding, without participation in such actions, following the conduct of any offences

outlined in this treaty (Article 24). Article 25 of the UNCAC describes the act of obstruction of justice, which is considered the final form of corruption under the convention. This act entails using force, threats, or intimidation to influence a person to provide false testimony or withhold evidence relevant to any of the crimes included in the treaty. It also applies to situations where law enforcement authorities or court personnel use physical force, threats, or intimidation to obstruct the proper discharge of their official responsibilities concerning the offences covered by the convention.

Of the eleven actions criminalised in the UNCAC, some are mandatory offences, and some are non-mandatory offences. These two types are not separate from the agreement of the participating countries in the convention. If a criminalised action is mandatory, all convention participants have agreed to regulate that action in their national laws, resulting in an obligation for state parties. Conversely, if an action is non-mandatory, it means that there is no agreement among convention participants to declare that action as a crime.

The UNCAC lists six offences as required criminal acts, including bribing domestic and international public officials, embezzling by public officials, using one's position for personal gain, money laundering, and obstructing the administration of justice. The signing nations have discretion over the remaining five offences, which include illegal enrichment and the trafficking of influence.

In contrast to national criminal law, international criminal law has a different concept of legality. International customs, which may include customary international law, serve as the basis of international criminal law, which is not codified. National criminal law, on the other hand, is founded on codified law and straightforward rules, known as lex scripta and lex certa, respectively. Therefore, customary law alone cannot serve as the exclusive basis for the principle of legality. National criminal law also strictly interprets criminal provisions, reflecting the principle of lex strict.[15]

This formulation characteristic is not without purpose. It is intended so that international criminals can be prosecuted with overlapping formulations. In other

[15] Bayu Dwi Anggono, Rofi Wahanisa, *"Corruption Prevention in Legislative Drafting in Indonesia,"* WSEAS Transactions on Environment and Development, vol. 18, pp. 172-181, 2022.

words, international criminals should not escape punishment. In addition, the lack of clear criminal sanctions in the criminalised actions aims to give broad discretion to judges to impose punishment while still upholding the principles of due process of law. This characteristic is taken into account since corruption is an extraordinary crime.

There are several unique features of corruption as a severe offence:

1. Corruption is an organised crime that is committed systematically.
2. The modus operandi of corruption is often complex, making it challenging to detect and prove.
3. Corruption is inherently linked to power. In this regard, Lord Acton's postulate that "power tends to corrupt, and absolute power corrupts absolutely" is relevant.
4. Corruption can potentially impact the lives of many individuals, as the misappropriation of state funds could significantly affect people's well-being.

V. Formulation of 'Trading in Influence' in UNCAC and the Draft Law on the Eradication of Corruption

Essentially, in the formulation of the UNCAC article on criminal acts, it can be considered necessary for each party state to criminalise it as a criminal offence, which, if done intentionally, can be broken down into two points:

a) Giving an offer, promise, or gift to an official or any other person to obtain an unauthorised benefit, which would lead the official or person to abuse their position of influence and gain an unauthorised benefit from the administrative authority or officer of the party-state, whether the act is done for their benefit or someone else's benefit.
b) Making a request or accepting an offer from a public official or another person that results in an improper benefit for oneself or others, as a result of which the official or other person abuses their position to gain an improper benefit from the officer or administrative authority of the party state.

Articles 18a and 18b of UNCAC define 'Trading in Influence' into two parts: active Trading in Influence, as in Article 18a, and passive Trading in Influence, as in Article 18b. Active Trading in Influence means offering to trade Influence, while passive Trading in Influence means accepting an offer to trade influence. The intention is not easy to prove, but the difficulty in proving the intention is balanced by the existence of influence abuse that is easily proven. This is implied in the words "...which is actual or perceived..." This means that to prove influence abuse, there does not necessarily have to be actual influence abuse, but it is enough to be based on the assumption that the act is influence abuse.

To prove the intention, the objective theory of intention is usually used so that the person is considered to be trading Influence. Objectified intention is not a type of intention but a way to ensure the existence of intention. Mistakes, intention, and negligence are the relationship between the perpetrator's mental attitude and the act committed. In order to determine the existence of intention, it is not an easy task for judges. It cannot be determined with certainty whether a person has acted intentionally or not. In this case, the existence of intention must be concluded from the act that appears. The article applies not only to public officials but also to any person who has a connection or relationship, whether direct or indirect, with the public official and can be subject to punishment or addressed accordingly. It can be said that the formulation of the article has widened the criminal liability of those who trade Influence. Not only someone who trades influence public officials but also intermediaries in the act of trading influence can be held criminally liable. In short, the formulation of the article contains an extensive theory of participation.

VI. Conclusion

After considering the explanations above, it is apparent that the UNCAC, which Indonesia ratified through Law No. 7 of 2006, can combat corruption, including the criminal offence of Trading in Influence. Therefore, immediate implementation of the UNCAC is recommended to combat corruption effectively. Corruption is an international crime. This indicates that the principle of universal jurisdiction in criminal law is in effect, which means that all nations must investigate and penalise those who commit international crimes. Second,

the ratification of UNCAC by the Indonesian Government is undoubtedly based on careful consideration that the content of the convention is in line with the country's situation and conditions, which is currently actively combating corruption. Third, the ratification of UNCAC acts as a self-executing treaty. This means that it can be immediately enforced as positive law. The ratification of an international convention is governed by the general principle of international law known as pacta sunt servanda. This principle holds that agreements made by parties are binding and must be upheld like laws.

International criminal law is an extra element to national criminal law, particularly when the provisions contained in ratified international conventions have not yet been incorporated into national legislation. Trading in Influence is urgent for Indonesia to avoid legal gaps and uncertainties. The authorised institutions, in discussing and harmonising regulations, can regulate this act in Indonesia and criminalise it.