



In the Absence of Trading in Influence in Anti-corruption Laws: Legal Framework within the United Nations Convention against Corruption

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Abstract. Corruption poses an enduring global challenge, impacting countries across different developmental stages. This research aims to investigate the imperative need for the criminalization of trading in influence in Indonesia, with a particular focus on its alignment with the United Nations Convention Against Corruption (UNCAC). Indonesia's ratification of the UNCAC in 2006 signifies a commitment to integrating its essential principles into domestic law to effectively combat corruption. While UNCAC Article 18 explicitly deals with trading in influence and recognizes it as a serious form of corruption, Indonesia has not yet incorporated it into its legal framework. Utilizing normative methods and drawing on secondary data sources such as legal documents and pertinent literature, this study underscores the urgency of incorporating criminal penalties for trading in influence into Indonesia's anti-corruption law. The research scrutinizes the harmonization of national interests with UNCAC obligations, examines the societal repercussions of this corrupt practice, evaluates the cost-effectiveness of criminalization, and appraises the state's capacity for enforcement. By enacting laws against trading in influence, Indonesia can bolster its anti-corruption measures, extend its reach to a wider array of wrongdoers, and guarantee the application of legality and justice in addressing corruption-related cases. The theoretical implications revolve around aligning international anti-corruption norms with domestic legal systems, facilitating greater adherence to UNCAC principles in Indonesia, and providing valuable insights into the broader struggle against corruption globally.

Keywords: Corruption, Trading in influence, UNCAC, Criminalization, Indonesia



Abstrak. Korupsi menimbulkan tantangan global yang berkepanjangan, berdampak pada negara-negara di berbagai tahap pembangunan. Penelitian ini bertujuan untuk menyelidiki pentingnya kriminalisasi perdagangan pengaruh di Indonesia, dengan fokus khusus pada keselarasan dengan United Nations Convention Against Corruption (UNCAC). Ratifikasi UNCAC yang dilakukan Indonesia pada tahun 2006 menandakan komitmen untuk mengintegrasikan prinsip-prinsip penting UNCAC ke dalam undang-undang domestik untuk memerangi korupsi secara efektif. Meskipun Pasal 18 UNCAC secara eksplisit mengatur perdagangan pengaruh dan mengakuinya sebagai bentuk korupsi yang serius, Indonesia belum memasukkannya ke dalam kerangka hukumnya. Dengan menggunakan metode normatif dan memanfaatkan sumber data sekunder seperti dokumen hukum dan literatur terkait, penelitian ini menggarisbawahi pentingnya memasukkan hukuman pidana bagi perdagangan pengaruh ke dalam undang-undang antikorupsi di Indonesia. Penelitian ini mengkaji harmonisasi kepentingan nasional dengan kewajiban UNCAC, mengkaji dampak sosial dari praktik korupsi ini, mengevaluasi efektivitas biaya kriminalisasi, dan menilai kapasitas negara dalam penegakan hukum. Dengan memberlakukan undang-undang yang melarang perdagangan pengaruh, Indonesia dapat memperkuat langkah-langkah antikorupsinya, memperluas jangkauannya terhadap pelaku kejahatan yang lebih luas, dan menjamin penerapan legalitas dan keadilan dalam menangani kasus-kasus terkait korupsi. Implikasi teoretisnya berkisar pada penyelarasan norma-norma antikorupsi internasional dengan sistem hukum dalam negeri, memfasilitasi kepatuhan yang lebih besar terhadap prinsip-prinsip UNCAC di Indonesia, dan memberikan wawasan berharga mengenai perjuangan yang lebih luas melawan korupsi secara global.

Kata kunci: Korupsi, Perdagangan pengaruh, UNCAC, Kriminalisasi, Indonesia

1. Introduction

Corruption is a pervasive issue found in nearly every country around the world, affecting both developing and developed nations alike.¹ In developing countries, corruption often becomes a barrier to progress and can even lead to state failure.² Furthermore, corruption obstructs the development of essential infrastructure necessary to enhance the quality of life for the population.³ The severe consequences of corruption have compelled the international community to focus more extensively on this criminal activity.⁴ Its adverse impacts have also raised awareness that corruption can pose a threat to global peace and stability.⁵ Recognizing these concerns and shared interests, the international community has

¹ Pranab Bardhan, "Corruption and Development: A Review of Issues," *Journal of Economic Literature* 35, no. 3 (1997): 1321.

² Hilary Appel, "Corruption and the collapse of the Czech transition miracle," *East European Politics and Societies* 15, no. 03 (2001): 533.

³ Shrabani Saha and Mohamed Sami Ben Ali, "Corruption and economic development: New evidence from the Middle Eastern and North African countries," *Economic Analysis and Policy* 54 (2017): 83.

⁴ Corruption is intrinsically tied to criminal law, serving as the legal framework to define, classify, and prosecute corrupt practices. Criminal law not only identifies various forms of corruption but also facilitates investigations, trials, and penalties, acting as a crucial deterrent. Corruption in developing nations is closely tied to the proliferation and illicit use of small arms. This problem is particularly evident in regions like the Pacific, where corruption and the spread of small arms play a significant role in the exploitation of natural resources. Mismanagement of this sector can spark armed conflicts over valuable resources, drawing the attention of both private and government security forces. While these security personnel provide protection to companies, they are frequently entangled in illegal activities, corruption, and human rights violations. For further discussions, see, Karin Von Stokirch, "The region in review: international issues and events, 2004," *The Contemporary Pacific* 17, no. 2 (2005): 416; Debra Satz, "Markets, privatization, and corruption," *Social research* 80, no. 4 (2013): 1000; A. Katarina Weilert, "United nations convention against corruption (UNCAC)—after ten years of being in force," *Max Planck Yearbook of United Nations Law Online* 19, no. 1 (2016): 217.

⁵ There are growing concerns about the hindrance of corruption on global and regional peace-making and stability. For instance, see Robert I. Rotberg, ed., *Corruption, global security, and world order* (Rowman & Littlefield, 2009), 30; Kempe Ronald Hope Sr, *Corruption, Sustainable Development and Security Challenges in Africa: Prospects and Policy Implications for Peace and Stability* (Springer Nature, 2023), 34. These concerns are particularly on the rise, especially in less developed nations like those in Africa. For more in-depth discussions, see, Ibrahim Harun, "The impact of endemic corruption on constitutionalism and peace-building in Somalia," in *Corruption and Constitutionalism in Africa* 19, ed. Charles M Fombad and Nico Steytler (Oxford: Oxford University Press, 2020), 260; Augustine Ruzindana, "The importance of leadership in fighting corruption in Uganda," *Corruption and the global economy* (1997): 133; Hazel M. McFerson, "Governance and hyper-corruption in resource-rich African countries," *Third World Quarterly* 30, no. 8 (2009): 1529.

unanimously committed to collaborative global efforts aimed at combating corruption.

In line with this international commitment, The United Nations Convention Against Corruption (UNCAC) was adopted during the High-Level Conference held on December 9-11, 2003, in Merida, Mexico.⁶ Three years later, on September 19, 2006, Indonesia ratified the convention through Law No. 7 of 2006. There are at least two reasons for ratifying the UNCAC. First, corruption is no longer a local issue but a transnational phenomenon that affects entire societies and economies.⁷ Therefore, international cooperation is crucial for its prevention and eradication, as well as the recovery or return of assets from corrupt activities. Second, international cooperation in preventing and combating corruption needs to be bolstered by integrity, accountability, and good governance practices.⁸ The consequence of this ratification is that everything contained in the provisions of the convention must be obeyed and obeyed as a subject of international law.⁹ In other words, the legal consequence of Indonesia's ratification of UNCAC through Law No. 7 of 2006 is the obligation to incorporate the important norms outlined in the convention into Indonesia's positive law. Apart from addressing the deficiencies in the current Anti-Corruption Law, this ratification aims to establish common standards for qualifying types of corruption-related crimes and mechanisms for handling corruption cases, including trading in influence.¹⁰

Referring to the outcomes of the UNCAC, it is evident that trading in influence cases have been globally recognized and are specifically regulated in Article 18 of the UNCAC. This is further emphasized by Article 65(1) of the UNCAC, which

⁶ This international treaty represents a comprehensive effort to combat and address corruption on a global scale. UNCAC outlines various measures and principles aimed at preventing corruption, prosecuting corrupt individuals, enhancing international cooperation in anti-corruption efforts, and promoting integrity and accountability in public and private sectors worldwide. It is a significant international commitment to tackling corruption as a transnational problem that impacts societies and economies globally. For further discussion, see, Philippa Webb, "The United Nations convention against corruption: Global achievement or missed opportunity?," *Journal of International Economic Law* 8, no. 1 (2005): 191; Jan Wouters, Cedric Ryngaert, and Sofie Cloots, "The international legal framework against corruption: achievements and challenges," *Melbourne Journal of International Law* 14, no. 1 (2013): 205.

⁷ Vasyly Topchii et al., "International anti-corruption standards," *Baltic Journal of Economic Studies* 7, no. 5 (2021): 278.

⁸ Jawade Hafidz, "Operasi Tangkap Tangan (OTT) in Corruption Crimes Based on Sociological Perspective of Law Enforcement," *Lex Publica* 7, no. 1 (2020): 43.

⁹ Shiyun Sun, "The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification," *Chinese Journal of International Law* 6, no. 1 (2007): 21; Kenneth Roth, "The charade of US ratification of international human rights treaties," *Chicago Journal of International Law* 1, no. 2 (2000): 14.

¹⁰ Saldi Isra, Feri Amsari, and Hilaire Tegnau, "Obstruction of justice in the effort to eradicate corruption in Indonesia," *International Journal of Law, Crime and Justice* 51 (2017): 74.

states: “Each state party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.” Additionally, Article 65(2) affirms that “Each State Party may adopt stricter or more severe measures than those provided for by this Convention for preventing and combating corruption.”¹¹ After the UNCAC was adopted, the political will of the ratifying states was demonstrated through the organization of the Conference of States Parties (CoSP), which was first held in Jordan at the Dead Sea from December 10 to 14, 2006.¹² This conference aimed to enhance the capacity and cooperation among participating countries to achieve the goals and objectives of the UNCAC.¹³ Among the eight resolutions of this conference, the review of implementation became an important topic at the national level, particularly for Indonesia.¹⁴ As one of the state parties, Indonesia had a significant responsibility to synchronize and harmonize the UNCAC as a general standard for the formulation of national legal policies against corruption. This commitment was crucial in Indonesia’s efforts to combat corruption on a global scale.¹⁵ Subsequently, Indonesia became one of the first countries to undergo a review by

¹¹ Sean D. Murphy, “Adoption of UN Convention Against Corruption,” *The American Journal of International Law* 98, no. 1 (2004): 182.

¹² Anne Trebilcock, “Implications of the UN convention against corruption for international organizations: oversight, due process, and immunities issues,” *International Organizations Law Review* 6, no. 2 (2009): 515. The Conference of States Parties (CoSP) is a vital component of the United Nations Convention against Corruption (UNCAC). It provides member states that have ratified the UNCAC with a forum to convene and discuss matters concerning the convention’s implementation and enforcement. CoSP meetings focus on fostering international cooperation and capacity-building among participating nations to achieve the objectives outlined in the UNCAC. These gatherings address a range of issues, including the review of national-level anti-corruption efforts. In essence, the CoSP serves as a platform for countries to collaborate, share experiences, and collectively work towards the global fight against corruption. For further discussions, see, Jessica Schultz, “The United Nations Convention against Corruption. A Primer for Development Practitioners,” *U4 Brief* 2007, no. 3 (2007), 38. Anti-Corruption Resource Centre.

¹³ Some argue that the presence of multiple actors and institutions with diverse interests operating within the UN framework, leading to hybrid approaches in addressing global issues. These interactions often give rise to disputes and tensions related to normative decision-making processes. Understanding these complexities is crucial for comprehending how the UN functions as a global organization and how it navigates challenges to achieve its goals. See, Max Lesch, “Multiplicity, hybridity and normativity: disputes about the UN convention against corruption in Germany,” *International Relations* 35, no. 4 (2021): 614.

¹⁴ Febri Diansyah, and Illian Deta Arta Sari, *Corruption Assessment and Compliance United Nation Convention Against Corruption (UNCAC)-2003 in Indonesian Law* (Indonesia Corruption Watch, 2008), 43.

¹⁵ Isra, Amsari, and Tegnan, “Obstruction of justice,” 74.

other participating states.¹⁶ Two reviewing countries, Uzbekistan and the United Kingdom, conducted a review and a country visit to Indonesia from March 14 to 16, 2011. The results of the review identified several weaknesses, including the fact that UNCAC norms had not been incorporated into Indonesia's positive law. One of the review's recommendations was to encourage the implementation of UNCAC norms into national law to combat corruption, specifically with regard to the act of trading in influence, which had not been incorporated into positive law up to that point.

One crucial consideration is the criminalization of trading in influence. Trading in influence is a form of corruption where individuals exploit their positions and authority for personal gain or on behalf of others unethically.¹⁷ Trading in influence involves individuals or entities using their social, political, or economic connections to gain favorable treatment, contracts, or decisions from government officials or other influential figures. This can lead to unfair advantages and corrupt practices, undermining the principles of fairness, transparency, and equal opportunity.¹⁸ Outlawing trading in influence creates a legal framework for holding individuals and entities accountable for their actions. When such activities are prohibited, those engaging in them can be subject to legal consequences, including fines and imprisonment. This acts as a deterrent, discouraging individuals from attempting to use their influence for personal gain.¹⁹ Many international conventions and agreements, such as the United Nations Convention against Corruption (UNCAC), emphasize the importance of combating corruption, including trading in influence. By outlawing such practices, countries demonstrate their commitment to adhering to these international standards and promoting ethical behavior on a global scale.

¹⁶ Indonesia made history by becoming one of the first countries to undergo a review by other participating states under the United Nations Convention against Corruption (UNCAC). This voluntary review process signifies Indonesia's commitment to transparency, accountability, and the fight against corruption on an international stage. It allows other UNCAC member states to assess Indonesia's anti-corruption efforts and share recommendations for improvement, fostering a collaborative approach to combatting corruption on a global scale. Indonesia's participation in this process reflects its dedication to upholding the principles of the UNCAC and its willingness to work with the international community to strengthen anti-corruption measures. See, Karen Hussmann, "Anti-corruption policy making in practice: What can be learned for implementing Article 5 of UNCAC? Synthesis report of six country case studies: Georgia, Indonesia, Nicaragua, Pakistan, Tanzania, and Zambia," *U4 Report* 2007, no. 2 (2007), 13.

¹⁷ Erdianto Effendi, Zico Junius Fernando, Ariesta Wibisono Anditya, and M. Jeffri Arlinandes Chandra, "Trading in influence (Indonesia): A critical study," *Cogent Social Sciences* 9, no. 1 (2023): 2231621.

¹⁸ Willeke Slingerland, "Trading in influence: corruption revisited," *Saxion university* (2010): 3-4.

¹⁹ K. M. S. Herman, Faisal Santiago, and Bambang Bernanthos, "Rekonseptualisasi Tindak Pidana Pajak yang Merugikan Keuangan Negara sebagai Tindak Pidana Korupsi di Indonesia," *Lex Publica* 5, no. 2 (2018): 25.

The amendments incorporating trading in influence as a means of corruption into Indonesian anti-corruption law would foster an environment inhospitable to corruption and bolster Indonesia's anti-corruption initiatives.²⁰ Given this background, it becomes evident that criminalizing the act of trading in influence is urgently needed to combat corrupt practices in Indonesia.

2. Research Methods

This research falls under the category of normative research, and it relies on secondary data as its primary source of information. Secondary data refers to pre-existing information, including statutory regulations and various literature related to criminal law and criminology. Secondary data can be further categorized into primary materials and secondary materials. Primary materials encompass statutory regulations directly relevant to the research questions, such as the 1945 Constitution of the Republic of Indonesia, Law no. 31 of 1999 jo. Law no. 20 of 2001 concerning Eradication of Corruption Crimes, Law no. 7 of 2006 concerning the Ratification of UNCAC, the Criminal Code, and the Criminal Procedure Code. On the other hand, secondary legal materials comprise books, journals, and scientific writings related to the subject matter, including those pertaining to criminal law, corruption crimes, court decisions associated with corruption crimes, the United Nations Convention Against Corruption in 2003, and scientific journals relevant to the research themes.

The data collection methodology employed in this research primarily involves library research, where the author collects statutory regulations and literature related to the research topic. From this collection, the author analyzes the distinctions between *das sein* and *das sollen* and subsequently formulates the research questions. These research questions, derived from the analysis of the differences between *das sein* and *das sollen*, guide the author in conducting an in-depth examination of research gaps. This examination is undertaken using legal sources that are intertwined with legal theories, with the aim of providing comprehensive answers to the research questions.

²⁰ Fatria Khairo, Firman Freaddy Busroh, and Rianda Riviyusnita, "Urgency of Separation of Powers in State Institutions to Defend Against Corruption in Indonesia," *Lex Publica* 6, no. 2 (2019): 38.

3. Results and Discussion

3.1. The Concept of Trading in Influence

Conceptually, the act of trading in influence is indeed challenging to comprehend, and its manifestation is equally elusive. Michael Johnston, a researcher at the University of Cambridge stated that the scope of influence market corruption is difficult to specify. Johnston further argues that ‘influence market corruption revolves around the use of wealth to seek influence within strong political and administrative institutions, often with politicians offering their own access for rent.²¹ Meanwhile, in Article 18 letters (a) and (b) UNCAC²², trading in influence is defined as follows:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- a. The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person*
- b. The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage*

Additionally, in Council of Europe Criminal Law Convention on Corruption,²³ trading in influence described as follows:

“when it committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone, who asserts or confirms that he or she is able to exert an improper influence over the decision making of any persons in consideration thereof, whether the undue advantage is for himself or herself, or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended results.”

Black’s Law Dictionary also provides an explanation of trading in influence, defining it as the improper utilization of authority or trust that overrides an

²¹ Michael Johnston, *Corruption, contention and reform: the power of deep democratization* (Cambridge: Cambridge University Press, 2014), 47.

²² Cecily Rose, Michael Kubiciel, and Oliver Landwehr, eds. *The United Nations convention against corruption: A commentary* (Oxford University Press, 2019), 11.

²³ Miklos Hollan, “Trading in influence: Requirements of the council of Europe convention and the Hungarian criminal law,” *Acta Juridica Hungarica* 52, no. 3 (2011): 236.

individual's free will and replaces it with another's agenda.²⁴ This definition doesn't confine itself solely to the use of political position or influence on someone's behalf; it also encompasses the misuse of inappropriate power that interferes with objectivity. Article 18 letters (a) and (b) UNCAC regulates trading in influence. Essentially, it covers any promise or offer made to a public official or another individual, either directly or indirectly, with the intention of providing undue benefits. This is done in a way that leads the public official or individual to misuse their influence or to have the intent to obtain something or inappropriate advantages, either for the instigator's benefit or for the benefit of others.

The practice of corrupt activities, such as trading in influence, is prevalent in Indonesia and has been observed in significant cases. For instance, in a corruption case involving beef import quotas, Luthfi Hassan Ishaq, the General Chair of the Prosperous Justice Party (PKS), received a substantial sum from a major beef importer, PT. Indoguna Utama, to influence Minister of Agriculture Suswono, a fellow party member, to increase the beef import quota.²⁵ Other notable cases include Irman Gusman, former Chairman of the Regional Representatives Council, and M. Romahurmuziy, who was involved in the sale and purchase of positions within the Ministry of Religion. The link between trading in influence and corrupt acts underscores the importance of addressing influence-based abuses.²⁶ The Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK) has uncovered cases that originated from trading in influence, emphasizing its role in corrupt practices. However, further efforts are needed to establish the legal connection between trading in influence and corruption. In Europe, countries like France, Spain, Norway, and Belgium have taken steps to regulate trading in

²⁴ "Black's Law Dictionary - Free Online Legal Dictionary," The Law Dictionary, August 3, 2022, <https://thelawdictionary.org/>.

²⁵ Corruption in Indonesia exhibits diverse methods, including "Trading in Influence," a practice detailed in the Anti-Corruption Law. Despite the Corruption Eradication Commission (KPK) demonstrating cases stemming from this, ambiguity surrounding its definition creates loopholes for defendants. Trading in Influence is also addressed in the United Nations Convention Against Corruption (UNCAC), yet it hasn't been fully incorporated into Indonesian law, leading to challenges in prosecution. Examples include cases related to beef imports and sugar quotas. In contrast, France has regulated trading in influence since 1994, distinguishing between public officials and individuals, thus providing a legal framework to combat such corruption. To effectively tackle this issue, Indonesia should consider revising its Anti-Corruption Law, though this may face political resistance. For further discussion, see: Ali Mukartono and Muhammad Rustamaji, "The Development of Corruption in Indonesia (is Corruption a Culture of Indonesia?)," in *3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)* (Atlantis Press, 2019), 139; Luís de Sousa, Susana Coroado, and Bertram Lang, "Lobbying regulation: beyond trading in influence," in *Sussex: Conference Draft*. 2015, 21.

²⁶ Eddy Omar Sharif Hiariej, "United Nations Convention Against Corruption Dalam Sistem Hukum Indonesia," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 31, no. 1 (2019): 115.

influence, viewing it as a form of corruption associated with illegal political financing.²⁷

3.2. Construction of Trading in Influence as a Corruption Crime

United Nations Convention against Corruption (UNCAC) was ratified during the Diplomatic Conference in Merida, Mexico, in December 2003. It is open for signature by States Parties to the Convention. The UN General Assembly, through Resolution Number 57/169, has adopted the UN Draft Convention as a valid document, available for signing by the Contracting States to the Convention. The Indonesian government actively participated in preparatory meetings for the Ad Hoc Committee negotiations, which discussed the draft convention. The Indonesian delegation even succeeded in incorporating social organizations into the formulation of Article 13, recognizing that in Indonesia and other developing countries, there are individuals and groups committed to eradicating corruption.²⁸ Another important consideration pertains to the return and placement of assets resulting from corruption based on a final court decision in the requested country.²⁹ States are requested to waive this requirement, as outlined in Article 57, paragraph 3, subparagraphs (a) and (b). This takes into account that several countries, including Indonesia, adhere to the civil law system, where court decisions must achieve permanent legal force.

According to this convention, corruption is regarded as a crime that significantly impacts a country's economic development, political stability, and the well-being of its people, as stated in the UNCAC Preamble, which reads:

The States Parties to this Convention, concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the

²⁷ The 1999 Council of Europe Criminal Law Convention on Corruption suggests that member countries, including Switzerland, contemplate classifying trading in influence as an offense subject to punishment. Trading in influence represents a subtler manifestation of cronyism and favoritism, and it is undeniably more prevalent than straightforward corruption. Guy De Vel and Peter Csonka, "The Council of Europe Activities against Corruption," in *Corruption, integrity and law enforcement*, ed. Cyrille J.C.F. Fijnaut and Leo Huberts (Brill Nijhoff, 2000), 362; Wolfgang Rau, "The Council of Europe's Civil Law Convention on Corruption," in *The Civil Law Consequences of Corruption*, ed. Olaf Meyer (Baden-Baden: Nomos, 2009), 21.

²⁸ Mahrus Ali, Andi Mulyono, and Syarif Nurhidayat, "The Application of a Human Rights Approach toward Crimes of Corruption: Analyzing Anti-Corruption Regulations and Judicial Decisions," *Laws* 12, no. 4 (2023): 68.

²⁹ Article 51 of the United Nations Convention against Corruption sets forth the return of assets diverted through corruption as a fundamental principle of the Convention. Some argue that the State where the stolen assets are located has a wider discretion over the return of stolen assets. Furthermore, some argue that the rule of law may be better served if States take vigorous action to confiscate the proceeds of corruption regardless of whether they are ultimately repatriated. See, Anton Moiseienko, "The ownership of confiscated proceeds of corruption under the un convention against corruption," *International & comparative law quarterly* 67, no. 3 (2018): 670.

institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,

Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

Convinced further that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,

Convinced that the illicit acquisition of personal wealth can be particularly amaging to democratic institutions, national economies and the rule of law, determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery,

Acknowledging the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,

Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, nongovernmental organizations and community-based organizations, if their efforts in this area are to be effective.

Bearing also in mind the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption.

In Chapter III, Articles 15 to 22 of the UNCAC regulate clearly and firmly regarding acts that can be qualified as criminal acts of corruption, including the act of trading in Influence as stated in in Article 18.³⁰ According to UNCAC, several forms of criminal acts of corruption are defined. These include bribery of national

³⁰ Article 18 deals with the criminalization of trading in influence, both actively and passively. It calls for the consideration of legislative measures to establish these acts as criminal offenses when committed intentionally. Trading in influence includes making promises, offering, giving, soliciting, or accepting undue advantages to misuse real or perceived influence for personal or others' gain in dealings with public authorities. For further explanation, see: Shahrul Kresna Imansyah and A. Djoko Sumaryanto, "Trading in Influence as a Crime in Indonesia Criminal Law System: A Juridical Study," *Yuris (Journal of Court and Justice)* (2022): 29.

public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, or misappropriation of property by public officials, and trading in influence. Bribery of national public officials, as outlined in Article 15 of UNCAC, involves intentionally promising, offering, or giving an undue advantage to a public official, either directly or indirectly, to influence their actions in the discharge of official duties.³¹ Similarly, the solicitation or acceptance of such undue advantages by public officials is also considered a criminal offense. Bribery of foreign public officials and officials of public international organizations is covered in Article 16. This pertains to actions where undue advantages are offered, given, solicited, or accepted with the intent of influencing foreign public officials or officials of public international organizations in the exercise of their duties, often for international business purposes.³²

Article 17 addresses embezzlement, misappropriation, or other diversion of property by public officials. This involves intentionally misappropriating property, public or private funds, or valuable items entrusted to a public official for their benefit or that of another person or entity.³³ Article 18 deals with trading in influence, both actively and passively. Active trading in influence involves actively using influence to make promises, offers, or provide undue benefits to public officials or other individuals, directly or indirectly, with the aim of having them misuse their influence to obtain undue benefits. Passive trading in influence is the request or receipt of undue benefits by public officials or other individuals, either directly or indirectly, for themselves or others, with the intent to misuse their influence.³⁴

³¹ Key aspects of UNCAC related to bribery include: 1) Criminalization: UNCAC calls on signatory countries to criminalize various forms of corruption, including active and passive bribery in both the public and private sectors. 2) Preventive Measures: The convention encourages countries to implement preventive measures to combat corruption, such as establishing codes of conduct for public officials, ensuring transparency in government procurement, and promoting integrity in the private sector. 3) International Cooperation: UNCAC emphasizes international cooperation in investigating and prosecuting corruption cases that cross national borders. It includes provisions for extradition and mutual legal assistance. 4) Asset Recovery: The convention addresses the recovery of assets obtained through corrupt practices and promotes mechanisms for their return to the affected countries. 5) Whistleblower Protection: UNCAC encourages countries to establish mechanisms to protect whistleblowers who report corruption. See: Anastasia Suhartati Lukito, "Building anti-corruption compliance through national integrity system in Indonesia: A way to fight against corruption," *Journal of financial crime* 23, no. 4 (2016): 935.

³² Michael Kubiciel, "Core criminal law provisions in the United Nations Convention against Corruption," *International Criminal Law Review* 9, no. 1 (2009): 139.

³³ UNODC, *State of implementation of the United Nations Convention against corruption: criminalization, law enforcement and international cooperation* (Vienna: United Nations, 2015), 34.

³⁴ Zhanat Askarovna Mamitova et al., "Trading in influence: criminal law and criminal procedure aspects," *Journal of advanced research in law and economics* 7, no. 6 (20) (2016): 1451.

The elements of criminal acts of corruption under Article 18 include actively and passively trading influence. Active trading influence requires intention and entails offering benefits to manipulate influence.³⁵ Passive trading influence involves public officials or individuals requesting or receiving undue benefits, abusing their influence, and providing undue benefits to others. UNCAC allows states to decide whether to criminalize trading in influence, leaving it as a non-mandatory offense. The formulation of this provision necessitates intentional actions and an abuse of influence, which can be based on perception rather than concrete evidence.³⁶ Furthermore, Article 18 extends criminal liability not only to public officials but also to any person involved in trading influence, even intermediaries such as brokers. This broad inclusion aims to cover various categories of public officials based on their functions, rather than solely on their status.³⁷ In contrast to bribery, which often involves a bilateral relationship, trading in influence can entail a trilateral relationship. The subjects of trading in influence may include non-state actors with access to public authorities, while bribery typically centers on state officials or civil servants as recipients of promises or gifts.

3.3. Urgent Need to Criminalize Trading Influence to Eradicate Corruption in Indonesia

Urgently criminalizing trading influence in Indonesia is paramount to the eradication of corruption within the nation. This corrupt practice, involving the misuse of authority or trust to manipulate individuals for personal gain, poses a grave threat to the integrity of both public and private institutions.³⁸ By introducing legislation to criminalize trading influence, Indonesia can take significant strides in the fight against corruption for several reasons. Firstly, it aligns with international

³⁵ Valerica Dabu and Gabi Teodor Manuc, "Trading in Influence in the New Penal Code as Passive Corruption," *Pro Lege Review (Revista Pro Lege)* 2011, no. 1 (2011): 107.

³⁶ Isra, Amsari, and Tegnan, "Obstruction of justice," 76.

³⁷ Antonio Argandoña, "The United Nations convention against corruption and its impact on international companies," *Journal of Business Ethics* 74 (2007): 481. Article 18, Section (1), outlines the concept of *trading in influence* as the act of promising, offering, or providing an undue advantage, directly or indirectly, to public officials or individuals, with the aim of exploiting their real or perceived influence to gain an undue advantage from a State Party's government agency or public institution. Moreover, Section (2) of the same article defines trading in influence as the scenario where public officials or individuals either make inappropriate demands or receive benefits for themselves or others to misuse their actual or perceived influence, ultimately seeking improper gains from a government agency or public institution of the State Party. This activity can take an active form when individuals proactively offer improper favors to public officials due to their authority, or it can be passive when a public official accepts an improper promise, offer, or benefit from another party. See, Ali, Mulyono, and Nurhidayat, "The Application of a Human Rights Approach," 68.

³⁸ Joseph Pozsgai-Alvarez, "The abuse of entrusted power for private gain: Meaning, nature and theoretical evolution," *Crime, Law and Social Change* 74, no. 4 (2020): 434.

anti-corruption standards, as Indonesia is a signatory to the United Nations Convention Against Corruption (UNCAC), which recognizes trading influence as a corrupt act.³⁹ Secondly, it closes existing legal loopholes that have allowed corrupt actors to exploit the absence of specific laws targeting this form of corruption. Thirdly, such criminalization enhances transparency and accountability, instilling trust in public institutions and the business environment. Furthermore, it acts as a deterrent, discouraging individuals from engaging in corrupt practices, particularly in politics, while also protecting public resources, promoting good governance, and strengthening the rule of law.

The juridical consequences of Indonesia's ratification of the UNCAC through Law No. 7 of 2006 on the Ratification of the UNCAC are significant. One of the most notable consequences is the obligation to incorporate essential norms from UNCAC into Indonesia's positive law.⁴⁰ This ratification not only addresses the deficiencies in the existing Anti-Corruption Law but also signifies Indonesia's unwavering commitment to combatting corruption at all levels of society and governance.⁴¹ It acknowledges that corruption takes on various forms beyond the conventional ones like mark-ups, mark-downs, bribery, and gratuities. What is particularly worrisome is the emergence of corruption practices that, at their core, subvert the functions of the state for personal gain, whether in business, politics, or the intersection of both, often referred to as "state capture." In response, it becomes imperative to implement UNCAC's rules comprehensively. UNCAC's Article 65(1) emphasizes that each state party should take necessary measures, including legislative and administrative actions, in accordance with their domestic legal principles to ensure the convention's obligations are met. This provision implies that the Indonesian government is not only allowed but also encouraged to enact more robust measures than those outlined in the convention itself.⁴² This underscores the pressing need to prioritize the incorporation of trading influence regulations into Indonesian positive law to effectively address the multifaceted challenge of corruption.⁴³

³⁹ There were 189 (as of 18 November 2021) countries and territories that were signatories to the United Nations Convention Against Corruption (UNCAC). See: Argandoña, "The United Nations convention," 483.

⁴⁰ Lindawaty S. Sewu, "Pemberantasan Tindak Pidana Korupsi Pasca Ratifikasi The United Nations Convention Against Corruption Dan Pembaharuan Hukum Pidana Indonesia," *Lex Publica* 1, no. 2 (2015): 102.

⁴¹ Steven Timoty and Hery Firmansyah, "Criminalization of Trading in Influence in Indonesia Law," In *The 2nd Tarumanagara International Conference on the Applications of Social Sciences and Humanities (TICASH 2020)* (Atlantis Press, 2020), 954.

⁴² Imansyah and Sumaryanto, "Trading in Influence," 30.

⁴³ Bambang Waluyo, "Upaya Taktis dan Strategis Pemberantasan Korupsi di Indonesia," *Lex Publica* 4, no. 1 (2017): 623.

When considering the criminalization of an act, several crucial factors come into play.⁴⁴ Firstly, the application of criminal law must align with national development goals, aiming to create a just and prosperous society based on Pancasila principles. The primary purpose of criminal law in this context is to combat crime and enhance societal well-being and protection while minimizing countermeasures. Secondly, the acts targeted for prevention or remediation by criminal law should encompass undesirable actions that cause harm, either material or spiritual, to the community members. Thirdly, the utilization of criminal law should adhere to the cost-benefit principle, weighing the costs and outcomes. Lastly, it should take into account the capacity and workload of law enforcement agencies to avoid overburdening them.

Junker, on the other hand, proposed absolute criteria for the criminalization process.⁴⁵ Criminalization should not solely serve as a means to enforce a specific moral attitude toward certain behaviors. It should not primarily aim to establish a framework for protecting or treating potential criminals in their own interests. Additionally, criminalization should not strain the capabilities of the criminal justice system, nor should it be employed as a cover-up for not addressing the root problem effectively. In the context of Trading in Influence, the critical question is whether this behavior aligns with the criteria necessary for its criminalization. McNamara et al. presents three criteria for criminalization within the criminal law reform process.⁴⁶ First, designating an act as a prohibited criminal act should align with the prevailing legal sentiments within society. Second, it should be determined whether the threat of punishment and criminal sanctions serves as the primary means to prevent violations of these prohibitions. Lastly, it should be assessed whether the government, through the relevant state apparatus, is genuinely capable of enforcing criminal penalties in cases where individuals violate these prohibitions.

4. Conclusion

The urgency of criminalizing the act of Trading in Influence in eradicating criminal acts of corruption lies not only in accommodating Article 18 of the United Nations Convention Against Corruption (UNCAC) into Indonesian national law

⁴⁴ Sudarto, *Kapita Selekta Hukum Pidana* (Bandung: Alumni, 1986), 44-48.

⁴⁵ John M. Junker, "Criminalization and Criminogenesis," *UCLA L. Rev.* 19 (1971): 697. The relationship between the criminalization of certain behaviors and the emergence or perpetuation of criminal behavior in society. This could involve discussions on the consequences of criminalization, the impact on individuals and communities, and the broader societal implications. See also, Mamitova et al., "Trading in influence," 1451.

⁴⁶ Luke McNamara et al., "Understanding processes of criminalisation: Insights from an Australian study of criminal law-making," *Criminology & Criminal Justice* 21, no. 3 (2021): 391.

but also in ensuring that law enforcement against the criminal act of Trading in Influence can target perpetrators who are not civil servants or state administrators. This, in turn, can make efforts to eradicate criminal acts of corruption in Indonesia more effective. The act of Trading in Influence is highly deserving of criminalization as a corrupt act in the forthcoming Corruption Eradication Law. There are several reasons for this: firstly, this behavior occurs in the public domain rather than the private sphere, given the impact it has on the interests of society at large. Secondly, it meets the criteria for criminalization because trading influence can result in material or immaterial losses for members of the community and is consistent with prevailing legal norms in society, with criminal prosecution being the primary means of prevention. Thirdly, the phenomenon of corruption is undergoing complex developments, both in terms of modes and actors, making it undeniable that law enforcement officials are facing increasing challenges in processing numerous acts that qualify as criminal offenses. Fourthly, it's essential to maintain the principle of legality and ensure proper application, as numerous cases exhibit characteristics of Trading in Influence, potentially leading to injustices for the perpetrators themselves. Fifthly, it would be unjust for society if many acts of Trading in Influence were left unaddressed by the law, especially given their potential to disrupt the social order. As a suggestion, it is imperative to promptly criminalize the act of Trading in Influence as part of the revision of the Corruption Eradication Law, thereby complementing the provisions for corrupt acts established in previous regulations (Law No. 31 of 1999 jo. Law No. 20 of 2001).

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