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42. Definitions and concept

Defining corruption

The term 'corruption' lacks a universally accepted definition. Scholars in various academic disciplines approach the subject of corruption from different perspectives and have defined, conceptualized, and categorized corruption in different ways. Consequently, when legal scholars and social scientists refer to corruption, they are not necessarily referring to the same phenomenon. This entry predominantly approaches the subject of corruption from the perspective of law, and in particular public international law. International anti-corruption treaties are a useful touchstone because they represent the product of international consensus on the minimum set of conduct that qualifies as corrupt. References are made to the 2003 United Nations Convention against Corruption (UNCAC) because this anti-corruption treaty is almost universally ratified, and therefore has the widest scope of application, as compared with the numerous regional and sub-regional anti-corruption treaties (see Chapters 5, 59, 85, 101).

International anti-corruption treaties do not define corruption, but instead use the word 'corruption' as an 'umbrella' term that refers to particular corrupt acts which the treaties define and conceptualize as criminal offences. The drafters of anti-corruption treaties avoided defining corruption because they considered that an overarching definition of corruption was unnecessary and also unachievable, in that the drafters were unable to agree on a definition. Corruption therefore appears in the titles of anti-corruption treaties, and the negative consequences of corruption are often described in preambular language, but a definition of the term itself is omitted.

Unlike international anti-corruption treaties, some legal scholarship has attempted to define corruption. Legal scholarship tends to rely on a definition of corruption that originates in the social sciences (Nye), even though this definition does not sufficiently capture the entire set of corrupt acts set out in international anti-corruption treaties. The definition formulated by Transparency International (TI), the anti-corruption non-governmental organization, is frequently cited and reflects

the various definitions put forward by social scientists (Nye; Johnston 11–12; Mungiu-Pippidi 3; Rose-Ackerman and Palifka 9; Zimring and Johnson 796) (see Chapters 3, 46, 89). According to TI, corruption is 'the abuse of entrusted power for private gain'. The term 'entrusted power' is appropriately broad, as it encompasses both public sector and private sector corruption. While public sector corruption typically involves corrupt conduct by a public official and a private actor, private sector corruption involves corrupt conduct by only private actors. In lieu of the term 'entrusted power', some social scientists use terms such as 'public authority' or 'public power', which do not cover private sector corruption. The term 'private gain' is also suitably broad, as it covers both monetary gain as well as non-monetary gains, such as goods, services, or positions.

Although TI's definition is fairly encompassing, it still excludes certain forms of corrupt conduct because it addresses only passive corruption, and does not cover active corruption. The terms 'passive' and 'active' corruption do not appear in international anti-corruption treaties, but they are often used to describe the behaviour of the two parties to a corrupt transaction. In the context of bribery, for example, active corruption refers to promising, offering, or giving an undue advantage to another person or entity, while passive corruption refers to soliciting or accepting an undue advantage from another person or entity. The descriptors 'active' and 'passive' usefully allow different types of corrupt conduct to be distinguished, but these labels can be misleading. A bribe recipient may, for example, actively solicit a payment, but such behaviour would still be described as 'passive' corruption because the person receives rather than gives the bribe.

TI's definition of corruption is ultimately insufficient because it does not encompass active corruption (Rose, Kubiciel, & Landwehr 3–4). The phrase 'abuse of entrusted power' covers the conduct of the person soliciting or accepting the undue advantage (passive corruption), but does not necessarily cover the conduct of the person exercising improper influence over those entrusted with power (active corruption). For example, an employee of a private entity who engages in the active bribery of a public official may not be abusing any entrusted power, but could instead be faithfully implementing

the private entity's procurement policy. By capturing only passive corruption, this definition focuses too narrowly on the conduct of only one of the actors involved in a corrupt transaction. In order for TI's definition to be sufficiently inclusive, it would have to be expanded to refer to 'an abuse of entrusted power for private gain, or the exercise of improper influence over those entrusted with power' (Bukavansky 186; Rose 2015).

Conceptualizing corruption as a criminal offence

International anti-corruption treaties reflect a relatively narrow conception of corruption insofar as they address a limited set of criminal conduct, most significantly bribery and misappropriation or embezzlement (UNCAC Arts 15–17, 21–22) (see Chapters 16, 17, 47). The other forms of corrupt conduct that are covered by these treaties—trading in influence, abuse of functions, and illicit enrichment—are best understood as closely related to or variants on bribery and misappropriation or embezzlement (UNCAC Arts 18–20) (see Chapters 63, 98). This narrow legal conception of corruption contrasts with the more expansive conception of corruption that has generally been adopted by social scientists who tend to conceive of corruption as covering a wider range of conduct, which is not necessarily criminal or even illegal (Kaufman and Vicente). When social scientists use the term 'corruption', they may be referring not only to bribery and misappropriation and embezzlement, but also to extortion, nepotism, cronyism, fraud, and conflicts of interest (Rose-Ackerman and Palifka 8–9).

Bribery is sometimes inaccurately characterized as synonymous with corruption, even though it only represents one possible form of corruption, albeit a significant form. Bribery involves an undue advantage which is promised, offered, given, solicited, or accepted in exchange for influence over the exercise of duties held by a person entrusted with power. Bribery may take place in the public and the private sectors. The intended or actual recipient of an undue advantage may be a national public official, a foreign public official, an official of a public international organization, or a person who directs or works for a private sector entity (or a third party, such as a family member or associate). The exchange of an undue advantage may take place directly

between the briber and the bribe recipient, or indirectly, such as through an intermediary who conveys an undue advantage from a briber to a bribe recipient (see Chapter 56).

Unlike bribery, which necessarily involves a transaction between two or more parties, misappropriation or embezzlement need only involve the conduct of one actor—the person engaged in the diversion of property, funds, or securities. The person engaged in such misconduct may be a public official or a person who directs or works for a private sector entity. Both public and private sector misappropriation or embezzlement involve the intentional diversion of property, funds, or securities by a person for his or her benefit or for the benefit of another person or entity. The diverted property, funds, or securities must have been entrusted to the public official or private actor by virtue of his or her position within the public or the private sector entity.

Two other forms of corruption—trading in influence and abuse of functions—are closely related to bribery as they both involve an undue advantage. These forms of corruption, however, allow prosecutors to pursue bribery cases where neither active nor passive bribery can be proven. Trading in influence targets the role of the intermediary in bribery transactions, as it focuses solely on the transaction between the briber (the 'original instigator') and the intermediary. Prosecutors do not need to prove that the intermediary ultimately conveyed the undue advantage to the public official, whom the original instigator sought to influence. Instead, prosecutors must prove that the purpose of the conduct at issue was to secure the intermediary's 'real or supposed influence' over an 'administration or public authority', with a view towards obtaining an undue advantage for the original instigator.

The offence of abuse of functions allows prosecutors to pursue charges for corruption even when they cannot prove that a bribery transaction took place between two or more persons. This offence focuses on the actions and mental state of the public official alone and does not require proof of the actions or mental state of the briber. Prosecutors must prove that a public official violated laws, in the course of his or her official duties, for the purpose of obtaining an undue advantage for herself or himself, or a third party.

Finally, illicit enrichment represents another corruption offence that allows prosecutors to target bribery as well as misappropriation or

embezzlement despite an absence of proof that the wealth at issue represents the proceeds of corruption. Illicit enrichment refers to 'a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her unlawful income' (UNCAC Art 19). Illicit enrichment is therefore applicable to situations in which a public official's personal wealth far exceeds his or her legal income and cannot be reasonably explained by the public official.

Distinguishing corruption and related conduct

Corruption offences are distinct from but closely related to other forms of criminal conduct, most notably money laundering and obstruction of justice (UNCAC Arts 23, 25). These forms of criminal behaviour relate to the capacity of states to combat not only corruption, but also other types of criminal conduct, such as drug trafficking and the financing of terrorism. Money laundering refers to the process by which the illegal origins of criminal proceeds are hidden. Obscuring the illegal origins of bribery payments or embezzled funds, for example, enables perpetrators (or their family members or close associates) to enjoy the proceeds of their criminal conduct. Anti-money laundering measures are considered to be a tool for the prevention of corruption and for the recovery of assets and are therefore addressed in international anti-corruption treaties (UNCAC Arts 14, 52). The offence of obstruction of justice involves the criminalization of behaviour that disrupts the enforcement of domestic anti-corruption laws. The obstruction of justice may involve the use of physical force, threats, or intimidation for the purpose of interfering with the production of evidence, in particular witness testimony, or the ability of justice or law enforcement officials to carry out their duties.

Many other forms of behaviour are often described as 'corrupt', even though they fall outside of the ambit of international anti-corruption treaties and may be legal in many states. Under international law, for example, nepotism, campaign financing, and lobbying are not, in principle, forms of corruption and states are not required by international anti-corruption treaties to criminalize such conduct. From an international legal perspective, specific instances of nepotism, campaign financing, and lobbying could, however, be

considered 'corrupt' if they involved acts of corruption, such as bribery or trading in influence. Finally, fraud is related to corruption in that it involves intentional deception for private gain. Fraud represents a method by which corrupt acts are carried out, but from a legal perspective it is not synonymous with corruption. Fraudulent book-keeping may, for example, play an important role in acts of bribery and embezzlement.

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