Anti-Corruption Helpdesk Answer

Clarifying Abuse of Office: Comparative Legal Approaches

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This Helpdesk Answer provides an overview of the abuse of function offence as a "catch-all" provision for suspected cases of corruption in which it is not possible to prove that an act of bribery was committed, using Article 19 of the United Nations Convention against Corruption (UNCAC) as a baseline. It outlines the offence's purpose, its semi-mandatory status within UNCAC, and the wide variation in how states have incorporated it into national law.

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Query

How is the abuse of function offence, as described in Article 19 of the UNCAC, defined, regulated and applied in selected UNCAC States Parties, and what major differences in scope and legal interpretation emerge from these national approaches? In what ways do these variations affect the offence's role as a residual tool for addressing corruption when bribery cannot be proven?

Main points

- Article 19 defines abuse of function as a residual offence meant to capture intentional misconduct by public officials aimed at obtaining an undue advantage, even where bribery cannot be proven.
- States are required only to *consider* criminalising abuse of function, which has contributed to wide differences in domestic legislation.
- National laws differ on what conduct qualifies, ranging from broad violations of law to detailed lists of prohibited acts, or additional requirements such as proof of harm.
- While UNCAC requires intent to obtain an undue advantage, many states either heighten or lower this requirement, changing the offence's scope and evidentiary threshold.
- Departures from the UNCAC model can limit the offence's auxiliary role or create risks of vagueness, overreach, and selective enforcement.
- Recent repeals and revisions triggered by concerns about legal certainty and human rights reflect the ongoing tension between maintaining an effective residual offence and ensuring fair and predictable criminal law.

Contents

Abuse of function

According to the United Nations Convention against Corruption (UNCAC), the offence of abuse of function (or position)[1] is defined as "*when committed intentionally* [...] *the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity*" (Article 19).

While it is a provision included in the convention, unlike offences such as active and passive bribery, it is considered to be a semi-mandatory provision. The UNODC Legislative Guide to the UNCAC notes only that "*States must consider establishing as a criminal offence the abuse of function or position*" (UNODC 2012: 79). This means that State parties "bear only an obligation of consideration, rather than obligation to criminalise" (Rose 2019).

The UNCAC's own Interpretative Notes state that the offence of 'abuse of function' "*may encompass various types of conduct, such as improper disclosure by a public official of classified or privileged information*." (UNODC 2010: 194)

While assessing the state of implementation of UNCAC's criminalisation provisions, the UNODC (2017: 47) made explicit the role of the 'abuse of office' provision: it "*is designed to cover a wide range of official misconduct and has an auxiliary role in relation to other, narrower corrupt offences*." For this reason, as noted below, restrictions to its scope are often criticised by UNCAC implementation review teams as not meeting the elements of Article 19 of the Convention.

Regional anti-corruption conventions also include provisions on abuse of function, including the Inter-American Convention against Corruption[2] and the African Union Convention on Preventing and Combating Corruption[3]. The Council of Europe's Criminal Law Convention on Corruption, on the other hand, does not include a provision on 'abuse of function'.

As a part of the European Union's effort to modernise its anti-corruption normative framework, the European Commission proposed a Directive of the European Parliament of the Council on Combating Corruption and it included a provision requiring Member

[1] It may also be referred to as "abuse of power or authority", "abuse of authority and failure to discharge official duties", "abuse of public office", "criminal breach of trust", "abuse of official position" or "misconduct in public office" See UNODC (2017: 48).
[2] "Article VI, 1, c - Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party".
[3] "Article 4, 1, c – Any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party".

States to criminalise 'abuse of functions' in both the public and private sectors, under Article 11, defining each of the offences as follows:

> 1. the performance of or failure to perform an act, in violation of laws, by a public official in the exercise of his functions for the purpose of obtaining an undue advantage for that official or for a third party;
> 2. the performance of or failure to perform an act, in breach of duties, by a person who in any capacity directs or works for a private-sector entity in the course of economic, financial, business or commercial activities for the purpose of obtaining an undue advantage for that person or for a third party.

According to the European Commission (2023), abuse of function is already an offence covered in the national law of the 25 EU Member States surveyed. Among these countries, the range of years for imprisonment sanctions is between one and 20 years, with a median of between 4 and 6 years. The statute of limitation for the abuse of function offence ranges from 5 to 25 years, with a median of 9 to 10 years.

Elements of the crime

While there is no universal consensus on the elements that should make up the offence of 'abuse of functions', there are some generally accepted elements which are found in the international convention texts, especially in the UNCAC, and in most national laws.

Actus Reus

As it relates to the actual conduct of individuals accused of this offence (*actus reus)*, three elements need to be found when assessing a case, according to the UNCAC:

1. The performance of or failure to perform an act (an act or an omission);
2. The violation of a law; and
3. The fact that the accused is a public official acting in the discharge of his/her functions.

Regarding the element 'violation of a law', Rose (2019: 213) states that this implies that "cases in which a public official has exercised discretion [potentially for the purpose of obtaining an undue advantage] in the course of his or her official duties, without actually violating any law" are not suitable for prosecution under the offence of abuse of functions.

States have sought to implement the element of "violation of a law" into their national legal framework on abuse of function in one of two different ways. Some states, such as Italy (before recent reforms) refer broadly to laws or regulations, while others, such as Norway, list specific conducts that are considered prohibited. Its Penal Code criminalises conducts such as:

> Section 111. If a public servant demands for himself or another public servant or for the public authorities any unlawful tax, duty or remuneration for services rendered or receives what is mistakenly offered to him as due in this respect, he shall be liable to imprisonment for a term not exceeding five years.
> Section 121. Any person who wilfully or through gross negligence violates a duty of secrecy which in accordance with any statutory provision or valid directive is a consequence of his service or work for any state or municipal body shall be liable to fines or imprisonment for a term not exceeding six months.

The later approach is also commonly found in Asian and Pacific States, but the UNODC (2017: 49) noted that, while "*these [specific] offences may indeed address to a certain extent the behaviour described in article 19 [of UNCAC], they remain bound by significant limitations and cannot be considered as entirely satisfactory for the purposes of the Convention, which calls for a much wider offence protecting the integrity of public service*". For this reason, UNCAC implementation review teams have often recommended States reproduce more precisely article 19.

The third element ("a public official acting in discharge of his/her functions") excludes private acts by public officials as well as persons in the private sector. The UNCAC itself defines 'public officials' broadly in article 2 (a), going as far as to note that it "may mean any person who performs a public function or provides a public service", which clearly includes ministers, whether they are also MPs or not.

The International Law Commission (2015) has recommended that when trying to ascertain whether the related "act was performed in an official capacity", investigators consider whether (i) the act was performed on behalf of the State and (ii) if it involves the exercise of sovereignty and elements of the governmental authority.

Other states have added the production of damage, harm or injury as a fourth element to the *actus reus* of their legal definition of abuse of function, meaning that damage has to be documented in order to allow prosecution to proceed. This is also considered to be a "*significant deviation from the text of the Convention*" and the UNODC (2017: 50) advised "caution" regarding this type of requirement, noting that most UNCAC implementation review teams recommended the elimination of this restrictive requirement.[4]

For example, in Lithuania, the Criminal Code defines abuse of office as "A civil servant or a person equivalent thereto who abuses his official position or exceeds his powers,

[4] While the teams did accept justification, in some countries, that the violation of laws will almost always harm the state in the sense of its legal order or that the jurisprudence had concluded that all arbitrary acts of a public official produce some type of prejudice to citizens (UNODC 2017: 50).

where this incurs major damage to the State, an international public organisation, a legal or natural person" [emphasis added]" (Article 228).

However, in a number of Balkan countries, causing harm is a non-mandatory element, meaning that the conduct must involve either an undue advantage or cause harm, but not necessarily both (Rose 2019: 214).

For example, in Montenegro, the Criminal Code defines abuse of office as: "A public official who misuses his office or authority, oversteps the limits of his official authority or refrains from performing his official duty and thereby obtains for himself or another undue advantage*, or causes damage to another or seriously violates the rights of another* shall be punished by a prison sentence for a term from six months to five years" [emphasis added] (Article 416).

In other countries, the fact that the crime occasioned harm to an individual or the public sector may constitute an aggravating circumstance, increasing the penalty to be imposed (Rose 2019: 215).

Mens rea

Following the UNCAC's own provision ("*when committed intentionally*"), prosecutors will need to demonstrate that the defendant intended to abuse their function or position. This refers to their state of mind, or *mens rea*. There are countries, however, that have enacted a lower standard, allowing for penalties to be imposed even in cases where only recklessness or negligence is demonstrated, such as Australia and Georgia (Rose 2019: 215).[5] This has been considered a success by some UNCAC Review Mechanism teams (UNDOC 2017: 49).

In the UNCAC provision, there is an additional element of *mens rea* to the 'abuse of function' offence, which is that the accused should have a special purpose of obtaining an undue advantage (Rose 2019: 215). As prescribed by article 28 of the UNCAC, intent or purpose "may be inferred from objective factual circumstances".

Slovenia's Criminal Code exemplifies this in defining the abuse of office offence as "An official who, *with the intention of procuring any non-property benefit for himself or another or of causing damage to another*, abuses his office or exceeds the limits of his official duties or fails to perform his official duties, shall be sentenced to imprisonment for not more than one year" (article 261).

In other UNCAC-defined offences, such as bribery (article 15-16) and trading in influence (article 18), 'undue advantage' is a part of the *actus reus*, meaning that these offences require that an undue advantage is actually promised, offered, given, solicited

[5] Broadly speaking, there are different levels of *mens rea* that might be required for criminal conducts to be considered as such: intention, awareness, recklessness and negligence (Foster 2021).

or accepted. By including the 'undue advantage' element in the *mens rea* of the 'abuse of function' offence, prosecutors would not need, in theory, to demonstrate that the public official received an undue advantage such as an illicit payment, but only that he or she acted with such a purpose. As noted by Rose (2019: 216), "because 'undue advantage' is a part of the mens rea rather than of the actus reus, this offence [abuse of function] may act as a 'catch-all' provision that is easier to prove."

In this sense, where the transposition of UNCAC article 19 into national law includes 'undue advantage' as part of the *actus reus*, this will require that prosecutors prove that an undue advantage was actually obtained, rather than simply intended. According to Rose (2019: 216) this would negate the "*provision's 'auxiliary role' in relation to these offences*" (Rose 2019: 216). As explicitly noted by the UNODC (2017: 50), "*where the law considers obtaining an advantage to be an objective element of the crime and not an element referring to the purpose of the perpetrator, then the elements of article 19 would not be fully me*t."

This is the case of the Serbian Criminal Code, article 359 of which defines abuse of office as "An official who by abuse of office or authority, by exceeding the limits of his official authority or by dereliction of duty *acquires for himself or another physical or legal entity any benefit*, or causes damages to a third party or seriously violates the rights of another, shall be punished with imprisonment of six months to five years" [emphasis added]."

Many countries have added an additional element to this offence relating to damage, harm or injury produced as the result of the act or omission in question. Some states, such as Austria and Lichenstein, have added it to the *mens rea* as a mandatory element, requiring that officials act with the intention of causing harm to others rather than with the intent to obtain an undue advantage. The Austrian Criminal Code in article 302 defines abuse of official authority as "an official who abuses wilfully his authority to carry out official matters executing the laws in the name of the federal government, a state, a local government, a municipality or another person under public law *with the intent to harm the right of others* shall be punished by prison sentence from six months to five years" [emphasis added].

The mandatory nature of this type of provision represents a "*significant deviation*" from the UNCAC text and "such legislation fails to fully implement Article 19, and instead resembles the offence of actual fraud" (Rose 2019: 215).

Where it has been included as an additional non-mandatory element of *mens rea*, this is considered unproblematic, given that it represents an expansion rather than a restriction of the offence: as is the case in Croatia, Indonesia and Switzerland (Rose 2019: 215). For example, article 337 of the Croatian Criminal Code defines abuse of office as "an official or responsible person who*, with an aim to procure for himself or another non-pecuniary benefit, or to cause damage to a third person*, abuses his office or official authority, oversteps the limits of his official authority, or fails to perform his duty" [emphasis added].

Table 2: Elements of the offence of 'Abuse of Function'

Elements of the offence	Mens Rea (intent)	Actus reus (result)
Obtaining an undue advantage	UNCAC-aligned Example: Slovenia	Against UNCAC Example: Serbia
Causing injury, damage or harm (as mandatory)	Against UNCAC Example: Austria	Against UNCAC Example: Lithuania
Causing injury, damage or harm (as non-mandatory)	Compatible with UNCAC Example: Croatia	Compatible with UNCAC

Classification by the author based on data provided by UNODC (2017) and Rose (2019).

In summation, the UNCAC does not require that accused individuals actually obtain an undue advantage for themselves or for a third party or that they cause injury, damage or harm to others.

It does require, however, that prosecutors demonstrate that there was a specific intent by the defendant to obtain said undue advantage for themselves or for a third party. National legislations, however, have often strayed from these directives, including additional requirements as constituent elements of the abuse of function offence.

Recent reforms of 'abuse of function' offences

The very nature of the 'abuse of function' offence as a residual, catch-all offence with sometimes vague and generic terms can lead to tensions with human rights and due process guarantees. In 2007, Estonian legislators repealed the provision that defined the related offence of 'misuse of official position' (article 161) as the "intentional misuse by an official of his or her official position with the intention to cause significant damage or if thereby significant damage is caused to the legally protected rights or interests of another person or to public interest."

The repeal followed controversy over the enforcement of this provision, which led the European Court of Human Rights in the case Liivik v. Estonia to deem the provision incompatible with article 7 of the European Charter on Human Rights.[6] (Venice Commission 2013: 11). In essence, this provision enshrines safeguards against arbitrary prosecution, conviction and punishment, determining that criminal law should not be

[6] Article 7 states that "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."."

extensively construed to an accused's detriment. Therefore, laws should be accessible and foreseeable in its enforcement (European Court of Human Rights 2009).

In the case, Jaak Liivik, who worked as Director-General of the Estonian Privatisation Agency, was charged and convicted for the misuse of his official position in giving representations and warranties in a privatisation agreement. The court found that the "interpretation and application of Article 161 in the present case involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects" (European Court of Human Rights 2009).

More recently, in Italy, the parliament repealed the country's 'abuse of function' provision. Article 323 of the Criminal Code incriminated the public official "who, abusing the powers inherent to his functions, commits, to cause damage to others or to procure him an advantage, any fact not envisaged as a crime by a particular provision of law." This provision had a broad application which included rigging procurement processes, steering government contracts to specific third parties and denying permits for self-interested reasons (Da Paolis 2025).

It was argued that the provision was "too vague" and that it had been discouraging local politicians and civil servants from authorising projects due to a fear they would be investigated no matter their efforts to abide by the law (Tondo 2024). Critics also noted that according to data from the Ministry of Justice, 96% of abuse of office proceedings end with the closure of the investigations against the accused, which demonstrates that most investigations around this type of offence had been meritless and, possibly, politically-motivated tools of harassment (Tondo 2024). This vote, however, was criticised by the President of National Anti-Corruption Authority and the European Commission as not only shortsighted, but also as posing a risk for increased infiltration of the mafia into local government (Da Paolis 2025).

References

Da Paolis, Roberta. 2025. The Global Anticorruption Blog. Guest Post: Italy's Misguided, and Possibly Illegal Repeal of the Abuse of Office Offense.

European Commission. 2023. Proposal for a Directive of the European Parliament and of the Council on combating corruption.

European Court of Human Rights. 2009. Case of Liivik v. Estonia, Application n. 12157/05.

Foster, Michael. 2021. Mens Rea: an Overview of State-of-Mind Requirements for Federal Criminal Offenses.

International Law Commission. 2015. Fourth report on the immunity of State officials from foreign criminal jurisdiction. A/CN.4/686.

Rose, Cecile. 2019. The United Nations Convention against Corruption: a commentary. Oxford University Press.

Tondo, Lorenzo. 2024. The Guardian. Italy's far-right government submits plans to decriminalize abuse of office.

UNODC. 2010. Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption.

UNODC. 2012. Legislative guide for the implementation of the United Nations Convention against Corruption.

UNODC. 2017. State of implementation of the United Nations Convention against Corruption: criminalization, law enforcement and cooperation.

Venice Commission. 2013. Report on the Relationship between Political and Criminal Ministerial Responsibility.

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