

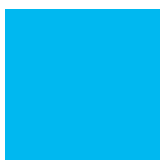
Defining Whistleblowing

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Defining Whistleblowing

The whistleblowing debate is gaining momentum not only in the anti-corruption environment but also outside this traditional circle, attracting actors typically not dealing with whistleblowers protection and anti-corruption at large. This paper summarizes how the understanding of the term “whistleblowing” has been developing from its origins to present days. It will do so by exploring how the term has been – and is – understood and defined by three categories of “agents”: academics, international and regional organizations, and those “outsiders” who only recently started addressing the notion of whistleblowing in the areas that are not strictly related to corruption.

1. Academic understandings of whistleblowing

As definitions from around the world differ from each other, most scholars tend to agree that a common understanding of “whistleblowing” has not been reached. This is, perhaps, because this term still lacks both a proper technical connotation and a unanimous legal definition. In academia, there are numerous definitions of whistleblowing and whistleblower developed over the years. Hirschman (1970) identified whistleblowing with the act of dissent. According to him, when facing degenerative behaviors in organizations, employees might react in three different ways:

- Exit: the standard response to dissatisfaction with economic entities,
- for instance, leaving one’s position by seeking a transfer or resigning.

- Voice: expressing one’s concern or disagreement. It is the usual way to deal with dysfunctional social and political organisations. In both cases the means of expression are mechanisms to relieve the individual’s discontent and to give signals that will allow the organisation to heal itself.
- Loyalty: a clearly distinct course of action which condenses into complete or partial compliance with questionable behaviours.

Presumably, it is the option “voice” that could be understood as the abovementioned “act of dissent” and which can be related to a widely accepted understanding of whistleblowing provided by Nader in 1971. He described a “whistleblower” as a man or a woman who, believing that the public interest overrides the interest of the organization he/she serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent, or harmful activity (Nader, 1971, p.vii). More recently, Near and Miceli (1985, p.4) defined the act of whistleblowing as the “disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action”. Rehg and Van Scotter (2004) believe such a definition to be very inclusive, as it permits empirical determination of differences among types of whistleblowers. In fact, it refers to whistleblowers who use both internal and external channels.

The reference to internal channels, however, has been criticized by a number of scholars. Farrell and Petersen (1982), for instance, perceive whistleblowing as occurring only when information is leaked to parties outside the organization. In other words, as explained by King (1999), whistleblowing can

only occur when parties external to the organization are informed of illegal or unlawful wrongdoing within an organization. Further, Boatright (2000, p.109) provides for a similar definition which still focuses on the relevance of external reporting channels: “the voluntary release of non-public information, as a moral protest, by a member or former member of an organization outside the normal channels of communication to an appropriate audience about illegal and/or immoral conduct in the organization or conduct in the organization that is opposed in some significant way to the public interest”. Jubb (1999, p.79), instead, not only defines whistleblowing as a “deliberate non-obligatory act of disclosure” that “is made by a person who has or had privileged access to data or information of an organization” but also differentiates whistleblowing from the act of informing in general “if the term is to have and convey particular significance”. He continues by affirming that whistleblowing is distinguishable from some types of informing because the disclosure is an indictment, as it identifies perceived wrongdoing, typically a bad news message about misconduct, incompetence, and fraud (Jubb, 1999). Along the lines of the Hirschman argument, Jubb agrees with defining whistleblowing as an act of dissent and further elaborates on a concept which can be seen as a “response to an ethical dilemma”. The latter typically contains the following six items:

1. The act of disclosing damaging news or information
2. The whistleblower agent
3. A disclosure subject – some potential wrongdoing
4. A target organisation that is held responsible
5. A disclosure recipient, for example the media or ombudsman
6. An outcome – the disclosure enters the public domain.

(Jubb, 1999, p.83).

Some scholars have developed another approach to analyse whistleblowing by employing societal models. In other terms, the nature and social acceptability of the act of whistleblowing might change in response to different cultural backgrounds. For instance, Triandis and Gelfand (1998, p.118) propose four types of what they call cultural “orientation” of society:

- **Horizontal collectivism:** all individuals are equal, interdependent and share common goals.
- **Horizontal individualism:** all individuals are equal but have a tendency to be self-reliant and do not share common goals.
- **Vertical collectivism:** individuals tend to sacrifice individual goals for the pursuit of loyalty to and respect of a hierarchical system.
- **Vertical individualism:** individuals are self-reliant and tend to move up in the hierarchy as a result of competitions with other individuals.

By further elaborating on this framework, most scholars tend to agree on the general assumption that collectivist cultures generally discourage whistleblowing. Collectivists, in fact, avoid directly criticizing a co-worker since it disrupts the unity of an organization (Brody et al., 1998). On the other hand, in individualistic societies, the act of whistleblowing might be seen in a more positive way, consistent with the idea that it might be a means to move up in the societal hierarchy. Regarding the vertical-horizontal dialectic, rather than focusing on the relationship between culture and the act of whistleblowing, scholars have focused on how vertical and horizontal societies shape the way individuals report, and to whom. For example, King (1999) suggests that in the presence of vertical structures, individuals

tend to avoid internal reporting channels and might look for external ones.

Setting aside the last paragraph which reviews a specific approach to whistleblowing, based on the analysis above, it is possible to conclude not only that most scholars tend to more or less agree with the definition provided by Near and Miceli but also that, as usefully summarised by the U4 Anti-Corruption Resource Centre (2009), it is possible to identify the four key characteristics of whistleblowing among the various definitions provided:

- It typically refers to wrongdoings connected to the workplace.
- It can involve a breach of the law, unethical practices, corruption, health/safety violations, and in some cases, maladministration.
- Wrongdoings are usually reported internally or externally.
- As opposed to personal grievance, there is often a public interest dimension.

2. International and regional efforts

The last century has seen a number of whistleblowing related scandals in a variety of settings (health, environment, nuclear weapons, etc.). Some of the high-profile ones related to corruption. The 1970s “Watergate scandal” involving the abuse of power by members of the Nixon administration, the systemic corruption in the New York Police Department reported by Frank Serpico, and the 1988 case of the misuse of pension funds by the Mirror Group reported by Harry Templeton are just some of a long list of

scandals involving fraud, bribery, abuse of office, and other forms of corruption identified and exposed by whistleblowers. Huge amounts of money involved in these cases caused the regional and international anti-corruption communities to include in their instruments provisions aimed at not only preventing the occurrence of such corrupt acts but also guaranteeing protection to the individuals putting themselves at risk by blowing the whistle.

This section provides an overview of how the regional and international anti-corruption communities have progressively been dealing with – and their understanding of – whistleblowing over the last decades.

The focus on anti-corruption instruments does not negate the importance and need of reporting on environmental, health, and human rights violations. Rather, the whistleblowing related debate has been – and currently is – quite active in the anti-corruption community. This has caused a number of international organizations to include whistleblower protection in a number of conventions, recommendations and guidelines which came into being during the last 20 years and were meant to assist states in establishing and implementing whistleblower protection mechanisms.

After discussing the general principles enshrined in the international instruments, the analysis will be structured along the following three questions:

- Who is entitled¹ to disclose?
- What kind of information may be disclosed?
- What are the rules for disclosure?

The Inter-American Convention against Corruption

¹ In other words, who is going to receive protection in case of disclosure?

The Organization of American States (OAS) Inter-American Convention against Corruption entered into force in 1997 and to date counts 33 Member States. The earliest among the international anti-corruption instruments, the Convention was also the first one to include a provision establishing protection for whistleblowers. In Article III.8 “Preventive Measures”, the Convention calls upon Member States to “create, maintain and strengthen systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems” (Inter-American Convention against Corruption, 1996). Regarding those who shall be granted protection when disclosing information (i.e. the subjects of the disclosure), the Convention calls upon Member States to shield “public servants and private citizens” from retaliatory practices. In this sense, Article III.8 of the Convention presents a wide-ranging definition of the term “whistleblower” because it entitles not only public servants but also private citizens, who believe to be in possession of relevant information, to report and receive protection. The principle is very clear in affirming that the persons entitled to report would be protected only in case of good faith reports on acts of corruption.

The Organisation for Economic Co-operation and Development

During the last twenty years, the Organisation for Economic Co-operation and Development (OECD) has been studying the practices and developing guidelines on whistleblower protection which resulted in four documents: the Recommendation on Improving Ethical Conduct in the Public Service (OECD, 1998), the Recommendation of the Council on Public Integrity (OECD, 2017), the Recommendation of the Council

for Further Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, 2009), and the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (OECD, 2016).

In the first document, Principle 4 regulates – in a very embryonic manner – whistleblower protection only in the public sector: “Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing” (OECD, 1998, Principle 4). In recommending States to improve their policies on whistleblower protection, the OECD puts the provision in the rights-obligations framework: “... Public servants need to know what their rights and obligations are”. This means that the OECD understands whistleblowing not only as the exercise of the public servants’ right to freedom of expression, but also as a procedure which requires the actors involved to respect certain procedural rules.

Principle 4 does not provide for a detailed description of wrongdoings. As a consequence, this might put States in the position to either extensively or restrictively interpret the scope of the recommendation. In this sense, the spectrum of interpretations would range from only the issues related to ethical conduct in the public service to all those misconducts falling outside the category of corruption in the public sector.

No specific mentioning of good faith in reporting is made in Principle 4. However, in January 2017, the OECD Council adopted the Recommendation of the Council on Public

Integrity (C(2017)5) which revisited and broadened the scope of whistleblower protection guidelines. At paragraph 9.b., the OECD calls upon Member States to “support an open organisational culture within the public sector responsive to integrity concerns, in particular through “providing clear rules and procedures for reporting suspected violations of integrity standards, and ensure, in accordance with fundamental principles of domestic law, protection in law and practice against all types of unjustified treatments as a result of reporting in good faith and reasonable grounds” (OECD, 2017, para. 9.b).

The third instrument, namely, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, provides for whistleblower protection in Recommendation IX.iii. It states that Member States should ensure that “appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions” (OECD, 2009, paragraph IX.iii). The recommendation, however, deals with a very specific act of corruption: bribery of foreign public officials. Notwithstanding the peculiarity of the provision, it is interesting to note that although the scope is very narrow, the OECD recommends Member States to grant protection not only to public officials, but also to private sector employees who report in good faith.

The fourth OECD document pertaining to whistleblower protection is the 2016 Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption. In paragraph 7.1, the Council recommends

Member States to create reporting/whistleblowing mechanisms which should “be applicable for all public officials involved in development co-operation and implementing partners who report in good faith and on reasonable grounds suspicion of acts of corruption” (OECD, 2016, para. 7.1). In this context, this Recommendation does not significantly differ from the previous ones as:

- The opportunity to report should be granted only to “public officials”.
- Public officials would be granted protection only in case of reporting on cases of corruption and not on any other breaches of law.
- Public officials would be granted protection only in case of reporting in good faith and on reasonable grounds.

The Council of Europe (CoE)

The analysis of regional organizations’ understandings of whistleblowing cannot be complete without mentioning the work done by the Council of Europe (CoE) in two of its anti-corruption instruments: the Civil Law Convention on Corruption (CoE, 1999) and the CoE Recommendation CM/Rec (2014) (CoE, 2014).

Under Article 9 (Protection of employees), the Civil Law Convention states that “each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities” (CoE, 1999). At the time of drafting the Convention, the CoE considered that only one category of individuals was “entitled to report”: employees. At first glance, therefore, it seems that the CoE’s understanding of the

term “whistleblower” tends to resemble the OECD’s one. That is, perhaps, because in this provision, the CoE refers both to the existence of a work-based relationship between the “reporter” and the “reported”, and the need to report in good faith.

Before analysing the second document, we need to mention that during the last two-three decades, the CoE’s perspective on a broad variety of issues – including corruption – has been significantly influenced by human rights principles, especially by the work done within the 1950/53 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The matter of whistleblower protection is broadly reflected in Article 10 of the ECHR, “Freedom of expression.” The article states that “everyone has the right to freedom of expression” and that “this right shall include freedom to hold opinions and to receive and impart information and ideas without interference” (ECHR, 1950). By relying on Article 10, the European Court of Human Rights (ECtHR), in *Guja v. Moldova*, one of the most significant whistleblower protection cases, decided that “severely sanctioning a civil servant for his public disclosure to the press of internal documents revealing possible governmental corruption constitutes a violation of freedom of expression under Article 10 of the European Convention of Human Rights” (Right2info, 2017).

While, on the one hand, the ECtHR has shown due interest in protecting whistleblowers by upholding every person’s right to freedom of expression, on the other hand, there is no specific reference – neither in the ECHR nor in the Court decisions – to extending the coverage of the term “whistleblower” to individuals outside the sphere of work-based relationships. Perhaps for this reason, in 2014, the CoE provided a more comprehensive definition of whistleblower

within the Recommendation CM/Rec (2014)7 “Protection of Whistleblowers”. In the appendix to CM/Rec (2014)7 under point II.4, it is recommended that “the national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage” (CoE, 2014, p. 7).

As we see, from the Civil Law Convention on Corruption to the abovementioned Recommendation, the CoE’s view on whistleblowing is evolving through the broadening of the categories of individuals entitled to report. At the same time, the 2014 Recommendation is yet to be implemented by CoE Member States.

The United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) entered into force in 2005 and to date counts 181 Parties (UNODC, 2017). Having been ratified by the majority of countries around the world, the UNCAC represents what U4 has described as “a global response to a global problem” (U4 Anti-Corruption Resource Centre, 2013). The UNCAC is the outcome of a process in which the international community, by acknowledging the need to take a firm position against corruption at the global level, created a unique treaty not only due to its geographical coverage, but also because of the extent of its provisions. The comprehensive nature of the UNCAC is reflected throughout its text, including the provision dedicated to whistleblower protection systems. To the latter, the UNCAC dedicates Article 33 “Protection of reporting persons.” The article provides that “each State Party shall consider incorporating into its

domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention” (UNCAC, 2005).

Compared to the instruments analyzed above, it seems quite safe to state that Article 33 is more comprehensive than its predecessors in other international instruments. As mentioned in the UNCAC Technical Guide to the United Nations Convention Against Corruption, that is because the Convention aims to remind its signatories of “the importance of promoting the willingness of the public to report corruption” (UNODC, 2009, p.106). Article 33 calls upon States Parties to provide protection to any person, irrespective of his/her status, who decides to report on one or more acts of corruption listed in the Convention. Like the OECD and the CoE, the UNCAC requires individuals to report not only on reasonable grounds, but also in good faith. However, it is important to underline that Article 33 is a non-mandatory provision. Rather, States Parties “shall consider” extending protection to any individual as a complement to Article 32 “Protection of witnesses, experts and victims” (UNODC, 2009, p.105).

The African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (AU Convention) entered into force in 2006 and to date counts 38 States Parties. The Convention addresses corruption in both the private and public sectors and promotes transparency and accountability towards the enhancement of the rule of law and good governance. The Convention touches upon the matter of whistleblowing in Article 5.6, calling upon States Parties to “adopt measures that ensure

citizens report instances of corruption without fear of consequent reprisals” (AU Convention, 2006).

It is interesting to focus the attention on the categories of individuals the AU Convention entitles to report. Article 5.6 uses the term “citizens”. In this sense, by neither referring to work-based relationships nor distinguishing between the private and the public sectors, Article 5.6 seems to follow the UNCAC line. However, the term “citizen” might leave room to different kinds of interpretation. On the one hand, the term might refer to any individual living in one of the 38 Member States of the AU Convention. On the other hand, the term “citizen” might be understood as referring only to the persons holding citizenship in one of the 38 States Parties. This would imply that all those individuals living or working in the African Union countries without the citizenship of one of the Parties (i.e. migrant workers) might not receive protection in case of reporting on acts of corruption. This scenario, together with the nature of the different subjects of whistleblowing set forth in the instruments under consideration, will be further discussed in the following sections.

The Arab Convention to Fight Corruption

The 2010 Arab Convention to Fight Corruption has been signed by 19 states. It is based on the principles of Islam, the Charter of the League of Arab States, the UN Charter, and all regional and international conventions related to fighting corruption that the Arab states have signed including the UNCAC (Arab Convention to Fight Corruption, 2010, Preamble). As highlighted by Nouaydi and Meknassi (2012), the Arab Convention to Fight Corruption affirms that the fight against corruption is not limited to the official authorities, but people and civil society have a crucial role to play as well.

Concerning whistleblowing, rather than referring to “reporting persons”, the Convention regulates the protection of several categories of individuals without differentiating them. Informers, witnesses, experts, and victims as well as their relatives and those “closely connected to them” are the categories of individuals who – under Article 14 – shall be granted protection when giving evidence relating to the acts criminalized by the Convention. It is interesting to note, however, that Article 14 regulates the matter without distinguishing among these categories, for example, between informers and victims. As mentioned before, the aim of the Convention was to further strengthen previous anti-corruption commitments of the States Parties. It may be the case that those countries in need of technical assistance might require more detailed guidelines at the regional level. These would help define the differences between the categories of individuals willing to report acts of corruption, their relation to the “reported” subjects, and the rules for disclosure.

The nature of understanding of whistleblowing changes in response to the nature of the document under analysis. It is predictable that organizations such as the OECD and the United Nations deal with whistleblowing in a different manner because different are their mandates, their geographical coverage, and their historical backgrounds. However, despite the evident differences, the legal instruments discussed above present the lowest common denominator, i.e., that whistleblowing is understood as a means, a tool which governments are encouraged to employ and further foster for not only detecting, but also preventing the occurrence of acts of corruption. As a minimum, the persons entitled to report include “employees”. As a maximum, they may include “all persons.” Depending on the nature of the document, the subjects are entitled to report cases

which range from bribery of foreign public officials to various other acts of corruption listed in the conventions. The requirement of reporting in good faith has been introduced in some of these international instruments, and “on reasonable grounds” appears to be a requirement only in the OECD documents and the UNCAC.

3. Alternative approaches to understanding whistleblowing

Despite the existence of different understandings of whistleblowing, one could argue that the public interest nature of whistleblowing should always override employees’ sense of loyalty to a given organization. Rather than an absolute axiom, such a conviction originates from two main assumptions on whistleblowing. The first one is that whistleblowing can (and does) constitute an effective means to detect, investigate and eventually punish corrupt practices. The second one is that punitive measures taken against whistleblowing individuals, such as harassment, dismissal, persecution, or even imprisonment, must be prevented by implementing efficient mechanisms of protection.

As briefly mentioned in the introductory part, the whistleblowing related debate is being increasingly characterized by the inclusion of actors typically not dealing with corruption. The following section will illustrate how three different actors understand whistleblowing: the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OAS Special Rapporteur on freedom of expression, and the international NGO Whistleblowing International Network (WIN).

Looking at whistleblowing from a non-anti-corruption perspective has, for these actors, essentially two implications. First, that whistleblowing can be seen as a tool which would allow for the detection of wrongdoings outside the anti-corruption sphere, such as breaches by organizations of human rights, environmental, health, labour laws, and so on. Secondly, at a more theoretical level, that the act of whistleblowing is itself a right which every individual, irrespective of his/her status, should be guaranteed to exercise. The following section has an illustrative purpose, and the three actors selected are not meant to represent an exhaustive list of the so-called “alternative approaches”. Rather, the section will demonstrate that their understanding of whistleblowing has two main reasons: first, because they represent the international human rights and non-governmental environments, and second, they have been selected for the peculiarity of their arguments.

The 2015 Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

It is well known that certain retaliatory practices against whistleblowers have been quite severe. Stemming from the assumption that retaliation might jeopardize the enjoyment of whistleblowers’ civil and political as well as economic and social rights, the need to protect disclosing individuals has been addressed by international human rights bodies. For instance, the UN High Commissioner for Human Rights (OHCHR) in 2013 emphasized the “need to protect persons disclosing information on matters that have implications for human rights” (UN News, 2017).

Among the diverse human rights bodies addressing whistleblowing, the recommendations contained in the 2015

Report by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (hereinafter UNSR) are broadly seen as the most in-depth analysis of this matter. However, before embarking on the analysis of the Report, a brief introduction to the nature of this UN human rights mechanism may be helpful.

The Special Rapporteur is one of the UN Charter-based mandates under the umbrella of the so-called “UN Special Procedures”. Established by the Human Rights Commission (later the Human Rights Council)², such procedures are carried out by independent and impartial experts on a pro bono basis. Depending on the topic the Human Rights Council (HRC) has requested the experts to investigate, Special Procedures can either assume the form of a working group (usually 5 members – one from each UN Regional Group) or be conducted individually. In the latter case, an expert is appointed as “Special Representative of the Secretary General”, “Independent Expert” or, as in this case, “Special Rapporteur” (Luf, 2012, p.77). Working methods and competences may differ depending on the nature of the subject and be country-specific or thematic (Luf, 2012, p.78). In general, the expert examines victims’ complaints, conducts country visits/fact-finding missions upon the invitation of states, and interacts with a broad variety of stakeholders including governments, NGOs, civil society, and the media. After collecting the information, the expert drafts a report and submits it to the HRC in Geneva and often also to the UN General Assembly (UNGA) in New York.

² The Human Rights Commission was replaced by the Human Rights Council by the UNGA Resolution 60/251 in 2006. For further info, see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement>.

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression's mandate is defined by the Human Rights Council (HRC) resolution 7/36 of March 2008. The resolution states, in point 3.c, that the UNSR should "make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations" (HRC, 2008).

The 2015 UNSR Report (adopted by the UNGA Resolution A/70/361) touches upon such topics as access to information, public participation in political affairs, democratic governance, and public accountability (UNGA, 2015). Further, it dedicates its entire Chapter IV to the protection of whistleblowers. That is, perhaps, because whistleblowing is understood by the UNSR as one of the manifestations mentioned in Resolution 7/36. Although the section addresses whistleblower protection in a variety of settings, including in international organizations and in relation to national security, this paper will focus only on the first part of Chapter IV, "Legal protection of whistle-blowers".

Entitled "The term 'whistle-blower' should be broadly defined and focus attention on alleged wrongdoing," the subchapter in question consists of four paragraphs. In each paragraph, the Special Rapporteur outlines a key principle which, in his opinion, should be taken into account when regulating whistleblower protection. The four principles, to which paragraphs 28 - 31 are dedicated, can be summarised as follows:

- Broad definition of whistleblower (para. 28)

According to the Special Rapporteur, in order to enhance "the right to know, accountability

and democratic governance," it is necessary to look at a whistleblower as

a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety."

- Work-based relationship requirement is viewed as a limitation (para. 29)

"Protection laws often limit whistle-blowers to those who blow the whistle 'in the context of their work-based relationship'". That is presumably because employees, as insiders, are by their very nature the ones most informed and best positioned to identify and report on misconduct. However, "because of the range of others who may report wrongdoing allegations, such as consultants, interns, job applicants, students, patients, and others who do not enjoy a legally protected relationship with an organization", the Special Rapporteur affirms that "such a limitation is not recommended".

- Protection as an incentive to disclose (para. 30)

In paragraph 30, the Special Rapporteur focuses attention on the relevance of encouraging disclosure irrespective of the nature of the wrongdoing. In other words, regulations should "not require potential whistle-blowers to undertake precise analyses of whether perceived wrongdoing merits penalty under existing law or policy".

- Relevance of the information over motivation of the whistleblower (para. 31)

By highlighting the existence in some national cases of "good faith" as a prerequisite to disclosure of information, the

Special Rapporteur affirms that to encourage whistleblowing, “motivations at the time of the disclosure should be immaterial to an assessment of his or her protected status”. This is, arguably, because shifting the attention from the object (information) to the motives of disclosure might require individuals to meet additional requirements. As a consequence, potential whistleblowers might abandon any attempt at disclosure.

The OAS Special Rapporteur for Freedom of Expression

While Article III.8 of the Inter-American Convention against Corruption represents what OAS Members have agreed upon, seven years later, a representative of the Organization, namely the OAS Special Rapporteur for Freedom of Expression, expressed his opinion on whistleblowing. In 2004, he stated that “whistleblowers releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in good faith (OAS Special Rapporteur, 2004). Evidently, the OAS Special Rapporteur looks at whistleblowing as an act not strictly related to corruption. It rather consists of a deliberate exercise of everyone’s right to freedom of expression and “reporting” on unlawful conduct.

When comparing the two understandings of whistleblowing, it is necessary to be aware not only of the nature of the two documents under analysis, but also the periods in which they were developed. While the Convention constitutes the outcome of a negotiation process between states, the Special Rapporteur works independently, and his/her mandate requires him/her to deal with a given issue merely from a “freedom of

opinion and expression” standpoint, neglecting approaches which might be important to other actors, such as States Parties. Thus, if it is true that the OAS Special Rapporteur’s understanding of whistleblowing is more comprehensive than the one provided by the OAS Convention, such deduction was rather predictable.

The Whistleblowing International Network

Under the motto “Protecting those who act to protect us”, the Whistleblowing International Network (WIN) is an international platform at the disposal of NGOs and civil society organizations dealing with whistleblower protection to which it offers counsel, tools and expertise. WIN understands whistleblowing as an act of “public interest” which might be threatened in various circumstances, such as corruption, waste, fraud, abuse, and human rights violations. The NGO advocates for understanding whistleblowing as the right to communicate information about risk or wrongdoing of any kind as a part of the freedom of speech which ensures that citizens are able to freely express their ideas, opinions and views (WIN, 2018). Consequently, according to WIN, the relevance of the information should always prevail over the category of individuals willing to report (employees, officials, citizens, etc.). Such a perspective challenges the need for the existence of one of the most common requirements for disclosure, particularly contained in anti-corruption instruments: good faith. In other words, according to WIN, the attention of investigators and the public at large should be focused on the potential that the information shared by a whistleblower has and not on his/her credibility. Not taking into account good faith, in WIN’s opinion, would help solving the dilemmas of investigating and intervening in cases raised by such subjects as prisoners, prostitutes, mentally-challenged individuals, and so on.

4. Some observations on the different understandings of whistleblowing

Moving away from the differences identified in the previous sections, this section aims to underline the need to discuss lexical dissimilarities. To illustrate a few, Table 1 summarizes the analysis.

- **Subjects of whistleblowing**

The review of regional and international instruments has highlighted significant differences in how the term “whistleblowing” is understood. The Inter-American Convention understands/accepts “public servants” and “private citizens” as whistleblowers, the AU Convention entitles every “citizen” to report, the OECD and the CoE Conventions use the word “employee”, and the UNCAC and the Special Rapporteur affirm that “any person” shall be free to blow the whistle.

The OECD and the CoE adopt a “restrictive” interpretation of the term. That is arguably because employees, as insiders, might be by their very nature the ones most informed and well-placed to identify and report misconduct. It might be the case, however, that not every employee feels comfortable to report. This might occur due to a broad variety of factors: uncertainty, fear of retaliation, lack of trust, and so on. In other words, before committing to disclose, every individual embarks on a sort of a “cost-benefit analysis” of the incentives (public interest matters) and the hurdles (retaliation-related fears) related to a potential revelation. As a matter of fact, such cost-benefit analysis often leads to abstention from blowing the whistle: the risks override the benefits. Yet it might happen that such “discomfort” leads employees to open up elsewhere. They might pass a piece of information on to relatives, friends, members of associations they belong to, and others. The acknowledgment of such “informal channels” might be one of the

reasons leading the OAS and the AU to extend whistleblower protection to “any citizen”.

The term “any citizen” encompasses a much broader category of individuals than “employees”. Yet, a question arises whether the term “citizen” takes into consideration those individuals who work and live in countries of which they don’t hold citizenship. Therefore, although sounding wide-ranging and egalitarian, the use of the term “citizen” might constitute a restrictive measure with significant consequences.

First, it would not guarantee protection to individuals in possession of relevant information who are non-citizens. Second, at a more abstract level, it may lead to violations of human rights, such as the right to freedom of opinion and expression of foreigners, and the right to freedom from discrimination based on nationality, for instance, of migrant workers. Therefore, it can be argued that the UNCAC, entitling “any person” to report, might provide for the most wide-ranging and comprehensive understanding of the term “whistleblower.” Along the same line, the UNSR opinion referring to “any person” would enable the attention to be focused on the information at hand and not on the “qualifications” of the person willing to report.

A specific question, however, arises at this point, i.e. whether by using the term “person” the UNCAC and the UNSR meant only natural persons or legal persons as well. If the latter, an extensive interpretation of the term would lead to a new debate concerning the role of CSOs and NGOs in reporting on behalf of natural persons.

Table 1

| Source | Actors protected | Type of action regulated | Motivational requirement |
|---|--|---|---|
| OAS Convention | Public servants and private citizens | Reports of acts of corruption | Good faith |
| AU Convention | Citizens | Reports of instances of corruption | N/A |
| CoE Convention | Employees | Reports of suspicions of corruption | Good faith |
| CoE (2014) | Employees and individuals whose work-based relationship has ended and individuals whose work-based relationship has not been initiated | Reports of information concerning a threat or harm to the public interest | N/A |
| Arab League Convention | Informers, witnesses, experts, victims, their relatives, and those closely connected to them | Reports of acts of corruption listed in the Convention | N/A |
| OECD (1998) | Public servants | Reports of suspected wrongdoings within the public service | Good faith and reasonable grounds |
| OECD (2009) | Private and public sector employees | Reports of suspected acts of bribery of foreign public officials | Good faith and reasonable grounds |
| OECD (2016) | Public officials | Reports of cases of corruption | Good faith and reasonable grounds |
| UNCAC | Any person | Reports of offences established in accordance with the Convention | Good faith and reasonable grounds |
| UNSR Report | Any individual | Disclosures on what constitutes a threat or harm to a specified public interest, such as violations of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety | Motivation at the time of the disclosure should be immaterial to an assessment of the individual's protected status |
| OAS Special Rapporteur Declaration | Individuals releasing confidential or secret information | Information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law | Good faith |
| WIN | Any individual | Any threat to the public interest | N/A |

Source: Ruggero Scaturro

- **Disclose vs report**

Throughout the course of this review we have come across different systems of whistleblower protection. In very general terms, “blowing the whistle” might be associated with disclosing and/or reporting indiscriminately. However, there are certain differences in the use of the terms “disclosure” and “reporting.” While “disclosing” implies the possibility to divulge information to the public (authorities, CSOs, NGOs, media, etc.), “reporting” usually refers to the act of passing information to authorities (internal or external to the organization) in an official manner. In other words, provisions which appear comprehensive and wide-ranging but which entitle individuals only to “report” might not be as expansive as those allowing individuals to “disclose”. Therefore, when integrating whistleblower protection provisions, it is important to also take into consideration this specific terminology.

- **Good faith and reasonable grounds**

Although stating that “motivations at the time of the disclosure should be immaterial to an assessment of his or her protected status”, the UN Special Rapporteur affirms that a whistleblower is a person who exposes information he/she *reasonably* believes to be true. The very general idea of this requirement to disclose/report should be further analysed and clarified. That is, generally, because in different societies and cultures, different understandings may exist with regard to what brings/causes individuals to divulge information. For example, in the Republic of Korea, the law incentivises employees to report on wrongdoings by guaranteeing them up to 30% of the amounts recovered because of their disclosures (Chang et al., 2017, p.6). As the disclosing person may be motivated by public interest

and not think/know of the possible reward, or by both the reward and the public interest, one could argue that the two motivations can coexist quite successfully.

In this case, however, the good faith rationale behind a public interest disclosure might lose its direct contact with its Latin origin: *bona fides*, meaning a genuine act, contrary to *mala fides*, an act deliberately put in practice to harm someone else’s right(s). It may happen that such differences get nuanced, and, as a consequence, it would be more difficult to identify the moral and ethical connotations of selfless disclosures, and the pure public interest aspect might be undervalued.

Given the psychological and social consequences whistleblowers have to face after their disclosures, if institutions and policymakers see whistleblower protection as a “sword” and not as a “shield”, there may be significant implications. If the original goal of disclosing and/or reporting is employing such an act as a tool for enhancing public accountability, the creation of economic incentives might divert society away from promoting the creation of a culture of integrity and moral rectitude. It is true, however, that financial incentives have shown to be an easy and effective way to encourage whistleblowers.³ It is, therefore, a question of how policymakers look at this specific issue. Financial incentives make the whistleblowing mechanism more effective, but the question which arises, from a political perspective, is whether “effectiveness” is the only ultimate goal of the mechanism.

³ In countries like the US and South Korea, the number of whistleblowers is significantly higher than in countries where whistleblowing is not financially incentivized. See, i.e., Wolfe, S., et al., 2014. Whistleblower Protection Rules in G20 Countries: The Next Action Plan. Public Consultation Draft, Transparency International Australia. Available at <http://www.transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf>.

Nonetheless, it is still interesting to see how the whistleblowing related debate has been progressively attracting a broad variety of participants, including from environments not typically dealing with anti-corruption. This might be the result, presumably, of the increasing number of whistleblowers around the world suffering from retaliation, together with the more and more attention that the media and public opinion are dedicating to this phenomenon. Further, as discussed above, when alleged human rights violations originate from whistleblowing related retaliatory practices, it is foreseeable to expect human rights bodies to express their own view.

From an analytical perspective, when a topic attracts the attention of organizations with different backgrounds and mandates, such as, for example, the OECD and the UNSR, it is also interesting to see not only the different understandings, but also the goals and the ways such organizations advocate for the implementation of their recommendations. At the legislative level, advocating for the adoption of new or changes to the existing regional or international agreements is an arduous task. At the same time, within the last two decades, the organizations analysed in this paper have been producing new guidelines and new recommendations aimed at refining their views towards whistleblowing which, although non-binding, help national governments in implementing cutting-edge regulations.

Conclusion

This paper has attempted to illustrate the variety of existing understandings of the term “whistleblowing”. In academic literature, the debate seemed to be quite active, especially in the 1970s and 1980s, and whistleblowing was approached from many

perspectives: economic, legal, sociological, etc. The 1990s were characterized by the regional and international anti-corruption communities’ realization of the importance of regulating whistleblowing and even more so, protecting existing whistleblowers and encouraging potential ones. The 2000s were – and are – the years in which institutions outside the typical anti-corruption community expressed their views on the matter. As a result, one might have noted a high degree of heterogeneity not only among the various international instruments, academic writing and other documents, but also, as showed in the previous section, in the usage of specific terms.

Professor Michael Johnston, one of the pioneers in the anti-corruption field, has recently stated that “the anti-corruption community is in danger of becoming an echo chamber with too much consensus and not enough debate” (Johnston, 2017). That might be true not only in general terms but also with regards to a variety of specific topics such as the nexus between corruption and human rights or, pertinently to the scope of this paper, the understanding of whistleblowing. This paper attempted to provide an overview of different understandings on the matter. Intentionally, no preference for a particular definition of whistleblowing has been indicated. That is because the purpose of this paper was not to seek a common definition and consensus among the actors. Rather, it aimed at illustrating how, alongside anti-corruption instruments, an increasing number of actors is dealing with whistleblowing from unconventional approaches as well as highlighting the issue for further studies.

References

Books

Boatright, J.R., 2000. *Ethics and the Conduct of Business*. 3rd ed. Upper Saddle River, NJ: Prentice Hall.

Hirschman, A.O., 1970. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States*. Cambridge: Harvard University Press.

Luf, G., in Nowak, M., Januszewski, K., eds., 2012. *All Human Rights for All. Vienna Manual on Human Rights*. Graz: NWV.

Nader, R., Petkas, P. J., Blackwell, K. eds., 1972. *Whistle Blowing: The Report of the Conference on Professional Responsibility*. Grossman: New York.

Near, J.P., Miceli, M.P., 1992. *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*. New York: Lexington Books.

Articles

Brody, R.G., Coulter, J. M. and Mihalek, P.H., 1998. Whistle-Blowing: A Cross-Cultural Comparison of Ethical Perceptions of U.S. and Japanese Accounting Students. *American Business Review*, 16(2), p.14–23.

Chang, Y., Wilding, M., and Shin, M.C., 2017. Determinants of Whistleblowing Intention: Evidence from the South Korean Government. *Public Performance & Management Review*, p.1-21.

Chiu, R., 2003. Ethical Judgment and Whistleblowing Intention: Examining the Moderating Role of Locus of Control. *Journal of Business Ethics*, 43, p.65–74.

Farrell, D. and J. C. Petersen, 1982. Patterns of Political Behavior in Organizations. *Academy of Management Review*, 7, p.402–412.

Jubb, P.B., 1999. Whistleblowing: A Restrictive Definition and Interpretation. *Journal of Business Ethics* 21, p.77-94.

King, G., III, 1999. The Implications of an Organization's Structure on Whistleblowing. *Journal of Business Ethics*, 20(4), p.315–326.

Latimer P., Brown, A.J., 2008. Whistleblower Laws: International Best Practice. *University of New South Wales Law Journal*, (31)3, p.766-794.

Near, J.P. and Miceli, M.P., 1985. Organizational Dissidence: The Case of Whistle-Blowing. *Journal of Business Ethics*, 4, p.1–16.

Near, J.P., Rehg, M.T., Van Scotter, J.R., and Miceli, M. P., 2004. Does Type of Wrongdoing Affect the Whistle-Blowing Process? *Business Ethics Quarterly*, 14, p.219-242.

Tavakoli, A.A., Keenan, J.P., Crnjak-Karanovic, B., 2003. Culture and Whistleblowing: An Empirical Study of Croatian and United States Managers Utilizing Hofstede's Cultural Dimensions. *Journal of Business Ethics*, 43, p.49–64.

Triandis, H.C. and Gelfand, M.J., 1998. Converging Measurement of Horizontal and Vertical Individualism and Collectivism. *Journal of Personality & Social Psychology*, 74(1), p.118–128.

Legal documents

African Union Convention on Preventing and Combating Corruption, signed 1 July 2003, entered into force 5 August 2006.

Recommendation CM/Rec(2014)7 and explanatory memorandum, adopted by the Committee of Ministers of the Council of Europe on 30 April 2014.

Civil Law Convention on Corruption, signed 4 November 1999, entered into force 1 November 2003.

Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953.

Human Rights Council, *Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Resolution 7/36 (28 March 2008), available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.

Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.

OECD Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service, 23 April 1998.

OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2009.

OECD Recommendation of the Council for Development Cooperation Actors on Managing Risks of Corruption, 9 December 2016.

OECD Recommendation of the Council on Public Integrity C(2017)5, 26 January 2017.

Inter-American Convention Against Corruption, signed 29 March 1996, entered into force 6 March 1997.

United Nations, General Assembly, *Promotion and protection of the right to freedom of opinion and expression*: report of the Secretary-General, A/70/361 (8 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

United Nations Convention Against Corruption, signed 9 December 2003, entered into force 14 December 2005.

Online Sources

United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption* (New York: United Nations, 2009), available at: http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

Good Law & Practice, 2018. *Guja v. Moldova*. (online) Available at: <http://www.right2info.org/cases/r2i-guja-v.-moldova> (Accessed 11 November 2017).

International Anti-Corruption Academy (IACA), 2017. *Time for Fresh Thinking on Anti-Corruption*. (online) Available at: <https://www.iaca.int/958-time-for-fresh-thinking-on-anti-corruption.html> (Accessed 10 December 2017).

U4 Anti-Corruption Resource Centre, 2013. *U4 Anti-Corruption Resource Centre, UNCAC in a nutshell: A quick guide to the United Nations Convention against Corruption for embassy and donor agency staff*. (online) Available at: <http://www.u4.no/publications/uncac-in-a-nutshell-a-quick-guide-to-the-united-nations-convention-against-corruption-for-embassy-and-donor-agency-staff/> (Accessed 11 January 2018).

UN News Centre, 2017. *UN rights chief urges protection for individuals revealing human rights violations*. (online) Available at: http://www.un.org/apps/news/story.asp?NewsID=45399#.WkqVF9_ibIU (Accessed 6 December 2017).

United Nations Office on Drugs and Crimes (UNODC), 2017. *Signature and Ratification Status of UNCAC*. (online) Available at: <https://www.unodc.org/unodc/en/corruption>

n/ratification-status.html (Accessed 5 March 2018).


Abdelaziz Nouaydi Pr., Filali Meknassi S., 2012. A glance at the Arab convention to fight corruption. (online) Available at: <http://blog.transparency.org/2012/08/21/a-glance-at-the-arab-convention-to-fight-corruption/> (Accessed 11 February 2018).


WIN, 2018. Statement of Principles. (online) Available at: <https://whistleblowingnetwork.org/about/statement-of-principles/> (Accessed 10 April 2018).

Wolfe, S., Worth, M., Dreyfus, S., and Brown, A.J., 2014. Whistleblower Protection Rules in G20 Countries: The Next Action Plan. (online) Available at: <http://www.transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf> (Accessed 11 February 2018).



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