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The International Legal Framework on Whistle-Blowers: What More Should Be Done?

Dimitrios Kafteranis

I. INTRODUCTION

Like all areas of law, international law is a living organism that changes constantly. However, international law has another unique feature, notably that of sovereign states. States should co-exist and co-operate, but every state seeks to retain its sovereignty and thus, conflict is always possible in international law. Moreover, sovereign states are required to cope with the various conditions and problem areas arising in international society. One major example from the previous century is the use of nuclear weapons and how it was regulated under international law.¹ All these changes require amendments of the existing international legal instruments. Such amendments can be quite challenging, since international law does not evolve as rapidly as changes occur.² Accordingly, international law should adapt to global conditions and not vice versa. This statement is a challenge to lawyers, but it also conceals an important truth—international law should move towards addressing changes experienced by its constituents. The globalization of many areas of law, such as financial markets or commercial relations, demands a strong representation in international law at this level.³

The COVID-19 health crisis is the latest example of a serious problem that concerns not only sovereign states, but the global society as such.⁴ A

¹ MALCOLM N. SHAW, *INTERNATIONAL LAW* 888 (6th ed. 2008).

² *Id.*

³ SHAW, *supra* note 1, at 40.

⁴ Dimitrios Kafteranis, *Coronavirus and the Whistleblower: The Missing Role of International Law*, *GEO. J. INT'L L.* (Apr. 14, 2020), <https://www.law.georgetown.edu/international-law-journal/blog/coronavirus-and-the-whistleblower-the-missing-role-of-international-law/> [<https://perma.cc/4KQ7-3FHT>].

virus that started its spread in China more than one year ago has now afflicted almost the entire globe,⁵ a unique situation only science fiction writers conceived of happening.⁶ There is no need for nationalism and closed minds, but rather there is a need for coordinated solutions in order to return to normality as quickly as possible.⁷ This crisis has impacted several areas of law that international law should address.

One issue that demands more attention under international law is whistleblowing.⁸ Advancements in technology have amplified the calls of common people to increase transparency and accountability on a national and international level.⁹ Luxleaks,¹⁰ Panama Papers,¹¹ and Swissleaks¹² are only

⁵ See Chris Buckley, *Chinese Doctor, Silenced After Warning of Outbreak, Dies from Coronavirus*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/06/world/asia/chinese-doctor-Li-Wenliang-coronavirus.html> [<https://perma.cc/7QUT-9WUK>].

⁶ See, e.g., PAULO COELHO, *CONFESSIONS OF A PILGRIM* 277–88 (reissue ed., 2010) (discussing a Chinese flu that will affect the whole world in this science fiction novel); Arianna Vidaschi & Chiara Graziani, *Coronavirus, Health Emergencies and Public Law Issues*, VERFASSUNGSBLOG ON MATTERS CONT. (Mar. 6, 2020), <https://verfassungsblog.de/coronavirus-health-emergencies-and-public-law-issues/> [<https://perma.cc/G8S2-7BQ3>].

⁷ *Id.*

⁸ ROBERT G. VAUGHN, *THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS* 239 (2012).

⁹ Helen Lam & Mark Harcourt, *Whistle-Blowing in the Digital Era: Motives, Issues and Recommendation*, 34 NEW TECH., WORK & EMP. 174, 174–75 (2019).

¹⁰ *See Arrêt de la cour d'appel dans le cadre de l'affaire dite « Luxleaks »* [*Judgment of the Court of Appeal in the So-Called "Luxleaks" Case*], LA JUSTICE : GRAND DUCHÉ DE LUXEMBOURG (Mar. 15, 2017), <https://justice.public.lu/fr/actualites/2017/03/arret-luxleaks-cour-appel.html> [<https://perma.cc/YW82-GZNT>] (discussing Luxleaks, the Luxembourg leaks, documents related to tax optimization that were revealed by two former employees of PwC in Luxembourg. The decision of the Court of Appeal and the decision of the Cassation Court explain the case in detail) [hereinafter *Luxleaks*].

¹¹ *See The Panama Papers: Exposing the Rogue Offshore Finance Industry*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://panamapapers.icij.org/> [<https://perma.cc/897E-PAQX>] (discussing the Panama Papers, the scandal of tax evasion revealed by the ICIJ showing that natural and moral persons were avoiding taxes by using offshore companies in Panama and other parts of the world).

¹² *See Explore the Swiss Leaks Data*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/project/swiss-leaks/explore-swiss-leaks-data>

a selection of the many scandals revealed by whistle-blowers. The recent health crisis demonstrated once again that whistle-blowers are not heard and often not protected. Dr. Li Wenliang, the Chinese doctor who sounded the alarm for a new disease that easily infects human beings, was silenced by the Chinese authorities for spreading fake facts.¹³ The revelation of these scandals has demonstrated the power that common people have to rectify illegalities or irregularities and to demand greater transparency and accountability from people in leadership. Despite these scandals and the attention to whistle-blowers, the picture is incomplete, and it is reflected in the dispersed regulations on whistleblowing.¹⁴

II. ROADMAP

In recent years, whistle-blowing has become more salient to international institutions and global actors. The field of legal science has lost its reluctance to engage with whistle-blowing,¹⁵ and now the issue is more intensively studied.¹⁶ International law and multinational institutions play a vital role in these legal developments. International organizations apply pressure on sovereign states to adopt legislation and to clarify the legal status of whistle-blowing.¹⁷ The United Nations Convention Against Corruption sets requirements for reporting mechanisms and for the

[<https://perma.cc/Q8HH-5XBJ>] (discussing Swissleaks, the scandal of tax evasion of private clients of HSBC revealed by Hervé Falciani).

¹³ Buckley, *supra* note 5.

¹⁴ Bjorn Fasterling, *Whistleblower Protection: A Comparative Law Perspective*, in INTERNATIONAL HANDBOOK ON WHISTLEBLOWING RESEARCH 331, 345–46 (A.J. Brown et al. eds., 2014).

¹⁵ VAUGHN, *supra* note 8, at 239.

¹⁶ Directive 2019/1937, of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, 2020 O.J. (L 305/17) 1.

¹⁷ Comm. of Ministers of CoE, *Recommendation CM/Rec(2014)7 on the Protection of Whistle-Blowers* (Apr. 30, 2014); see, e.g., *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008); see also *Heinisch v. Germany*, 28274/08 Eur. Ct. H.R. (2011).

protection of persons willing to report.¹⁸ Moreover, the International Labour Organization demands the protection of employees who report wrongdoings.¹⁹ Following the financial crisis of 2009–2010, international institutions in the field of banking and financial law have also begun to consider whistle-blowing. For instance, the Group of Twenty (G20) has produced work on the question of whistle-blowing to ensure transparency and fairness of the markets.²⁰ The Organization for Economic Co-operation and Development (OECD), as pioneer on the subject, shares the goal of working toward the protection of whistle-blowers,²¹ while the World Bank and other international bodies are heading in the same direction.

Despite the aforementioned efforts of international bodies, there is no convention, either from the UN or regional bodies such as the Council of Europe (CoE), on whistle-blowing or the protection of whistle-blowers.²² The need to protect whistle-blowers is mentioned in policy papers and in international legal instruments, but it is rarely the focus. For instance, in the UN corruption treaties, whistle-blowing is considered a tool to help detect corruption.²³ Efforts should be made towards the adoption of a treaty, convention, or agreement on whistle-blowing to clarify relevant issues, such

¹⁸ United Nations Convention Against Corruption (UNCAC), U.N. Doc. A/58/422 (Oct. 7, 2003), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18 [<https://perma.cc/KX5S-XH3P>].

¹⁹ *ILO Thesaurus 2005*, INT'L LABOUR ORG. (2020), <https://www.ilo.org/inform/online-information-resources/terminology/thesaurus/lang—en/index.htm> [<https://perma.cc/Y3DS-FSRG>].

²⁰ ORG. FOR ECON. COOP. & DEV., G20 ANTI-CORRUPTION ACTION PLAN, PROTECTION OF WHISTLEBLOWERS: STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION (2012), <https://www.oecd.org/corruption/48972967.pdf> [<https://perma.cc/6N4D-Z5X9>].

²¹ Comm. of Ministers of CoE, *supra* note 17.

²² Comm. on Leg. Affs. and Hum. Rts., *Improving the Protection of Whistleblowers All Over Europe* (Aug. 30, 2019).

²³ VAUGHN, *supra* note 8, at 243.

as the definition of whistle-blowing or the channels for disclosure.²⁴ The goal of such efforts would be to have specific rules on what constitutes whistle-blowing, as well as the protection of this activity, under a convention. All of the above would require states to agree on common standards and adopt a common approach to whistle-blowing.

The purpose of this article is to highlight the need to adopt a convention for the protection of whistle-blowers by the United Nations or other international organizations. Agreeing on rules will provide legal certainty for whistle-blowers and shift social and cultural attitudes towards whistle-blowing. In the first section of this article, existing efforts of international organizations to protect whistle-blowers will be presented. Then, the discussion will turn to the benefits of a convention and the legal bases suitable for such a convention.

III. BACKGROUND

A. Corruption and International Law: The Place of Whistle-Blowers

Whistle-blowing laws under international conventions were heavily influenced by a powerful anti-corruption movement, which started in 1990.²⁵ As mentioned above, several international conventions against corruption demanded states provide protection to persons that report corruption or related wrongdoings.²⁶ These conventions inspired national legislatures to offer partial or full protection to whistle-blowers. Depending on which convention the state signed, corresponding national legislation was adopted. Despite the importance of this first wave of protections for whistle-blowers who report on corruption, the differences among

²⁴ The terminology may vary. International Conventions are also called “treaties,” “covenants,” “statutes,” and so on. The substance, though, is the same: “a merger of wills of two or more international subjects for the purpose of regulating their interests by international rules.” ANTONIO CASSESE, *INTERNATIONAL LAW* 170 (2nd ed. 2005).

²⁵ VAUGHN, *supra* note 8, at 243.

²⁶ *Id.*

conventions have created a diverse and complex legal landscape. Requirements differ from one convention to the next, meaning that national legislations differ as well.

One key difference is who may blow the whistle. For instance, the Inter-American Convention Against Corruption protects every citizen, rather than only the employees of the institutions where corruption occurs,²⁷ whereas Article 9 of the Council of Europe's Civil Law Convention on Corruption only requires parties to the convention to protect employees who report corruption-related wrongdoing.²⁸ Another difference is the recipients of these reports. For example, several conventions only allow the whistleblower to report to the appropriate authorities in order to be protected under the relevant convention.²⁹ Contrast this restriction with the Inter-American Convention Against Corruption, which does not limit disclosures to the relevant authorities and instead allows for public disclosures.³⁰

B. The Existing UN Provisions on Whistle-Blowing: A Sector-Specific Approach

The United Nations Convention Against Corruption (UNCAC) entered into force in 2005 and has 186 state parties to date.³¹ Most countries have ratified the UNCAC, which demonstrates the importance of combatting corruption at the national and international level.³² The UNCAC is the

²⁷ Inter-Am. Convention Against Corruption, Mar. 29, 1966, S. Treaty Doc. No. 105-39, 35 I.L.M. 274, Article III. 8, http://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_Corruption.pdf [<https://perma.cc/ED8F-NZND>].

²⁸ Civil Law Convention on Corruption, Nov. 4, 1999, T.S. No. 174 (entered into force Jan. 11, 2003), <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm> [<https://perma.cc/34TZ-352S>].

²⁹ VAUGHN, *supra* note 8, at 244.

³⁰ Robert G. Vaughn et al., *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857, 865 (2003).

³¹ UNCAC, *supra* note 18.

³² RUGGERO SCATURRO, INT'L ANTI-CORRUPTION ACAD. RSCH. & SCI., DEFINING WHISTLEBLOWING 6 (2018),

outcome of the international community taking a strict position against corruption by creating a standalone convention to do so.³³ The UNCAC has comprehensive provisions on corruption which, *inter alia*, includes provisions on the protection of persons reporting corruption.³⁴ These persons can be characterized as whistle-blowers.³⁵

In this section, UNCAC provisions on the protection of whistle-blowers will be scrutinized to explain how UNCAC protects whistle-blowers reporting corruption. Article 33 of the UNCAC is titled “Protection of Reporting Persons” and reads as follows:

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.³⁶

This excerpt from Article 33 of the UNCAC invites state parties to provide protection to any person who reports one or more of the listed corruption incidents.³⁷ Specifically, such a person should have reasonable grounds to believe that the facts concern a corruption incident and he or she should report in good faith.³⁸ Nevertheless, Article 33 is a non-binding provision, meaning that states are not required to follow the provision.³⁹ In 2015, the United Nations Office on Drugs and Crime issued a resource guide on good

https://www.iaca.int/media/attachments/2018/06/18/research_paper_05_ruggero_scatirro_final.pdf [https://perma.cc/47ZX-8MU9].

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ UNCAC, *supra* note 18, at art. 33.

³⁷ *Id.*

³⁸ *Id.*

³⁹ A. Katarina Weilert, *United Nations Convention Against Corruption (UNCAC) – After Ten Years of Being in Force*, 19 MAX PLANCK Y.B. U.N. L. ONLINE 216, 224 (May 30, 2016).

practices in the protection of reporting persons as concerns the UNCAC.⁴⁰ The report recognized that significant steps have been made in a number of states, but highlighted the need for more measures to be taken.⁴¹ The legal provisions should be powerful and should enhance protection of reporting persons to combat corruption.⁴²

Finally, Article 33 of the UNCAC may be characterized as a sectoral protection of whistle-blowers. A sectoral legal provision protects the whistle-blower for a limited number of reports (here, only for corruption related offences) and does not go further.⁴³ The convention focuses solely on reporting corruption and does not implicate whistle-blowing in any other context. Calls have been made to expand this protection to other areas by the UNCAC coalition, but these calls have not been acted upon.⁴⁴

Despite UNCAC's significance, it may be characterized as just one small brick of protection in the vast wall of whistle-blowing reporting needs. Corruption is an important area to address, but it is not the only one that needs whistle-blowers. The United Nations should take the initiative to propose a convention on the protection of persons reporting breaches of international law not only focusing on corruption but entailing other areas.

⁴⁰ U.N. OFF. ON DRUGS & CRIME, THE UNITED NATIONS CONVENTION AGAINST CORRUPTION – RESOURCE GUIDE ON GOOD PRACTICES IN THE PROTECTION OF REPORTING PERSONS (2015), https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf [<https://perma.cc/2VUT-5BTX>].

⁴¹ *Id.* at 85–87.

⁴² *Id.*

⁴³ DEP'T OF PUB. EXPENDITURE & REFORM, GOV'T REFORM UNIT, PROTECTED DISCLOSURES BILL 2013: REGULATORY IMPACT ANALYSIS 10 (July 2013), <https://ahcai.ie/wp-content/uploads/2018/03/Protected-Disclosures-Bill-2013-Regulatory-Impact-Assessment.pdf> [<https://perma.cc/H8GF-2HCN>].

⁴⁴ SCATURRO, *supra* note 32, at 8.

C. OECD Efforts Towards the Protection of Whistle-Blowers

The purpose of the Organization for Economic Co-operation and Development (OECD) is “to build better policies for better lives.”⁴⁵ Active in the international scene for more than sixty years, its aim is to shape policies that foster prosperity, opportunity, and equality for all citizens.⁴⁶ One of the policies addressed by the OECD is whistle-blowing.⁴⁷ According to the OECD, whistle-blowing is an important tool for protecting the public interest.⁴⁸ Employees from both the public and private sectors should be protected in order to encourage a culture of integrity and accountability.⁴⁹ To achieve these goals, the OECD has adopted several soft law, or non-binding, instruments aimed towards the protection of whistle-blowers. The starting point for the OECD, like the UN, was the need to advance the protection and significance of the whistle-blower in this fight.⁵⁰

One of the top priorities of the OECD is to combat corruption. The meaning of the term “corruption,” as defined by the OECD, is behavior that harms the public interest and has consequences in both the public and private sector.⁵¹ The OECD has furthermore found that fraud or any wrongdoing that hinders the correct functioning of the public or private sector is related to corruption.⁵² The Recommendation on Improving Ethical Conduct in the Public Service, published in 1998, was the first

⁴⁵ *Who We Are*, ORG. FOR ECON. COOP. & DEV., <https://www.oecd.org/about/> [<https://perma.cc/RS8A-UJTG>].

⁴⁶ *Id.*

⁴⁷ *Whistleblower Protection*, ORG. FOR ECON. COOP. & DEV., <http://www.oecd.org/corruption/ethics/whistleblower-protection/> [<https://perma.cc/KA2Y-K8AB>].

⁴⁸ ORG. FOR ECON. COOP. & DEV., COMMITTING TO EFFECTIVE WHISTLEBLOWER PROTECTION 11 (2016), https://read.oecd-ilibrary.org/governance/committing-to-effective-whistleblower-protection_9789264252639-en#page1 [<https://perma.cc/QJ27-Z4N3>].

⁴⁹ *Id.*

⁵⁰ *Id.* at 20–21.

⁵¹ *Id.* at 11.

⁵² ORG. FOR ECON. COOP. & DEV., *supra* note 47.

instrument to include a dedicated principle on whistle-blower protection.⁵³ The aim of this Recommendation was to combat misconduct in the public sector, and the whistle-blower was regarded as one of the necessary tools in order to succeed.⁵⁴ However, this Recommendation does not use the term “corruption,” but instead uses the term “misconduct.” According to Alexandra Mills, Department of Premier and Cabinet (Victorian government), this omission of “corruption” may be because the Recommendation sought to frame issues in a positive light, or it may be related to the philosophical distinctions between corruption and unethical behavior.⁵⁵

In addition, the OECD published several reports or recommendations about the protection of whistle-blowers in sectors of interest. The OECD has a dedicated working group on bribery which looks at whistle-blowing in its reviews.⁵⁶ Under this group’s recommendations, whistle-blowing should be protected in the public and private sector where an employee reports suspicions of foreign bribery.⁵⁷ Furthermore, in 2012, the OECD CleanGovBiz, which is an anti-corruption initiative, published guidance on

⁵³ This recommendation has been updated by the 2020 Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service. OECD Legal Instruments, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, ORG. FOR ECON. COOP. & DEV. (2021), <https://legalinstruments.oecd.org/public/doc/129/129.en.pdf> [https://perma.cc/74GY-TTF9].

⁵⁴ Alexandra Mills, *Ethics Goes Global: The OECD Council Recommendation on Improving Ethical Conduct in the Public Sector*, 58 AUSTL. J. PUB. ADMIN. 61, 64 (2002).

⁵⁵ *Id.*

⁵⁶ See ORG. FOR ECON. COOP. & DEV. WORKING GROUP ON BRIBERY IN INT’L BUS. TRANSACTIONS, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS § IX (iii) (Nov. 26, 2009), <https://www.oecd.org/daf/anti-bribery/44176910.pdf> [https://perma.cc/M8TE-RLET].

⁵⁷ *Id.*

whistle-blower protection.⁵⁸ The ADB/OECD action plan for Asia-Pacific is an action plan under the aegis of OECD and the Asian Development Bank (ADB) with the purpose of encouraging public participation in anti-corruption activities through the protection of whistle-blowers.⁵⁹ In every annual meeting of the group, its members should report developments in whistle-blowing. These groups are related to the OECD and are examples of the anti-corruption work done by the OECD at the international level.

In 2016, the OECD published a significant study⁶⁰ analyzing the evolution of whistle-blowing⁶¹ and recommending enhancements for whistle-blower protections. The purpose of this study was to analyze global standards for whistle-blower protections in the public and private sectors, to discuss different cultural approaches towards whistle-blowing, and to provide an extensive analysis of several OECD countries' legislation.⁶² The study focused on presenting developments in national whistle-blowing laws until 2016 and the ways whistle-blowers' protections could be enhanced and reinforced in the future.⁶³ The study was designed to be a useful guide not only for countries, but also for employers and employees.⁶⁴ The study should be used as a blueprint for every interested party to assess its own

⁵⁸ See *OECD Announces New Transparency and Anti-corruption Initiative – clean.gov.biz*, ORG. FOR ECON. COOP. & DEV. (Mar. 3, 2011), <https://www.oecd.org/newsroom/oecdannouncesnewtransparencyandanti-corruptioninitiativecleangovbiz.htm> [<https://perma.cc/D4BF-SNJ6>].

⁵⁹ *Anti-Corruption Initiative for Asia-Pacific*, ORG. FOR ECON. COOP. & DEV., <https://www.oecd.org/site/adboecdanti-corruptioninitiative/> [<https://perma.cc/53WN-76LC>].

⁶⁰ ORG. FOR ECON. COOP. & DEV., *supra* note 47.

⁶¹ *Id.* at 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Renee Phillips, Mark Thompson & Michael Disotell, *Can You Hear the Whistle Blowing?: OECD Releases Report on Global Whistleblower Protection*, ORRICK (Apr. 25, 2016), <https://blogs.orrick.com/employment/2016/04/25/can-you-hear-the-whistle-blowing-oecd-releases-report-on-global-whistleblower-protections/> [<https://perma.cc/7BA3-JH55>].

policies towards whistle-blowing.⁶⁵ Legislators, regulators, and private entities can use the elements of the study to inform their national legislations and internal policies on whistle-blowing.

The OECD has a significant amount of soft law instruments published in relation to whistle-blowing. However, it should be noted that most of these instruments were not concerned directly with the whistle-blower, but the whistle-blower was used as an enforcement tool for the specific area of interest. In addition, these instruments are limited in scope, and they can be characterized as sectoral; the OECD lacks a horizontal instrument covering all areas of interest and having an overarching scope. Finally, the OECD has not yet adopted a convention on the protection of whistle-blowers. This point will be discussed further below, where the need for a convention will be presented by demonstrating its benefits.

D. Inter-American Convention Against Corruption

The starting point for the adoption of the Inter-American Convention Against Corruption was a resolution by the United Nations Security Council to create a working group on probity and public ethics.⁶⁶ In 1994, President of Venezuela Rafael Caldera proposed the adoption of an international treaty on anti-corruption, which was approved at the 1994 Miami Summit of the Americas.⁶⁷ The Inter-American Judicial Committee, one of the principal organs of the Organization of American States (OAS) which serves as an advisory body on judicial matters, and the Venezuelan government drafted final text for the Convention, which was presented to

⁶⁵ GREGORY S. BRUCH & AKITA N. ADKINS, *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 466 (Mark Pieth et al. eds., 2013).

⁶⁶ S.C. Res. 1294 (Apr. 13, 2000).

⁶⁷ 1994 Miami Summit of the Americas, Summit of the Americas Plan of Action point 5, http://www.summit-americas.org/i_summit/i_summit_poa_en.pdf [<https://perma.cc/R78X-RF9J>].

the OAS member states in 1996.⁶⁸ The Convention was quickly signed and went into effect in 1997.⁶⁹ This section of the article will analyze the Convention with consideration to its provisions on protection of whistle-blowers and to the steps taken until now.

Article III of the Convention, entitled “PREVENTIVE MEASURES,” requires whistle-blower protections be integrated into national legislation. The relevant section reads,

For the purposes set forth in Article II of the convention, the states parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:

8. 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.⁷⁰

Even though the convention was quickly ratified and went into force, its implementation has not been as fast paced.⁷¹ This slow implementation was partially due to the lack of a monitoring mechanism and limited resources to assist countries with model legislation and advice.⁷² In an effort to solve this issue, the OAS decided in 2001 to create a monitoring mechanism to evaluate the implementation of the convention.⁷³ A Committee of Experts

⁶⁸ AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES – INTER-AM. CONVENTION AGAINST CORRUPTION 1121, 1123 (1997), <https://core.ac.uk/download/pdf/216909226.pdf> [<https://perma.cc/F783-TADJ>].

⁶⁹ Inter-Am. Convention Against Corruption, *supra* note 27.

⁷⁰ Inter-Am. Convention Against Corruption, *supra* note 27.

⁷¹ David Banisar, *Whistleblowing: International Standards and Developments, in CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY* 64 (2011), https://www.researchgate.net/profile/David_Banisar/publication/228124587_Whistleblowing_International_Standards_and_Developments/links/551d1a510cf23e2801fe0197/Whistleblowing-International-Standards-and-Developments.pdf [<https://perma.cc/GZK2-7D2S>].

⁷² *Id.*

⁷³ *Id.*

was established to monitor the implementation by issuing questionnaires and by gathering information from governments or civil society organizations.⁷⁴ Unfortunately, only a minority of state parties, including Canada, the U.S., and Uruguay, have adopted even some protections.⁷⁵ Overall, the Committee has recommended that most of the countries should improve their protections.⁷⁶ In 2006, the Committee decided to review Article III (8) and issue a recommendation.⁷⁷ In 2013, a model law to facilitate and encourage the reporting of acts of corruption, protect whistle-blowers, and protect witnesses was established by the Committee.⁷⁸ The model law is dedicated to corruption and whistle-blowing, and thus takes a sectoral approach. Similar to other international organizations, the OAS has not yet adopted a convention on the protection of whistle-blowers.

E. Council of Europe

The Council of Europe (CoE) has forty-six member countries and has adopted two conventions on corruption.⁷⁹ The first convention, the Civil Law Convention on Corruption, was adopted in 1999 and entered into force in 2003.⁸⁰ The convention's focus is on the need to combat corruption, and whistle-blowing is considered a tool towards this fight. In Article 9, specific

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *Follow-Up Mechanism for the Implementation of the Inter-American Convention Against Corruption*, ORG. OF AM. STATES (2002), http://www.oas.org/juridico/spanish/usa_res1.htm [<https://perma.cc/X4BT-JY54>].

⁷⁸ See *Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption, Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*, OEA/Ser.L/SG/MESICIC/doc.345/12 rev. 2 (2013), http://www.oas.org/en/sla/dlc/mesicic/docs/model_law_reporting.pdf [<https://perma.cc/6G2T-BWSY>].

⁷⁹ *Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/47-members-states> [<https://perma.cc/CR6X-P5EQ>].

⁸⁰ Civil Law Convention on Corruption, *supra* note 28.

protections are given to employees who report on corruption.⁸¹ This article states, “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.”⁸² The Civil Law Convention incited States to start adopting anti-corruption legislation and this was completed by the Criminal Law Convention. The Criminal Law Convention on Corruption was the second convention about corruption adopted by the CoE. This convention was also adopted in 1999 but did not enter into force until 2002.⁸³ This convention includes provisions on the protection of witnesses and collaborators of justice (informants).⁸⁴ These two conventions represent the first steps of the CoE in the fight against corruption and encourage whistle-blowing in order to report corruption.⁸⁵ Since adoption of these two conventions, the CoE has produced significant work on the issue of whistle-blowing.

The work of the CoE has included reports and recommendations for member states. In 2009, the Parliamentary Assembly of the CoE (PACE) published a report from the Committee on Legal Affairs and Human Rights titled “The Protection of Whistleblowers.”⁸⁶ The report was issued to highlight the importance of whistle-blowing and to propose changes to legislation.⁸⁷ In 2010, PACE passed Recommendation 1916 and Resolution 1729, inviting states to review their legislation on the protection of whistle-

⁸¹ *Id.* at art. 9.

⁸² *Id.*

⁸³ Criminal Law Convention on Corruption, Jan. 27, 1999, T.S. No. 173 (entered into force Jan. 7, 2002), <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm> [<https://perma.cc/9XNA-MB3D>].

⁸⁴ *Id.* at art. 22.

⁸⁵ VAUGHN, *supra* note 8, at 243.

⁸⁶ COMM. ON LEG. AFFS. & HUM. RTS., THE PROTECTION OF “WHISTLE-BLOWERS” (Sept. 14, 2009), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12302> [<https://perma.cc/K7KF-FPQT>].

⁸⁷ *Id.*

blowers.⁸⁸ The Recommendation emphasized the importance of whistle-blowing “as a tool to increase accountability and strengthen the fight against corruption and mismanagement.”⁸⁹ The Resolution invited states to review their legislation based on the guidelines of the CoE and to examine the possibility of drafting a framework convention on the protection of whistle-blowers.⁹⁰ Despite this call, no action was taken, most likely because of a lack of political will.⁹¹

Although a framework convention was not drafted, in April 2014, the CoE adopted the Recommendation CM/Rec(2014)7.⁹² This Recommendation is a comprehensive legal instrument on protecting individuals who report on acts and omissions in the workplace that represent a serious threat or harm to the public interest.⁹³ The Recommendation was adopted by the Council of Ministers and it was prepared by the CoE’s European Committee on Legal Co-operation (CDCJ).⁹⁴ The Recommendation has an extensive analysis of necessary elements of whistle-blowing.⁹⁵ The Recommendation includes a definition of whistle-blower, channels for disclosure, and protections that should be

⁸⁸ Committee on Legal Affairs and Human Rights Res. 1729, Protection of “Whistle-Blowers” (Apr. 29, 2010), <https://pace.coe.int/en/files/17851> [<https://perma.cc/9ZUH-2TLR>].

⁸⁹ Rec. 1916, Parliamentary Assembly of CoE Protection of “Whistle-Blowers” (2010), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17852&lang=en> [<https://perma.cc/45DF-7AJB>].

⁹⁰ David Lewis, *The Council of Europe Resolution and Recommendation on the Protection of Whistleblower*, 39 INDUS. L.J. 432 (2010).

⁹¹ *Id.* at 435.

⁹² Comm. of Ministers of CoE, *Recommendation CM/Rec(2014)7 on the Protection of Whistle-Blowers*, COUNCIL OF EUR. (Apr. 30, 2014).

⁹³ Eur. Comm. on Legal Co-Operation, *Protecting Whistleblowers*, COUNCIL OF EUR. (Apr. 30, 2014), CM/Rec(2014)7, <https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers> [<https://perma.cc/3CY9-CU76>].

⁹⁴ *Id.*

⁹⁵ Comm. of Ministers of CoE, *Recommendation CM/Rec(2014)7 on the Protection of Whistle-Blowers*, COUNCIL OF EUR. (Apr. 30, 2014).

available for employees who report.⁹⁶ The text is concise and detailed, but it is only a recommendation and not a convention on the protection of whistle-blowers.

The enforcement mechanism of the CoE is the European Court of Human Rights (ECtHR or Strasbourg Court). The ECtHR has consistent case law on the protection of whistle-blowers under Article 10 of the European Convention of Human Rights (ECHR).⁹⁷ Under Article 10 of the ECHR, the right to freedom of expression includes whistle-blowing. Therefore, this right protects the act of whistle-blowing.⁹⁸ In the landmark case *Guja v. Moldova*, the ECtHR established principles to determine whether an interference in a person's right to freedom of expression can be justified.⁹⁹

There are six cumulative criteria that a whistle-blower should satisfy for their action to be covered by the right to freedom of expression.¹⁰⁰ First, disclosed information should be in the public interest and the authenticity of the information should be checked.¹⁰¹ In addition, the channels of disclosures as laid out by the Strasbourg Court should be respected.¹⁰² Second, the whistle-blower should initially report internally. Third, the whistleblower should report to the relevant authorities if the internal reporting agency is not responding. The whistleblower should only report to the public as a last resort if the previous two were not responding to his or her requests. Fourth, the whistle-blower should report in good faith and his or her reporting should not be motivated by objectives such as personal or economic gain.¹⁰³ Fifth, the Strasbourg Court assesses the damage suffered

⁹⁶ *Id.*; see generally *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008); see also *Heinisch v. Germany*, 28274/08 Eur. Ct. H.R. (2011).

⁹⁷ See *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008).

⁹⁸ Valerie Junod, *La Liberté d'Expression du Whistleblower*, 77 R.T.D.H. 234 (2009) (Fr.).

⁹⁹ *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008).

¹⁰⁰ Junod, *supra* note 98, at 234.

¹⁰¹ See *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. 74–75 (2008).

¹⁰² *Id.* at 73.

¹⁰³ *Id.* at 77.

by the employer and examines if this is outweighed by the public's interest in getting the information.¹⁰⁴ Finally, sixth, the ECtHR reviews the severity of the sanction imposed on the person and its consequences.¹⁰⁵

The Strasbourg court has followed the precedent set by *Guja* in several later cases,¹⁰⁶ evaluating them based on the facts of each specific case.¹⁰⁷ This case law is an inspiration for states where there is no or only sectoral legislation and has recently inspired the European Directive on the protection of persons reporting breaches of Union law.¹⁰⁸ Despite the importance of these criteria, a disadvantage is the case-by-case approach of the Strasbourg Court and the subjectivity of the criteria. The criteria lack objectivity, which could provide whistle-blowers with more certainty about their cases. As stated above, the court analyzes the criteria based on the facts at stake.¹⁰⁹ This creates subjectivity. In addition, the good faith and public interest requirements are both subjective, as the ECtHR has been unable to provide objective guidelines on how to assess them.

F. International Labour Organization

The International Labour Organization (ILO) was established in 1919 in the wake of the First World War and its vision is to establish lasting peace through social justice.¹¹⁰ In 1946, the ILO became the first specialized agency of the UN.¹¹¹ The organization's mission is to promote workers'

¹⁰⁴ *Id.* at 74–75, 76.

¹⁰⁵ *Id.* at 78.

¹⁰⁶ Valerie Junod, *Lancer l'alerte: quoi de neuf depuis "Guja"?: (Cour eur. dr. h., "Bucur et Toma c. Roumanie", 8 janvier 2013)*, 25 R.T.D.H 459 (2014) (Fr.).

¹⁰⁷ *Id.*

¹⁰⁸ Directive 2019/1937, of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons who Report Breaches of Union Law, 2020 O.J. (L 305/17) 1.

¹⁰⁹ Junod, *supra* note 98.

¹¹⁰ *About the ILO*, INT'L LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm> [<https://perma.cc/8VM4-BYCJ>].

¹¹¹ *Id.*

rights, encourage decent employment opportunities, enhance social protection, and strengthen discussion about work-related matters.¹¹²

The ILO has done some work on the protection of whistle-blowers within its broader missions. The ILO defines whistle-blowing as “the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.”¹¹³ In addition, the ILO’s Termination of Employment Convention, adopted in 1982, outlines some basic principles on the protection of whistle-blowers.¹¹⁴ Article 5(c) states, “the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities” should not constitute a valid reason for termination of an employment relation.¹¹⁵ Under Article 9, the burden of proof for such a termination lies on the employer.¹¹⁶ The formulation of Article 5(c) is narrow, and it is only relevant to termination of employment which does not deal with cases where the employee faces other punishment.¹¹⁷ This narrow formulation may have a limited impact on those deciding whether to report wrongdoings.¹¹⁸

Despite these ILO provisions, whistle-blowing is not protected in many ILO member states.¹¹⁹ The piecemeal nature of conventions, not only from ILO, but also from other international organizations, cannot ensure a high-level of protection and should be addressed with some urgency.¹²⁰

¹¹² INT’L LABOUR ORG., *supra* note 110.

¹¹³ INT’L LABOUR ORG., *supra* note 19.

¹¹⁴ *C158 - Termination of Employment Convention, 1982 (No. 158)*, INT’L LABOUR ORG. (June 22, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 [https://perma.cc/9UVL-62PK].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Bjorn Fasterling & David Lewis, *How Can the Law Effectively Promote Public-Interest Whistleblowing?*, 153 INT’L LABOUR REV. 71, 76–77 (2014).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 89.

¹²⁰ *Id.*

Commentators and experts agree: “an international labour Convention should protect those who disclose all types of serious wrongdoing.”¹²¹ A similar argument was made in a recent report commissioned by the ILO, which concluded that more normative work on whistle-blowing protection in the workplace should be done.¹²²

IV. REASONS TO ADOPT A CONVENTION ON THE PROTECTION OF WHISTLE-BLOWERS

The above analysis demonstrates that the protection of whistle-blowers under international law is piecemeal and there is an urgent need for a more concrete response from one or all of the aforementioned organizations. Some of the previously taken measures were successful. For instance, the UNCAC may be characterized, to a certain extent, as successful; the need to combat corruption at the international level put states in the process of creating an international legal instrument to eradicate corruption and provide protection to whistle-blowers reporting corruption offences.¹²³ Considering the success of the UNCAC, one may realize the possible importance of an international convention on the protection of whistle-blowers. The UNCAC has been the template for different regional conventions and national legislations combatting corruption.¹²⁴ In the same way, an international convention on the protection of whistle-blowers will stimulate further legal developments at the regional or national level.

Scholars in the field have already noticed the need for an international convention or for clearer rules at the international level for the protection of

¹²¹ *Id.* at 90.

¹²² Iheb Chalouat, Carlos Carrión-Crespo & Margherita Licata, *Law and Practices on Protecting Whistle-Blowers in the Public and Financial Services Sectors* (Int'l Labour Org., Working Paper No. 328, 2019).

¹²³ SCATURRO, *supra* note 32, at 8.

¹²⁴ *See* Civil Law Convention on Corruption, Nov. 4, 1999, T.S. No. 174.

whistle-blowers.¹²⁵ In 2014, Fasterling and Lewis argued that an international labour convention should protect those who report wrongdoing.¹²⁶ They based their view on the fact that the victimization of whistle-blowers should be equated with other forms of discrimination.¹²⁷ In 2010, Lewis again advocated for a convention on the protection of whistle-blowers that should be adopted by the CoE. Based on the PACE recommendation “to consider drafting a framework convention on the protection of whistle-blowers,” Lewis highlighted the urgency and advantages of it.¹²⁸ These calls from scholars were not heard by the international or regional organizations and things are frozen for the time being.

An international convention on the protection of whistle-blowers will create a set of rules, negotiated by the state parties, which will be a reference for whistle-blowers at the national level.¹²⁹ In the negotiation period, state parties will have the opportunity to sit together and discuss an issue that is not only a legal issue, but also a political, social, and cultural issue. Depending on the country or even continent, whistle-blowing is conceptualized in different ways. Taking as an example the European Union, the recent adoption of the Directive on the protection of persons reporting breaches of Union law demonstrates a change of perception at the EU level towards whistle-blowing considering the hostility of some states,

¹²⁵ Richard Hyde & Ashley Savage, *Whistleblowing Without Borders: The Risks and Rewards of Transnational Whistleblowing Networks*, in DEVELOPMENTS IN WHISTLEBLOWING RESEARCH 20, 27 (David Lewis & Wim Vandekerckhove eds., 2015); Dimitrios Kagiarios & Amanda Wyper, *Protecting Whistleblowers: The Roles of Public and Private International Law*, in LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 17 (Veronica Ruiz Abou Nigm et al. eds., 2018).

¹²⁶ Fasterling & Lewis, *supra* note 117, at 90.

¹²⁷ *Id.*

¹²⁸ Lewis, *supra* note 90, at 435.

¹²⁹ See JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 13 (9th ed. 2008).

such as France or Germany.¹³⁰ Bringing the different countries together in a fruitful debate will provide the international community with a legal instrument to balance different perceptions and considerations of whistle-blowing.¹³¹

Furthermore, the convention will clarify certain issues that are still debated around whistle-blowing. It would be important in the first instance to have a definition of the term whistle-blower, as there is currently no common definition¹³² and it is necessary to understand who can be characterized as a whistle-blower. Other issues will be clarified as well. For instance, the channels for disclosure are a fundamental aspect of the whistle-blowing process.¹³³ These channels need to be clear regarding to whom the whistle-blower should address his or her concerns. What should he or she report? Should it be in good faith or not? Should we provide financial rewards or not? These are some of the questions that the international convention will attempt to answer. From a practical perspective, it would be important to answer all of these questions through an international convention in order to ensure clarity and safety for future whistle-blowers.

Enforcing the convention may be a challenge, but there are ways to ensure a relatively effective enforcement.¹³⁴ One such method is by

¹³⁰ Directive 2019/1937, of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, 2020 O.J. (L 305/17) 1.

¹³¹ David Humphreys, *The Elusive Quest for a Global Forests Convention*, 14 RECIEL 1, 2 (2005) (discussing the concept of commitment by the Member States).

¹³² Richard Haigh & Peter Bowal, *Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis* 6–12 (Compar. Rsch. in L. & Pol. Econ., Research Paper No. 1974982, 2012)

¹³³ The channels for disclosure respond to where the whistle-blower should report. There are three channels for disclosure: internally to the workplace, externally to the competent public authorities, and externally to the general public (making the information available to the public through the net or journals for instance).

¹³⁴ See Israel Doron & Itai Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50 GERONTOLOGIST 588 (2010); see also CASSESE, *supra* note 24.

obliging countries to a mandatory report about the implementation of the convention in order to check their compliance and internal debates.¹³⁵ By reporting, the governments will have to engage in a constructive dialogue with the relevant international authorities that control the progress made for the implementation of the convention. Additionally, other enforcement mechanisms may be designed in order to achieve better results. For instance, the convention may allow individual complaints to be presented in front of the relevant international authority, perhaps under certain conditions, in order to present their problems and demand a solution from the international body.¹³⁶ The convention may also be used as a legal “weapon” in front of the national courts. Arguments stemming from the convention may be used during litigation to enhance the arguments presented by the whistle-blower or even by NGOs that are engaged in the field.¹³⁷ Depending on the national legal system, international law may not be binding, but it may convince the relevant court to reconsider its position in light of the convention.¹³⁸

Moreover, the adoption of an international convention on the protection of whistle-blowers will be a powerful advocacy tool.¹³⁹ Whistle-blowing is regarded both in a positive and negative light by scholars, regulators, governmental officials, and citizens.¹⁴⁰ The adoption of a convention will provide an important tool for advocacy groups to try to change the image of whistle-blowing, likely positively impacting the public opinion. In countries where no legislation exists for the protection of whistle-blowers, the

¹³⁵ *Id.*

¹³⁶ Doron & Apter, *supra* note 134, at 588.

¹³⁷ Humphreys, *supra* note 131, at 2.

¹³⁸ For instance, in Luxembourg, the Luxembourg Court of Appeal relied on the European Convention of Human Rights in order to make its verdict on a whistle-blowers case in the Luxleaks case. See *Luxleaks*, *supra* note 10.

¹³⁹ Doron & Apter, *supra* note 134, at 588.

¹⁴⁰ David Lewis et al., *Whistleblowing, Its Importance and the State of the Research*, in INTERNATIONAL HANDBOOK ON WHISTLEBLOWING RESEARCH 1, 6–7 (A.J. Brown et al. eds., 2014).

convention will be a basis on which to pressure the state to enact legislation.¹⁴¹ In the same way, countries with legislation will be encouraged to review and modify their legislation because of the convention.

The convention will bring changes not only within the legal landscape, but also to society and education.¹⁴² As briefly mentioned, whistle-blowing has negative connotations for certain states.¹⁴³ The Council of Europe's September 14, 2014 report noted that there are "deeply engrained cultural attitudes which date back to social and political circumstances, such as dictatorship and/or foreign domination, under which distrust towards informers of the despised authorities was only normal."¹⁴⁴ The convention will be a tool to educate people and to demonstrate that whistle-blowers are, under certain circumstances, important figures. Whistle-blowers' work will come to the limelight and people will understand that their work produces benefits for society. In the negotiation phase, the discussions around it will inform the society about whistle-blowers and the benefits they offer for combatting wrongdoings. Providing a debate and properly informing the people about whistle-blowers will create a more positive perception for them in society.¹⁴⁵ The clear information on the benefits of whistleblowing will allow people to unlearn negative misperceptions of whistleblowing created by historical and social influence. Instead, people will learn about the importance of reporting and the resulting benefits for society.

¹⁴¹ Doron & Apter, *supra* note 134, at 588.

¹⁴² Wim Vandekerckove et al., *Understandings of Whistleblowing: Dilemmas of Societal Culture*, in INTERNATIONAL HANDBOOK ON WHISTLEBLOWING RESEARCH 37, 37–42 (A.J. Brown et al. eds., 2014).

¹⁴³ VAUGHN, *supra* note 8, at 253–54.

¹⁴⁴ COMM. ON LEG. AFFS. & HUM. RTS., *supra* note 86.

¹⁴⁵ Vandekerckove et al., *supra* note 142, at 63–65.

V. INTERNATIONAL HUMAN RIGHTS LAW: A POSSIBLE BASIS FOR THE CONVENTION

A. *The Right to Freedom of Expression*

Given the importance and urgency of adopting a convention on the protection of whistle-blowers, international human rights law may serve as a basis for such an initiative. The right to freedom of expression as protected in different international legal instruments may serve as a basis under which states have the obligation to protect persons who have experienced retaliation for their public interest disclosures.¹⁴⁶ The state will be bound to protect the right to freedom of expression and thus the whistle-blower if a convention is adopted. With this approach, whistle-blowers will be empowered in countries with no specific law on their protection and will oblige countries with any type of legislation to comply with the international standards of protection, balancing the right to freedom of expression and whistle-blowing.¹⁴⁷

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect the freedom of expression.¹⁴⁸ The ICCPR, which aimed to adapt provisions of the UDHR into “legally binding obligations,”¹⁴⁹ states the following in Article 19(2):

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁵⁰

¹⁴⁶ See *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008).

¹⁴⁷ *Id.*

¹⁴⁸ G.A. Res. 217 (III) A, art 19, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, U.N.T.S. 171.

¹⁴⁹ Kagiarios & Wyper, *supra* note 125, at 13.

¹⁵⁰ G.A. Res. 217 (III) A, art 19, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, U.N.T.S. 171.

Whistle-blowing is an act that should be protected under the freedom of expression and this should be strongly supported in international human rights law.¹⁵¹ This has been recognized by UN Special Rapporteur¹⁵² Abid Hussain in 2000, who criticized the use of state security and other laws that prevent persons from reporting in the public interest.¹⁵³ In 2004, UN Rapporteur Ambeyi Ligabo was joined by the special representatives on freedom of expression and the media from the OAS and the Organisation for Security and Co-operation in Europe (OSCE) in a statement where they asked governments to adopt better protections for whistle-blowers. They stressed:

Whistle-blowers 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 as if they act in good faith.¹⁵⁴

In 2012, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlighted the primary role of whistle-blowers in alerting the public on misconduct in the health system.¹⁵⁵ In 2015, the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression reported on the issues around the protection of sources of information and whistle-blowers and stated, “Basic protections [for

¹⁵¹ Kagiaros & Wyper, *supra* note 125, at 13.

¹⁵² United Nations Committee on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Abid Hussain* (Jan. 18, 2000) (submitted in accordance with Commission resolution 1999/36 E/CN.4/2000/63).

¹⁵³ *Id.*

¹⁵⁴ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression (Dec. 2004).

¹⁵⁵ Anand Grover, *Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/HRC/20/15, 26 (2012).

confidential sources and whistle-blowers] are critical to an effective right to freedom of expression, accountability and democratic governance.”¹⁵⁶

Beyond the right to freedom of expression, there are other rights guaranteed by the ICCPR that are relevant to whistle-blowers. These rights include the rights to self-determination; protection from discrimination; effective remedy; life, liberty and security of person; a fair trial; privacy; freedom of thought, conscience, religion and opinion; take part in the conduct of public affairs; and have access to public service.¹⁵⁷ Nonetheless, it should be highlighted that the Human Rights Committee (HRC), which is responsible for the implementation of the ICCPR, has never issued any specific comment on the application of the ICCPR right to freedom of expression to whistle-blowers and this is an issue that needs to be pushed forward.¹⁵⁸

The connection of whistle-blowing and freedom of expression has also been embraced on a regional level. As mentioned above, the ECtHR in its case law about the protection of whistle-blowers has relied on Article 10 and the right to freedom of expression.¹⁵⁹ The Strasbourg Court established the six criteria that the whistle-blower should satisfy to claim protection under the right to freedom of expression for any type of retaliation he or she may face.¹⁶⁰ At the European level, the right to freedom of expression served as an inspiration for the adoption of the Directive on the protection

¹⁵⁶ U.N. Secretary-General, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/70/361 (Sept. 8, 2015).

¹⁵⁷ Arnaud Poivetin, *Whistleblowers and the Mainstreaming of a Protection Within the United Nations Guiding Principles on Business and Human Rights*, Submission to the United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 1, 4 (2014).

¹⁵⁸ *Id.*

¹⁵⁹ See *Guja v. Moldova*, 14277/04 Eur. Ct. H.R. (2008).

¹⁶⁰ BERNADETTE RAINEY ET AL., JACOBS, WHITE & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 442 (7th ed. 2017).

of persons who report breaches of Union law.¹⁶¹ The European Union highlighted that, by adopting the Directive, essential protection is offered to the whistle-blower and their right to freedom of expression.¹⁶²

B. The United Nations Guiding Principles on Business and Human Rights (UNGP)

The UNGP may be considered an additional legal basis or a motive for adopting a convention on the protection of whistle-blowers. Businesses under the UNGP have the responsibility to respect “internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”¹⁶³ Freedom of expression is certainly included within these human rights. Regarding whether whistle-blowing may be considered as a human right because of its interconnection with the right to freedom of expression, whistle-blowing should be encouraged and protected under the UNGP.

The UNGP imposes a duty for states and businesses to protect a variety of civil, political, economic, social, and cultural rights.¹⁶⁴ These rights have evolved through extensive interpretation and now include matters such as good governance, anti-corruption, the right to a safe and clean environment, and tax evasion.¹⁶⁵ States and businesses must respect human rights and make sure that their international obligation and activities comply with this

¹⁶¹ Directive 2019/1937, of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, 2020 O.J. (L 305/17) 1.

¹⁶² *Id.* at recital 31.

¹⁶³ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, princ. 12, 13 (Mar. 21, 2011).

¹⁶⁴ Poivetin, *supra* note 157, at 10.

¹⁶⁵ *Id.*

aim.¹⁶⁶ This duty of states and businesses is far reaching, covering not only the state or the specific business, but everyone related to them as a business. They carry several obligations *vis-à-vis* the respect for human rights and the due diligence with which they must proceed. The whistle-blower may be a valuable tool to be able to comply with the duties they have. States and businesses should encourage reporting and should be able to afford protection to whistle-blowers to be able to comply with their human rights obligations. In addition, protecting the whistle-blowers will strengthen the protection of stakeholders and will be an alternative to an all-audit solution. The whistle-blower will be an ally not only for states and businesses, but also for everyone who feels that their human rights are not respected.

VI. CONCLUSION

It is undeniable that the whistle-blower has attracted the interest of the international legal community over the years. Different scandals, such as the Snowden revelations and the Panama Papers, have demonstrated that various revelations have an international interest and have introduced the whistle-blower to the international legal scene. These figures have provoked an intense debate about their protection on a national, regional, and international level. This ongoing debate is crucial to move forward at the international level. The UN and other international and regional organizations have significant roles in this discussion and should work towards the adoption of a convention for their protection.

The need to combat corruption has previously led to the UNCAC, under which whistle-blowers should be protected when they report corruption related offences. As analyzed above, the progress of the UNCAC in relation to the protection of reporting persons has shown that significant steps have been made, but there is still plenty of room for positive changes. It is

¹⁶⁶ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *supra* note 163, at 10.

significant to note that the adoption of the UNCAC has led to better protection of whistle-blowers through several adopted conventions and to a better understanding of their importance in the fight against corruption. Apart from the international legal instruments, the global anti-corruption movement has influenced regional organizations and subsequently national governments. This demonstrates that the adoption of a convention on the protection of whistle-blowers may have positive results either in legal or cultural and social terms as the anti-corruption conventions. States without legislation will consider enacting legislation if a convention obliges them to that direction, while states with legislation will be able to review their standards of protection in the light of an internationally negotiated legal text. A global movement for whistle-blowers exists because of all these scandals revealed by them, and although international law addresses whistle-blowing, it is sectoral and limited. The introduction of a new convention will have many benefits as mentioned above, including making the rules around whistle-blowers clearer and providing reassurance to future whistle-blowers of their protection. Whistle-blowers should be able to refer to this specific international legal framework when they are involved in litigation. In addition, the convention will have social benefits, as it will become a tool for advocacy groups to better defend whistle-blowers. Finally, the convention will succeed in changing the cultural perception of whistle-blowing, thereby creating a more positive image of whistle-blowers.