

Submission to the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

Whistleblowers and the mainstreaming of a protection within the United Nations Guiding Principles on Business and Human Rights

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Quis custodiet ipsos custodiet?

"Who will guard the guardians?"

Latin phrase attributed to Juvenal

Between the strong and the weak, between the rich and the poor, between master and servant, it is liberty that is oppressive and the law that sets free.

Henri-Dominique Lacordaire

The issue of protection of whistleblowers has recently generated greater attention from the international community, especially in relation with serious threats to the human right to privacy entailed by the intelligence operations of certain States or the business activity of internet and information technology companies. The United Nations High Commissioner for Human Rights, Navi Pillay, declared in this respect in July 2013: *"Snowden's case has shown the need to protect persons disclosing information on matters that have implications for human rights, as well as the importance of ensuring respect for the right to privacy."*¹

The United Nations Independent Expert on the promotion of a democratic and equitable international order stressed in September 2013 that *"specific protection must be granted to human rights defenders and*

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¹ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Mass surveillance: Pillay urges respect for right to privacy and protection of individuals revealing human rights violations*, 12 July 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13534&> [accessed on 22 January 2014]

whistleblowers”², pointing threats created by breaches, in some countries, of the rights to freedom of expression, peaceful assembly and association.³

Earlier in 2012, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health called for the implementation of “*protection for workers who disclose information concerning their occupational health*”.⁴

What exactly is a whistleblower? The concept of whistleblower is not usually framed by any specific legal definition. The expression is usually tracked back to American activist Ralph Nader who defined whistleblowing in 1971 as “*an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is in corrupt, illegal, fraudulent or harmful activity.*”⁵

A definition of whistleblowing which is commonly referred to by legal scholars is the one of Near and Miceli: “*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.*”⁶

The Council of Europe (COE) defines a whistleblower as “*any person who reports or discloses information on a [serious] threat or harm to the public interest in the context of their work-based relationship.*”⁷

A brief view at the current state of legal domestic and international provisions addressing whistleblowers protection reveals the need to mention the risk of *de facto* or *de jure* retaliation faced by them as an additional key component of a possible relevant legal definition of whistleblowing. The threat is especially but not only acute within their professional framework in relation with duties of loyalty and/or confidentiality. All disclosures will not for example reach a high enough level of seriousness to be considered as whistleblowing.

The United Nations Guiding Principles on Business and Human Rights (UNGP) taking into account not only insiders but also outsiders of organizations, that is to say the whole spectrum of stakeholders to any organization, the relevance of a definition narrowing whistleblowing only to organization members might be discussed.

With regards to what precedes, a more satisfactory definition of whistleblower would be: “*An individual who, having disclosed information about illicit or non-compliant activities, or activities harmful to the public*

² OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *UN expert calls for concrete protection to support civil society voices, including ‘whistleblowers’*, 11 september 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13704&> [accessed on 22 January 2014]

³ INDEPENDENT EXPERT ON THE PROMOTION OF A DEMOCRATIC AND EQUITABLE INTERNATIONAL ORDER. *Report*, 1 July 2013, UN document A/HRC/24/38, p. 5, §14.

⁴ SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH. *Report*, 10 April 2012, UN Document A/HRC/20/15, p. 20, § 60.

⁵ NADER Ralph, PETKAS Peter J., BLACKWELL Kate (eds). *Whistle Blowing. The Report of the Conference on Professional Responsibility*. New-York: Grossman, 1972, p. 3-5.

⁶ MICELI, Marcia, NEAR, Janet. *Blowing the Whistle: the Organisational and Legal Implications for Companies and Employees*. New-York: Lexington Books, 1992, p. 15.

⁷ COUNCIL OF EUROPE. *Draft Recommendation on protecting whistleblowers as revised after the 93rd meeting of the CDCJ Bureau and approved by written procedure on 5 July 2013*, CDCJ(2013)Misc7 final, available at <http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/CDCJ%282013%29Misc7E.pdf> [accessed on 03/02/2014]

interest, and facing consecutively serious retaliations or threats thereof, including within its professional framework, necessitates a protection.”

The increasing light thrown on the issue of whistleblowing, both on the international and national stages, is an occasion to determine what the state of whistleblowers legal protection is today and how it impacts the UNGP, first ever global standard addressing adverse impacts of businesses on human rights, unanimously endorsed by the Human Rights Council on June, 16th, 2011⁸.

I. The state of whistleblowers legal protection

International law clearly provides provisions protecting whistleblowers through universal and regional instruments. States have also very frequently enacted legislations in this respect.

A. Protection bestowed by universal instruments

Universal legal instruments offer a general protection that is common to all whistleblowers, no matter which rights they defend or issue they disclose, and special safeguards addressing only specific disclosures.

1) General protection

Basic protection: The right to freedom of expression and other relevant fundamental rights

International law offers a binding universal legal framework which can be defined as a minimum threshold of protection for whistleblowers. This common basic protection for all whistleblowers is provided by the International Covenant on Civil and Political Rights (ICCPR) of December, 16th, 1966. States⁹ have an

⁸ See Human Rights Council resolution A/HRC/RES/17/4.

⁹ States parties but other States as well as long as these norms are considered as *erga omnes*. Furthermore, a debate exists on the question whether the rights of the ICCPR are only guaranteed within territories of States parties or with regards to individuals subject to their jurisdiction (Article 2.1 of the ICCPR). The International Court of Justice has ruled long ago that “the principles and rules concerning the basic rights of the human person” constitute *erga omnes* norms, that is to say, norms that “are obligations of a State towards the international community as a whole”. It can be assumed that these rights are mandatory regardless of the territory over which a State has its jurisdiction. However, there is a debate among scholars about which human rights norms are actually entitled to be *erga omnes*. It has been clearly stated so for protection from slavery, racial discrimination and genocide, the right of peoples to self-determination and for “a great many rules of humanitarian law applicable in armed conflict”. The status of other norms is unsure. Nevertheless, the Human Rights Committee (HRC) has stated that, with regards to the ICCPR, “rules concerning the basic rights of the human person’ are *erga omnes*”. See INTERNATIONAL COURT OF JUSTICE. *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, Report 1970, p. 32 ; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 257 ; *Case concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports 1995, p. 102

obligation to respect the rights guaranteed by the ICCPR, both negative (not to infringe them) and positive (to ensure that they are not infringed by a private actor under their jurisdiction).¹⁰

A great many rights guaranteed by this instrument are relevant to whistleblowers, the overarching one being the right to freedom of expression granted by article 19. They include right to self-determination, protection from discrimination, torture or cruel, inhuman or degrading treatment or punishment, slavery, servitude, forced or compulsory labour, right to an effective remedy, right to life, right to liberty and security of person, right to a fair trial, right to privacy, right to freedom of thought, conscience, religion and opinion, right of peaceful assembly, right to freedom of association, right to take part in the conduct of public affairs, right to vote and to be elected and right to have access to public service.

The responsibility of States with regards to the ICCPR may be examined by the Human Rights Committee (HRC) which can release comments on the report submitted by States parties on their implementation of the Covenant.¹¹ The Committee can also play the role of a mediator between States parties which disagree on the way they fulfil their obligations.¹² Last but not least, the Committee may examine communications submitted by individuals about possible violations of the covenant by States parties and express “its views”.¹³ Within these mechanisms, the sanction incurred by States is based on the publicity of the views of the Committee and is merely reputational. It should be stressed nevertheless that the ICCPR may be invoked in national courts in States whose constitutional regime allows to do so.¹⁴

The HRC has never issued any specific comment on the application of ICCPR right to freedom of expression to whistleblowers and this is without a doubt a major shortcoming that needs to be tackled.¹⁵ Thus, the ICCPR does not address retaliation issues consecutive to disclosure of confidential information and consequently neglects to tackle an essential component of whistleblowers protection.

However, the ICCPR still offers a necessary minimum threshold of protection. Indeed, what further protection can whistleblowers claim if prerequisites such as the right to freedom of opinion and expression or the right to a fair trial are not implemented?

The Universal Declaration of Human Rights (UDHR), adopted unanimously on December, 10th 1948 by the UN General Assembly, is another relevant legal instrument. It is this time not legally binding but States were unanimous to adopt it which implies a strong commitment for its implementation. Reference can be made to the UDHR especially for the few number of States non-parties to the ICCPR.¹⁶

; HUMAN RIGHTS COMMITTEE. *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 9 March 2004, UN document CCPR/C/21/Rev.1/Add.13, § 2.

¹⁰ KERBRAT, Yann. La responsabilité des entreprises peut-elle être engagée pour des violations du droit international ? In KERBRAT, Yann, GHERARI, Habib (eds). *L'entreprise dans la société internationale*. Paris : Pedone, 2009, p. 101.

¹¹ Only in the case of States Parties. But the ICCPR ratification status is relatively wide (ICCPR, art. 40.4.).

¹² ICCPR, art. 41-42.

¹³ But only for States parties to the Optional Protocol to the ICCPR adopted on December, 16th, 1966 and as long as all available domestic remedies have been exhausted (art. 2 of the Protocol). The Protocol is less widely ratified than the covenant and influential States such as the United States of America, the United Kingdom, Switzerland, India or China are not signatories (as of January 2014).

¹⁴ This is the case, among others, in France. See the case law of French supreme courts: COUR DE CASSATION, Ch. Mixte, May, 24th 1975, *Société des Cafés Jacques Vabre* ; CONSEIL D'ETAT, October, 20th 1989, *Nicolo* ; CONSEIL D'ETAT, *Confédération nationale des associations familiales catholiques et autres*, December, 21st 1990.

¹⁵ No express reference to whistleblowing can be found in the whole HRC jurisprudence. The HRC nevertheless recognizes a protection to journalistic sources against disclosure. Rights of persons who publish “human rights-related reports” are guaranteed as well. See HUMAN RIGHTS COMMITTEE. *General comment No. 34 - Article 19: Freedoms of opinion and expression*, 12 September 2011, UN document CCPR/C/GC/34.

¹⁶ As of January 2014, 167 States were parties to the ICCPR.

Protection specific to whistleblowers

The last universal legal instrument conferring protection to whistleblowers is the Convention no. 158 of the International Labor Organization (ILO) on Termination of Employment, adopted in 1982. This universal international agreement is the only one to provide an express protection to whistleblowers against reprisals from an employer. It bans any termination of employment based on *“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”*.¹⁷ However, this convention remains to a certain extent confidential, as it was only ratified by 36 States.¹⁸ Other ILO conventions may be applicable to some specific cases of whistleblowers, such as Conventions no. 111 of 1958 on Discrimination (Employment and Occupation), no. 87 of 1948 on Freedom of Association and Protection of the Right to Organise, no. 98 of 1949 on the Right to Organise and Collective Bargaining, no. 29 of 1930 on Forced Labour and no. 105 of 1957 on Abolition of Forced Labour¹⁹

2) Special protection

Disclosure of human right violations

Whistleblowers are also targeted by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, often shortened to Declaration on Human Rights Defenders.²⁰ This instrument, although not legally binding, was adopted by consensus by the UN General Assembly in 1998 and therefore represents a strong commitment by States to its implementation.

It addresses the issue of protection of those of the whistleblowers who disclose alleged violations of human rights. This specific scope makes it a pertinent reference for the UNGP. The instrument guarantees in particular the right *“to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in*

¹⁷ Art. 5c. The convention also declares invalid terminations of employment justified by union membership or participation in union activities, actions as a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. The convention also states that termination must be *“connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”* (art. 4). It further provides that workers facing termination be given an opportunity to defend themselves against allegations made (art. 7) and a possibility to appeal against that termination (art. 8).

¹⁸ As of February, 3rd 2014. Many economically influential States have not ratified it.

¹⁹ These five conventions are covered by the 1998 ILO Declaration on Fundamental Principles and Rights at Work which commits all ILO Member States to respect the rights they guarantee. Implementation of ILO conventions is monitored by ILO bodies. Allegations about violations can be submitted by a workers' or employers' organization. The International Court of Justice may intervene in the process (art. 20-34 of the ILO Constitution).

²⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 9 December 1998, UN Document A/RES/53/144.

violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.”²¹

Disclosure of corruption practices

Those of the whistleblowers who disclose corruption practices are entitled to a specific protection under the 2003 United Nations Convention against Corruption. It is provided by States parties “*against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences*”²² established by this international instrument.

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B. Protection under regional instruments

European legislation enforces several provisions protecting whistleblowers. The Council of Europe (COE), headquartered in Strasbourg, France, takes what appears to be a leadership in terms of whistleblowers protection through the European Court of Human Rights (ECHR) and other treaties.

European Court of Human Rights (ECHR)

In its judgment *Heinisch v. Germany* of July, 21st 2011, the ECHR recognized that whistleblowing was protected within private companies under article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the right to freedom of expression. The case involved a dismissal from employment on the ground of a criminal complaint brought against the private employer alleging deficiencies in the operations of the company.²³ A prior judgment, *Stoll v. Switzerland* of December, 10th 2007, already recognized a protection for individuals, in this case a journalist, publishing “secret official deliberations” covered by the criminal code.²⁴ The judgment of the case *Guja v. Moldova* on February, 12th 2008, recognized a protection to civil servants whistleblowers.²⁵

Other legal instruments of the Council of Europe (COE)

The Strasbourg institution is in the process of drafting a treaty entirely dedicated to the protection of whistleblowers but has already enforced regulations on the issue.

²¹ Art. 12. It further offers a right to a protection “*against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.*”

²² Art. 33 of the United Nations Convention against Corruption, 31 October 2003, UN document A/RES/58/4. The offences are as follows: Obstruction of justice; Concealment; Laundering of proceeds of crime, Embezzlement of property in the private sector; Bribery in the private sector; Illicit enrichment; Abuse of functions; Trading in influence; Embezzlement, misappropriation or other diversion of property by a public official; Bribery of foreign public officials and officials of public international organizations; Bribery of national public officials. As of February, 3rd 2014, the convention has 170 parties, which signifies the instrument is entitled to a widespread implementation.

²³ ECHR. *Heinisch v. Germany*, 21 July 2011, Application no. 28274/08.

²⁴ ECHR. *Stoll v. Switzerland*, 10 December 2007, Application no. 69698/01.

²⁵ ECHR. *Guja v. Moldova*, 12 February 2008, Application no. 14277/04.

The COE's European Social Charter is a treaty which was adopted in 1961 and revised in 1996. The 1996 version embeds the provisions of the ILO convention no. 158 which nullifies termination of employment based on "*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*".²⁶

The COE has also adopted two treaties on corruption in 1999. The Criminal Law and Civil Law Conventions on Corruption provides protection to those who report corruption offences.²⁷

European Union

The European Commission issued in 2012 its Guidelines on whistleblowing which apply to staff members reporting serious irregularities.²⁸

C. Protection bestowed by domestic schemes

Many countries have enforced legislation on whistleblowers protection, in the public and/or less commonly in the private sectors, either through a dedicated legislation or through various sectoral laws dealing with corruption, competition, accounting, environmental protection, civil service, employment or company and securities. A few representative examples are briefly mentioned below.²⁹

States such as the United States of America (USA) or the United Kingdom (UK) are often presented as pioneers in the field of whistleblowers protection.³⁰

The USA was first, according to certain sources, to introduce legislation in the field during the Civil War in the 19th century.³¹ The country introduced a Whistleblower Protection Act (WPA) as early as 1989 that was enhanced in 2012, among other regulations enforced as of today. Private sector protections are furthermore implemented in the 2002 Sarbanes-Oxley Act and the 2010 Dodd-Frank Act.

The UK adopted its Public Interest Disclosure Act (PIDA) in 1998 which protects disclosures by workers, including contractors, of serious fraud or malpractice at the workplace.

²⁶ Appendix to the European Social Charter (Revised), article 24-3-c.

²⁷ Art. 22a, Criminal Law Convention on Corruption; Art. 9, Criminal Law Convention on Corruption

²⁸ EUROPEAN COMMISSION. *Communication from Vice-President Šefčovič to the Commission on Guidelines on Whistleblowing*, 6 December 2012, SEC(2012) 679 final, available at <http://www.coe.int/t/dghl/standardsetting/cdci/Whistleblowers/EU%20guidelines%20-%20Whistleblowing.pdf> [accessed on 04/02/2014]

²⁹ For a comprehensive study of domestic regulations, see OECD. *Whistleblower protection frameworks, compendium of best practices and guiding principles for legislation* In G20. *Anti-Corruption Action Plan - Action Point 7: Protection of Whistleblowers*, available at <http://www.coe.int/t/dghl/standardsetting/cdci/Whistleblowers/G20%20-%20study%20on%20whistleblowers.pdf> [accessed on 04/02/2014]; LATIMER, Paul; BROWN, A. J. Whistleblower Laws International Best Practice. *University of New South Wales Law Journal*, Vol. 31, Issue 3 (2008), p. 766-794 ; CALLAHAN, Elletta Sangrey, DWORKIN, Terry Morehead, LEWIS, David. Whistleblowing: Australian, U.K., and U.S. approaches to disclosure in the public interest. *Virginia Journal of International Law*, Spring 2004, vol. 44, p. 879-912.

³⁰ COUNCIL OF EUROPE. COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS. *The protection of "whistle-blowers": Report*. 14 September 2009, Doc. 12006, available at http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN#P281_37828 [accessed on 04/02/2014]

³¹ *Ibid.*, § 98.

The People's Republic of China offers constitutional protection against retaliation for disclosures concerning “any State organ or functionary for violation of law or dereliction of duty”.³²

France enacted in 2013 landmark laws which protect private sector employees disclosing information on serious harm threatening public health or the environment³³ or private sector employees and civil servants disclosing any facts constituting any offence.³⁴

From what precedes, it can be assumed that a legal background exists for protection of whistleblowers in international law, especially in Europe or concerning corruption offences, even if it suffers from gaps and loopholes that clearly weaken it and should be addressed. In this respect, there is no legal reason for the HRC in the future not to expressly recognize a specific protection for whistleblowers under the right to freedom of expression, just as it already did for journalists, and not to follow the move of the ECHR on this issue.

II. Whistleblowers and the Guiding Principles

As seen *supra*, international law clearly protects the right to freedom of expression, under which whistleblowers may claim a protection. The responsibility of the implementation of this right lays on States but businesses have an indirect responsibility to respect it, as underlined for all others human rights in the “Protect, Respect and Remedy” Framework of the UNGP, which are not by themselves a binding instrument.³⁵

A. Relevant requirements of the Guiding Principles

³² Constitution of the People's Republic of China, December 4, 1982, art. 41.

³³ *Indépendance de la santé et de l'environnement : expertise et protection des lanceurs d'alerte* Act no 2013-316 of April, 16th 2013 (*Loi relative à l'indépendance de l'expertise en matière de santé et d'environnement et à la protection des lanceurs d'alerte*), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027324252>.

³⁴ *Fight against fiscal fraud and major economic and financial crime* Act no 2013-1117 of December, 6th 2013 (*Loi relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*), available at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028278976>. The law offers protection in case of a disclosure performed in good faith. It addresses whistleblowers in the private sector facing a ban to access a recruitment procedure or an internship or a period of training in a company, or being sanctioned, dismissed or subject to, direct or indirect, discriminatory measures, especially concerning salary, incentives or shares distribution, training, reclassification, appointment, qualification, professional promotion, relocation or renewal of contract, in case of a disclosure performed in good faith. Civil servants are also protected against retaliations related to recruitment, assignment to grade, training, evaluation, discipline, promotion, posting or transfer. It is worth noting that in case of litigation, the burden of proof lays solely with the defendant, that is to say the employer. This provision offers a high level of protection.

³⁵ For further considerations on indirect responsibilities of businesses, especially on environmental matters, refer to MALJEAN-DUBOIS, Sandrine, RICHARD, Vanessa. The applicability of international environmental law to private enterprises In DUPUY, Pierre-Marie, VIÑUALES, Jorge E. (eds). *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards*, Cambridge : Cambridge University Press, 2013, p. 69-96.

1) Applicable international provisions

The UNGP state that businesses have a 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*”.³⁶

The International Bill of Human Rights consists of the UDHR, the ICCPR (to which are usually added its two Optional Protocols) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The eight ILO core conventions as set out in the 1998 Declaration on Fundamental Principles and Rights at Work are as follows:

Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87)

Right to Organise and Collective Bargaining Convention, 1949 (no. 98)

Forced Labour Convention, 1930 (no. 29)

Abolition of Forced Labour Convention, 1957 (no. 105)

Minimum Age Convention, 1973 (no. 138)

Worst Forms of Child Labour Convention, 1999 (no. 182)

Equal Remuneration Convention, 1951 (no. 100)

Discrimination (Employment and Occupation) Convention, 1958 (no. 111)

As stated *supra*, all ILO member States are due to respect the rights guaranteed in these conventions. As seen earlier, instruments having some relevance for whistleblowers are conventions no. 111, no. 87, no. 98, no. 29 and no. 105.

These five conventions protect for both workers and employers the right of freedom of association³⁷, the right to protection against acts of anti-union discrimination, and against interference between workers' organisations and employers' organisations or domination of the former by the latter³⁸, the right to protection against discrimination in relation with the rights set up by all ILO Conventions or Recommendations, including in terms of access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.³⁹ Furthermore, forced or compulsory labour including as a means of political coercion or as a punishment for holding or expressing political,

³⁶ 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*, 21 March 2011, UN Document A/HRC/17/31, principle 12, p. 13.

³⁷ Art. 2 of Convention no. 87. It contains the right the right to establish and to join organisations of their own choosing without previous authorisation. Art. 3 also protects the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

³⁸ Art. 1-2 of Convention no. 98.

³⁹ Art. 1; 5 of Convention no. 111.

social or economic views, as a means of labour discipline or as a punishment for having participated in strikes, is prohibited.⁴⁰

2) Scope of the UNGP provisions

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From what precedes, it is clear that freedom of expression and other rights formulating some level of protection for whistleblowers are included within the scope of the UNGP.

It can be further elaborated that this protection concerns disclosures addressing a large panel of human rights and labour rights. These human rights may consist of civil and political rights as defined in part I *supra*, as well as economic, social and cultural rights which encompass the right to an adequate standard of living⁴¹, the right to health⁴² or the right to development⁴³. These provisions have evolved through extensive interpretations of international human right bodies to include issues such as anti-corruption, good governance, tax evasion, the right to a safe, clean, healthy and sustainable environment or the right to safe drinking water and sanitation. Eventually, it must be underlined that all kinds of disclosures, whether or not they fall into the category of internationally recognized human rights, might be entitled to a protection under the UNGP, because whistleblowing can be considered in its own right a human right derived from the right to freedom of expression.

The UNGP claim a duty for States to protect and a corporate responsibility to respect the abovementioned rights. These provisions should mainstream whistleblowers protection through the relevant arrangements of the UNGP framework detailed below.

States have a duty to enforce laws and policies aimed at requiring businesses to respect human rights⁴⁴, or make sure their international obligations and activities comply with this aim⁴⁵. This duty encompasses also ensuring a similar behaviour from State owned or controlled business enterprises or those receiving support from State agencies including export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. States duty further applies while they contract or conduct commercial transactions with businesses, including through procurement activities.⁴⁶ States are required to operate judicial and non-judicial grievance mechanisms (administrative, legislative and other, including national human rights institutions) and facilitate access to grievance mechanisms administered by a business enterprise alone or with stakeholders, by an industry association or a multistakeholder group, and to regional and international human rights bodies.⁴⁷

The responsibility of businesses *vis-à-vis* human rights includes their own activities and those of their business relationships.⁴⁸ The guiding principles further request business enterprises to set up policies and

⁴⁰ Art. 1 of Conventions no. 29 and 105.

⁴¹ Art. 11 of the ICESCR.

⁴² Art. 7, 10, 12 of the ICESCR.

⁴³ Art. 1 of the ICESCR and the ICCPR.

⁴⁴ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, *op. cit.*, p. 8, principle 3, p. 11, principle 8.

⁴⁵ *Ibid.*, p. 12, principles 9-10.

⁴⁶ *Ibid.*, p. 9-10, principles 4-6.

⁴⁷ *Ibid.*, principles 26-28.

⁴⁸ *Ibid.*, p. 14, principle 13.

processes such as a policy commitment and a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.⁴⁹ Businesses should participate in operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

B. Rationale for mainstreaming whistleblowers protection within the UNGP

There are further reasons to advocate for an express incorporation of whistleblowers protection in the UNGP.

1) Whistleblowers protection strengthens protection of affected stakeholders

Whistleblowers protection is a tool ensuring better stakeholders consultation, oversight and reporting

Inclusion of proper channels and safeguards for whistleblowing would ensure meet the objectives of the specific UNGP provisions mentioned *infra*.

Business enterprises should have in place policies and processes through which they can both know and show that they respect human rights in practice.⁵⁰ Human rights due diligence should involve meaningful consultation with potentially affected groups and other relevant stakeholders⁵¹ and be ongoing due to the changing nature over time of human rights risks as the business enterprise operations and operating context evolve : Whistleblowing channels would help businesses to stick to the actual situation on the ground in a timely manner.⁵²

Businesses are further responsible for an effective integration of the findings from their impact assessments across relevant internal functions and processes. This requires that oversight processes enable effective responses to such impacts⁵³ which should be tracked in a way that draws on feedback from both internal and external sources, including affected stakeholders. It should be integrated into relevant internal reporting processes, such as surveys, audits or operational-level grievance mechanisms⁵⁴. Whistleblowing channels and safeguards would help meet these ends: For the response to be effective, impacts should be

⁴⁹ *Ibid.*, p. 15, principle 15. The policy is approved at the most senior level of the business enterprise and is publicly available and communicated, including to personnel, business partners and relevant parties. Policy and due diligence are based on internal and /or external expertise and due diligence involve consultation with stakeholders. Responsibility for addressing impacts is assigned to the appropriate level and function within the business enterprise and Internal decision-making, budget allocations and oversight processes should enable effective responses. Businesses should track the effectiveness of their response through qualitative and quantitative indicators and feedback from both internal and external sources, including affected stakeholders. UNGP impose communications on these processes (Principles 17-21). Compliance is requested with all applicable laws and internationally recognized human rights wherever operations are located (Principle 17-23).

⁵⁰ *Ibid.*, Principle 21.

⁵¹ *Ibid.*, Principle 18b.

⁵² *Ibid.*, Principle 17c.

⁵³ *Ibid.*, Principle 19a-ii.

⁵⁴ *Ibid.*, Principle 20b.

well and timely reported and be based on stakeholders' feedback. Surveys and audits could in a similar way be accurately fed.

Whistleblowers protection strengthens the remedies mechanisms framework

The UNGP requires, with regards to State-based judicial, State-based non-judicial and non-State-based grievance mechanisms, that legal, practical and other relevant barriers which could lead to a denial of access to remedy be reduced. These barriers may include "*fears of reprisal*." They should also ensure "*that the legitimate and peaceful activities of human rights defenders are not obstructed*".⁵⁵

Operational-level grievance mechanisms⁵⁶ are particularly relevant with regards to whistleblowers. They are in most cases the first means of recourse and are peculiarly important because "*they support the identification of adverse human rights impacts*" and allow "*grievances, once identified, to be addressed*" and "*adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating*."

The effectiveness of grievance mechanisms also implies that "*people it is intended to serve know about it, trust it and are able to use it*", "*that it meets their needs*" and "*that they will use it in practice*."⁵⁷

These provisions of the UNGP clearly advocate for an express incorporation of whistleblowing channels and safeguards in the guiding principles implementation process.

2) Whistleblowers protection is an alternative to an all-audit solution

The UNGP foundations rely on the requirement of the implementation of due diligence processes by businesses in their own operations and those of their business relationships, these relationships being understood to include "*business partners, entities in [their] value chain, and any other non-State or State entity directly linked to [their] business operations, products or services*."⁵⁸

Major transnational corporations may sometimes have up to hundreds of thousands of suppliers or other entities in their value chain, which may frequently change on a day-to-day basis. Keeping these constraints in mind, how can businesses implement an effective due diligence, without making it an onerous labyrinthine system?

As already mentioned earlier, tracking the effectiveness of their response would mean for businesses to resort, among other solutions, "*to performance contracts and reviews as well as surveys and audits*".⁵⁹

⁵⁵ *Ibid.*, Principles 26; 31.

⁵⁶ *Ibid.*, Principle 29.

⁵⁷ *Ibid.*, Principle 31.

⁵⁸ *Ibid.*, Principle 13.

⁵⁹ *Ibid.*, Principle 20.

This all-audit solution, even though not extensively elaborated in the provisions of the UNGP, would nevertheless represent the major issue, economically, organisationally and technically, for businesses that will have to face the challenging burden to implement it.⁶⁰

Auditing represents a top-down approach in terms of effectiveness tracking: The transnational corporation will set up on its own inspection, audit or survey processes to make sure human rights are respected in its value chain.

Resources constraints will unavoidably lead to prioritization in due diligence operations, as it is already foreseen by the UNGP themselves. Audits will consecutively be focused on *“areas where the risk of adverse human rights impacts is most significant”*⁶¹ or on adverse human rights impacts *“that are most severe or where delayed response would make them irremediable.”*⁶² As a consequence, some adverse human rights impacts may remain non-addressed.

The gaps due to stem from this approach can turn out to be a real hindrance to the effectiveness of due diligence and response tracking by businesses and to the latter's comprehensive respect of human rights.

On the contrary, whistleblowing channels, incentives and safeguards consist in a bottom-up approach: Adverse human rights impacts would be monitored directly from the ground, up to the management of the business enterprise, by stakeholders in a way that could end up to be much more flexible, efficient and optimal in terms of resources saving. If correctly implemented, in a complementary way to auditing, they could avoid accountability vacuums entailed by an all-audit scheme.

Whistleblowers hotlines and other protections measures are already widely implemented for corruption offences reporting in States bodies or companies operations. Numerous internationally recognised anti-corruption compliance tools and recommendations involving whistleblowers protection provisions have been published by organizations such as the Organisation for Economic Co-operation and Development (OECD), the International Chamber of Commerce (ICC) or the World Bank.⁶³ These provisions designed for corruption issues should be extended to all other human rights abuses.

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As seen *supra*, even though no reference to whistleblowers is made in the text of the guiding principles, there is a strong legal, practical and economical case for mainstreaming express channels and protections dedicated to whistleblowers within the frame of the UNGP. Whistleblowing is, in itself, both a human right

⁶⁰ This issue is acknowledged by the UNGP which state: *“Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.”* Ibid., Principle 17.

⁶¹ Ibid.

⁶² Ibid., Principle 24.

⁶³ For a study on these mechanisms, refer to OECD. *Whistleblower protection frameworks, compendium of best practices and guiding principles for legislation* In G20. *Anti-Corruption Action Plan - Action Point 7: Protection of Whistleblowers*, op. cit.; For an example of recommendations to companies, see annex I of OECD. *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44176910.pdf> [accessed on 04/02/2014].

to be protected and a tool to ensure other rights are strictly respected. There is a deep rationale today to strengthen international and domestic safeguards concerning whistleblowers. One priority would be to settle a comprehensive and universal protection of whistleblowers. Another efficient tool would be to incorporate a dedicated protection within the UNGP. National action plans that are currently being set up to implement the UNGP in domestic frameworks should definitely integrate the findings of the present study and incorporate whistleblowing safeguards within their business and human rights compliance schemes and regulations.