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## Corporate Crime Observatory

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### THE UNCAC RESOLUTION ON REPORTING PERSONS: RECOGNIZING PROGRESS AND DISCUSSING PATHS FOR ENHANCEMENT

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The article discusses the resolution adopted by the 10th Conference of the States Parties (CoSP) to the United Nations Convention against Corruption (UNCAC), which focuses on the protection of reporting persons. Given the secretive nature of corruption, especially when it involves influential individuals or authorities, exposing and holding wrongdoers accountable becomes a challenging task. In this context, the article highlights the crucial role played by whistleblowers, journalists, and leakers in uncovering corrupt practices and emphasizes the necessity of safeguarding them from retaliation. It delves into the recent resolution CAC/COSP/2023/L.12/Rev.1 within the framework of the UNCAC, recognizing it as a significant step forward. However, it also conducts a critical analysis, highlighting the shortcomings present in the CoSP's document when compared to more robust legal instruments such as the EU Whistleblower Directive and other best practices. It also emphasizes how the CoSP's interpretation of "good faith" in whistleblower reports, which is clearly detached from the motivation behind the disclosure, represents the most innovative and significant element included in the resolution.

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On December 11, 2023, the 10th Conference of the States Parties to the [United Nations Convention against Corruption \(UNCAC\)](#) convened in Atlanta (USA), marking a significant event in the global effort to combat corruption. UNCAC is a pivotal international treaty that was adopted in 2003 and entered into force in 2005.



As of October 2023, [a total of 190 countries have become State Parties to this convention](#), which serves as a comprehensive framework for addressing the multifaceted challenges posed by corruption on a global scale. UNCAC encompasses a wide range of measures and provisions aimed at preventing corruption, promoting transparency, and enhancing accountability in both the public and private sectors.

It has to be highlighted that only a few UNCAC provisions are mandatory for the State Parties, whereas many others only require signatories to consider their implementation (OECD 2008, 14). Therefore, as it will be discussed, the UNCAC mechanism for the periodic evaluation of its implementation by States Parties assumes crucial importance to further implement the convention at the national level. In particular, under Article 63 of the convention, the Conference of the States Parties (CoSP) has been established to promote and review its implementation. [The CoSP may make decisions and adopt resolutions](#). Decisions primarily deal with procedural matters associated with the administration of the conference itself. In contrast, resolutions predominantly focus on substantive issues, shedding light on both existing and emerging challenges that hinder the successful execution of the convention. The resolutions serve as a means to draw attention to key matters that necessitate collective action and commitment from the participating states to enhance UNCAC implementation.

A significant problem with corruption lies in its clandestine nature, making corrupt agreements highly elusive and challenging to expose. "Corruption takes place in secret, is difficult to measure, and often does not have a clear individual victim" (Weilert 2015, 217). This difficulty arises because none of the involved parties typically have an incentive to reveal such agreements. Given the substantial power held by public officials, corrupt arrangements tend to become more secretive

when government authorities are involved. The problematic aspect represented by the secretive nature of corrupt practices gains further relevance when we recognize that corruption frequently amounts to a "crime of the powerful" (Ruggiero 2015, 2-5).

The prominent role of powerful individuals in corrupt practices significantly exacerbates the challenges associated with uncovering and addressing corrupt deals. The fact that corruption is a crime often committed by individuals with substantial influence and resources generates a heightened level of complexity in the anti-corruption investigative and enforcement efforts. Powerful individuals wield significant financial and political clout, which may enable them to engage in corrupt activities that may be shielded by layers of secrecy and protection. Moreover, their connections to established societal structures can reinforce their impunity and rationalize their actions, making it even more arduous to expose their wrongdoing. Additionally, the ability of these powerful individuals to secure top-notch legal representation further intensifies the complexity of holding them accountable for their corrupt acts, as they can effectively navigate the legal system to evade repercussions (Ring and Grasso 2023, 3).

Considering these fundamental aspects of corruption, it becomes clear that there is a critical need to establish effective systems for detecting and exposing corrupt practices. This need is particularly pronounced in cases where corrupt activities involving authorities or a country's elite lead to shifts in power or situations that can be categorized as state capture (for the notion of state capture see McCann et al. 2021, 1145).

In such a context, over the course of the last two decades, the actions of whistleblowers, leakers, and investigative journalists, who have successfully pierced the veil of ignorance revealing the pervasiveness of corrupt and other forms of illicit behavior in our democratic societies, have demonstrated to be the most effective means to unveil otherwise obscure corrupt practices (Grasso, *The Whistleblowers' Revolution*, forthcoming).

Despite their critical role, individuals who report corruption often face retaliation and harassment intended to punish them for exposing corrupt activities and deter others from coming forward, creating a deterrent effect similar to the one produced by state sanctions. In this context, it is crucial to examine how the UNCAC convention addresses this issue and encourages State Parties to protect these courageous individuals.

Even though the convention did not make explicit reference to whistleblowers, it nevertheless incorporated in its **Article 33**, albeit in a general manner, an important

provision aimed at protecting anyone who reported information useful for uncovering corrupt practices. It provides that "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

However, such a broad provision has not been translated into concrete actions taken by the States to safeguard the interests of reporting persons. This notable deficiency has prompted the adoption of the recent [resolution CAC/COSP/2023/L.12/Rev.1](#), which specifically addresses the "protection of reporting persons" (for the full text of the resolution please see below). It highlights the pressing need to fill this void and provide effective safeguards for those who come forward to expose corruption.

The adoption of this resolution appears even more significant when we take into consideration that the path of transparency in the implementation of the international convention has often been marked by significant challenges. The events of October 28, 2011, are emblematic of such a situation. On that occasion, during the Fourth Conference of States Parties (CoSP 4), Russia, with the support of China and Iran, introduced a Resolution that excluded civil society from participating in the deliberations of the UNCAC Implementation Working Group (IWG). This move was at odds with the core principles of the UNCAC, which emphasize the importance of civil society engagement in anti-corruption efforts, and it contradicted a prior legal opinion provided by the UN's legal adviser, raising concerns about its alignment with the Convention's objectives (Daniel and Maton 2013, 294).

Moving to a concise commentary on the resolution, what emerges is that its significance doesn't lie in suggesting particularly effective or innovative measures for protecting reporting persons. Instead, its value lies in the international recognition of the importance of safeguarding individuals who bravely expose corruption achieved in a context formed by a diverse group of states with varying political, institutional, and legislative traditions, as well as different approaches to transparency.

This is not only because the resolution includes only mere recommendations but also because, although the resolution calls upon States Parties to continue their efforts to implement Article 33, some of these recommendations appear less robust when compared to those found in other legal instruments. For instance, the resolution lacks provisions for the adoption of award systems for whistleblowers, despite their successful adoption by several countries, most notably the United

States, where such systems have proven to be highly effective (Inman 2020). Such a choice seems short-sighted, considering the experience gained in recent decades. Furthermore, it appears openly contradictory that national legal systems are inclined to offer privileged treatment to criminals who decide to cooperate with justice in order to uncover serious forms of crime, such as organized crime, whereas even honest individuals who courageously expose corrupt practices are left without any formal recognition from the state. This omission appears to be more due to states' lack of willingness to expose the corruption within the elite and authorities rather than to a concrete and functional need for whistleblowing practices. Also, arguments related to the preservation of public resources do not hold water. As the American experience has demonstrated, when monetary rewards are tied to the imposition of sanctions, instead of resulting in a loss for the state treasury, they actually lead to an increase in states' revenues.

Moreover, the resolution calls upon States parties to establish, facilitate, and maintain complaint intake systems that allow whistleblowers to report directly to relevant authorities, "without the need to exhaust internal reporting systems first." Such a provision does not represent the best standard when compared to Article 15 of the EU Whistleblower Directive (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). The EU Directive permits public disclosures (e.g. a disclosure made to the media) not only when no appropriate action has been taken in response to an internal report or a report to the authorities but also when the whistleblower has reasonable grounds to believe that the breach may pose an imminent or manifest danger to the public interest or that collusion between the authorities and the perpetrator may be occurring. Different from the UNCAC resolution, the adoption of such an approach by the EU Directive is commendable because it safeguards freedom of expression and information, which is a fundamental human right expressly recognized under Article 11(1) of the Charter of Fundamental Rights of the European Union (Grasso and Sieders, The New Harmonized European Legal Framework for the Protection of Whistleblowers: The EU Whistleblowing Directive, forthcoming).

In this context, the convention exhibits a significant deficiency as it fails to include provisions for safeguarding whistleblowers who disclose directly to the public. In that regard, it does not adequately address the potential for collusion between authorities and individuals involved in corrupt activities.

In such a scenario, should a whistleblower choose to disclose information to the authorities, the report is likely to yield no impact, while also subjecting the whistleblower to severe consequences at the hands of state authorities (for a more



in-depth examination of the repression of whistleblowers by authorities, see Vozza and Turksen, *When The State Keeps it on The Hush: On the Limit to the Punishment of Whistleblowers*, forthcoming).

Among the most interesting statements found in the resolution, it is possible to identify the following:

- It expressly mentions "whistle-blowers" defining them as "reporting persons who report corruption in the context of their professional activity and work-related environment."
- It highlights the need to enhance knowledge and promote academic research on good practices regarding all types of harm faced by reporting persons as a result of reporting.
- It further encourages States Parties to consider options to provide legal advice to persons who consider reporting corruption and ways of cooperating with competent authorities and other legal experts or professionals outside the public sector.
- It encourages States Parties to ensure that individual legal or contractual obligations, such as confidentiality or non-disclosure agreements, cannot be used to conceal corrupt acts from scrutiny in order to deny protection or penalize reporting persons. Such a recommendation appears to recall Article 24 of the EU Whistleblower Directive, which expressly establishes that "Member States shall ensure that the rights and remedies provided for under this Directive cannot be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."

In the resolution, the most noteworthy recommendation appears to be represented by the CoSP's invitation to "States parties, in accordance with domestic law, to interpret the notion of good faith, when included in national frameworks, as the reporting person's reasonable belief that the information reported is true, ***without considering the personal motivations behind the report.***"

This invitation essentially addresses a long-standing issue concerning the interpretation of good faith in the context of disclosure. It emphasizes that good faith should not be confused with the motivations driving the reporting person to blow the whistle. The inclusion of this clarification within such a significant international act represents a crucial step, particularly given existing research indicating widespread confusion on this matter.

For instance, during the [VIRTEU project](#), which focused on the interconnections between corruption and tax crimes, it was raised the question of the significance of motivation in whistleblowing in Greece (i.e., the personal reasons

that may be behind the report). On that occasion, the expert responded by explaining that in Greece, motivation is indeed significant when it comes to whistleblowing. He highlighted the cultural aspect, mentioning the level of distrust and competition that exists among neighbors. The expert further explained that this cultural mindset is why whistleblowers are often disliked in Greece, as they are perceived as disrupting the harmony within the community by revealing wrongdoings (Morozinis 2021, video recording at [1:15:52](#)). Also, during the VIRTEU Workshop focused on the United Kingdom, the former prosecutor, Lloydette Bai-Marrow, acknowledged that, when being contacted by whistleblowers, prosecutors naturally tend to evaluate the motives behind the disclosure (Bai-Marrow 2021, video recording at [1:01:25](#)).

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