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## COMMENTS

# FACILITATING APPROPRIATE WHISTLEBLOWING: EXAMINING VARIOUS APPROACHES TO WHAT CONSTITUTES “FACT” TO TRIGGER PROTECTION UNDER ARTICLE 33 OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

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## I. INTRODUCTION

In the quest for a corruption-free world, states have implemented various measures targeting corruption at all levels of society.<sup>1</sup> One

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1. See Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 700–15 (2007) (describing various anti-corruption efforts that have been implemented around the world, including the United States Foreign Corrupt Practices Act, the Inter-American Convention Against Corruption, the United Nations Convention Against Corruption, and the African Union Convention on Preventing and Combating Corruption); see also Rachel Beller, Note, *Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China*, 7 N.Y.U. J. L. & BUS. 873, 876–77 (2011) (recognizing the importance of anti-corruption and anti-fraud efforts in the United States and China via whistleblowing protection in the private sector).

measure, the facilitation of disclosure of information by those privy to such information, referred to as “whistleblowing,” is a relatively novel approach.<sup>2</sup> Nevertheless, whistleblowing is now considered an essential component in the battle against corruption and has therefore gained considerable sway in the international arena.<sup>3</sup> At the same time, any discussion regarding whistleblowing speaks to the fine balance between the battle against corruption and the related necessity for freedom of information on one side, and the privacy of information as well as the loyalty expected by the employers of potential whistleblowers on the other.<sup>4</sup> However, regardless of where that elusive balance lies, the only way to properly implement whistleblower protection measures is by creating a clear standard of law that removes much of the guesswork that plagues effective whistleblower protection.<sup>5</sup>

As an attempt to facilitate the implementation of anti-corruption efforts and whistleblower provisions around the world, the members of the United Nations agreed to the United Nations Convention Against Corruption (“UNCAC”) in 2003.<sup>6</sup> UNCAC as a whole strives to be a comprehensive framework dealing with corruption,

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2. See Elleta Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT’L L. 879, 880–82 (2004) (discussing the recent legislative focus on whistleblowing, especially given recent scandals that have been uncovered or could have been uncovered by whistleblowers).

3. See Indira Carr & David Lewis, *Combating Corruption Through Employment Law and Whistleblower Protection*, 39 INDUS. L.J. 52, 53 (2010) (noting that because it is difficult to detect corruption and wrongdoing externally, whistleblowers are perfectly suited to uncover corrupt practices internally).

4. See Kevin Rubinstein, *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, 52 N.Y.L. SCH. L. REV. 637, 641–42 (2007-08) (discussing the nature of whistleblowing as a compromise between the competing interests of employees, employers, and society).

5. See, e.g., PATRICIA MARTIN, OPEN DEMOCRACY ADVICE CENTRE, *THE STATUS OF WHISTLEBLOWING IN SOUTH AFRICA: TAKING STOCK* 104 (2010), available at [http://www.archivalplatform.org/images/resources/ODAC\\_Whistleblowing\\_Report\\_web.pdf](http://www.archivalplatform.org/images/resources/ODAC_Whistleblowing_Report_web.pdf) (noting that effective implementation of whistleblowing measures in South Africa is hindered by a lack of knowledge of laws and concerns regarding the complexity of the process).

6. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) [hereinafter UNCAC].

and Article 33 specifically addresses whistleblower protection.<sup>7</sup> While the text of Article 33 seems straightforward and has received little academic criticism, certain uncertainties arise in deciphering what Article 33 truly states, and these uncertainties can hinder effective implementation.<sup>8</sup> In particular, State Parties need to know exactly what constitutes sufficient “fact” in the context of a disclosure.

Although both UNCAC and whistleblower protection measures in general are relatively recent global phenomena and have therefore received little judicial scrutiny globally, certain countries have analyzed and interpreted the meaning of “fact” or “information” (an equivalent concept) in this context.<sup>9</sup> Despite some overlapping qualities of these approaches, the variances can lead to considerable differences in the outcome of a case. Uncertainty about protection—and even worse, knowledge of inadequate protection—dissuades potential whistleblowers whose unique access to information is so crucial in combating corruption and other types of wrongdoing.<sup>10</sup> Therefore, an effective approach must be unearthed and made clear so that potential whistleblowers understand and appreciate the law of their country, and so that countries that have not interpreted these issues have an example which they can then implement for themselves.

This comment argues that the approach used by South Africa, the Reasonable Belief Approach, is the ideal approach because it encourages appropriate disclosures, acknowledges that whistleblowers might not always have concrete facts to support their

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7. See *id.* pmb. (acknowledging that corruption poses serious threats to the stability of societies); *id.* art. 33 (requiring state parties to consider undertaking measures to protect whistleblowers from unjustified treatment).

8. See Carr & Lewis, *supra* note 3, at 57 (asserting that Article 33 imposes requirements, such as “reasonable grounds,” which are undefined in the Convention and may be difficult to determine in practice).

9. See, e.g., Callahan et al., *supra* note 2, at 898–99 (explaining that all U.S. states require whistleblowers to “have reasonable grounds to believe that the information reported is accurate”).

10. See, e.g., MARTIN, *supra* note 5, at 104 (recommending implicitly that an effective whistleblower protection scheme in South Africa must address concerns regarding the complexity of the process and the law, thereby ensuring whistleblowers that they will have adequate protection if they disclose information).

concerns, and because it is a clear standard that removes much of the guesswork that plagues whistleblowing. This comment also urges UNCAC to specifically require Member States to implement the Reasonable Belief Approach and use the “disinterested observer” test as the means by which reasonable belief is ascertained. Finally, this comment notes the importance of institutions which help ensure the proper implementation of these standards.

Part II of this comment introduces UNCAC and the importance of whistleblower protection in general, and it identifies the various approaches followed by certain countries that have judicially interpreted the meaning of “fact” in this context. Part III applies a typical whistleblower case to the various approaches, revealing that the Reasonable Belief Approach is preferred over the Specific Offense Approach, employed in the United Kingdom, and the Multiple Hurdles Approach, employed by the United States. Part IV recommends ways in which the best approach can be implemented so that Member States that currently use a different approach and ones that have not identified an approach can implement the Reasonable Belief Approach. Finally, Part V concludes by reiterating the importance of whistleblower protection and the best way that whistleblower protection can be achieved.

## II. BACKGROUND: UNCAC ARTICLE 33 AND ITS VARIOUS INTERPRETATIONS

Entered into force on December 14, 2005, UNCAC requires State Parties to implement, in accordance with the Convention, specific measures to facilitate the global battle against corruption.<sup>11</sup> There are currently 140 signatories and 159 parties to UNCAC.<sup>12</sup> Article 33 of UNCAC, “Protection of Reporting Persons,” deals specifically with

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11. See UNCAC, *supra* note 6, art. 1 (“The purposes of this Convention are: (a) [t]o promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) [t]o promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; [and] (c) [t]o promote integrity, accountability and proper management of public affairs and public property.”).

12. See *Signatories to the United Nations Convention Against Corruption*, U.N. OFF. ON DRUGS & CRIME (Jan. 6, 2012), <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (listing the signatories and parties to the Convention, including the dates upon which each country signed or ratified the Convention).

the protection of whistleblowers, stating that “[e]ach 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.”<sup>13</sup> While the language of Article 33 initially seems straightforward, UNCAC does not define the terms contained in Article 33, thereby leaving the task of interpretation to individual countries.<sup>14</sup> Some of the terms, such as the requirements of “good faith,” “reasonable grounds,” and “competent authorities” may be ambiguous, and countries have come to very different conclusions when interpreting what constitutes “fact,” specifically analyzing the sufficiency of evidence<sup>15</sup> and the specificity of evidence contained within a disclosure.<sup>16</sup>

The vast majority of countries that are Parties to UNCAC have not evaluated what constitutes sufficient information to qualify as protected disclosure.<sup>17</sup> Nevertheless, of the countries that have interpreted this issue, three approaches are readily identifiable: the “Reasonable Belief Approach” in South Africa, the “Specific Offense Approach” in the United Kingdom, and the “Multiple Hurdles Approach” in the United States. In this section, these approaches will be individually discussed, and a typical whistleblower fact-pattern will be introduced that will contrast the approaches.

#### A. THE REASONABLE BELIEF APPROACH CONSIDERS

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13. UNCAC, *supra* note 6, art. 33.

14. *See generally id.* (omitting any elaboration that would help define any of the terms, such as “reasonable grounds” or “facts,” in the context of protected disclosures).

15. *See Callahan et al., supra* note 2, at 898–99 (comparing Australian, U.K., and U.S. approaches that evaluate the evidence required for a statement to qualify as a “fact”).

16. *Compare City of Tshwane Metro. Municipality v. Eng’g Council of S. Afr.* 2009 (2) SA 333 (A) at 30 para. 45 (S. Afr.) (stating that a reasonable belief that general wrongdoing is occurring is sufficient to trigger protection), *with Goode v. Marks & Spencer*, [2010] UKEAT 0442/09, [28] (U.K.) (holding that a protected disclosure must contain evidence that points to a specific “breach of a legal obligation”).

17. *Cf. Ndiva Kofele-Kale, Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT’L L. REV. 697, 743–44 (2006) (asserting that the lack of adoption of whistleblower protection laws permits corruption).

REASONABLE BELIEF IN AN ALLEGATION A PROTECTED  
DISCLOSURE

The Reasonable Belief Approach has been championed by, and is best examined through, the lens of South Africa. This approach simply states that a disclosure has sufficient information and rises to the level of protected disclosure if it is made in good faith, and with a “[reasonable belief] that the information disclosed and the allegations [therein are] substantially true.”<sup>18</sup>

South Africa, which ratified UNCAC in 2004,<sup>19</sup> implements whistleblower protection primarily through the Protected Disclosures Act (“PDA”) and to a lesser extent the Labour Relations Act (“LRA”).<sup>20</sup> The LRA, passed in 1995 with the most recent amendments passed in 2002, governs the employment structure of South Africa.<sup>21</sup> The LRA also provides mechanisms for dispute resolution.<sup>22</sup> In 2000, South Africa enacted the PDA to comprehensively deal with whistleblower disclosures and protection.<sup>23</sup> Specifically, the PDA protects whistleblowers from reprisal.<sup>24</sup> However, whistleblowers are only protected if they make a

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18. See *City of Tshwane Metro. Municipality*, (2) SA para. 45.

19. See *Signatories to the United Nations Convention Against Corruption*, *supra* note 12.

20. See generally Protected Disclosures Act 26 of 2000 (S. Afr.) (creating a whistleblower protection scheme in South Africa); Labour Relations Act 66 of 1995 (S. Afr.) (dealing with whistleblower protection insofar as it governs wrongful terminations).

21. See generally Labour Relations Act 66 of 1995 (S. Afr.) (governing the employment structure by, among other things, regulating the organization rights of trade unions, promoting collective bargaining, and regulating strikes, and providing mechanisms for dispute resolution).

22. See *id.* pmbl. (establishing the Labour Court and the Labour Appeal Court “with exclusive jurisdiction to decide matters arising from the Act”).

23. See Protected Disclosures Act 26 of 2000, pmbl. (S. Afr.) (declaring that the purpose of the PDA is to “create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and the protection against any reprisals as a result of such disclosures; [and to] promote the eradication of criminal and other irregular conduct in organs of state and private bodies . . .”).

24. See *id.* § 2(1)(a) (“The objects of this Act are . . . to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure.”).

disclosure as defined by the PDA.<sup>25</sup> According to the PDA, a disclosure becomes protected when it is done through one of the specified channels.<sup>26</sup> In the same way that UNCAC does not define “fact,” the PDA does not define “information,” an equivalent concept.<sup>27</sup>

South Africa has litigated and therefore brought into the judicial sphere the opportunity to interpret the text of the PDA, particularly that which relates to the sufficiency of information needed to qualify as a protected disclosure.<sup>28</sup> Most recently, in *City of Tshwane v. Engineering Council of South Africa*, The Supreme Court of Appeal held that a reasonable belief that there exists a wrongdoing (e.g. a breach of law or obligation) is enough to constitute information for the purposes of protected disclosures.<sup>29</sup> In *Tshwane*, an employee submitted a letter claiming that incompetent people were to be appointed as systems operators.<sup>30</sup> Although there were specific reasons for this assumption, such as test scores and internal communication, the disclosure was ultimately a subjective opinion rather than a concrete fact.<sup>31</sup> Nevertheless, the court held that this

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25. *See id.* § 1(i) (“[D]isclosure’ means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by

any employee who has reason to believe that the information concerned shows or tends to show [at least one of a number of specified wrongdoings].”).

26. *See id.* § 1(ix) (explaining that a protected disclosure can be made to a legal advisor, an employer, a Cabinet or Executive Council member, the Public Protector, or the Auditor-General, depending on the nature of the specific disclosure).

27. *See generally id.* (omitting any definition of “information”).

28. *See City of Tshwane Metro. Municipality v. Eng’g Council of S. Afr.* 2009 (2) SA 333 (A) at 27–28 para. 41 (S. Afr.) (discussing the relationship between opinion and information); *Comm. Workers Union v. Mobile Tel. Networks* 2003 (ZALC), para. 21, <http://www.saflii.org/za/cases/ZALC/2003/59.html> (S. Afr.) (indicating that “genuine concerns and suspicions” should be protected, but not “rumors and conjecture”); *see also* MARTIN, *supra* note 5, at 45 (quoting *Vumba Intertrade CC v. Geometric Intertrade CC* 2001 (2) SA 1068 (W) (S. Afr.) (asserting that blind belief is not sufficient to trigger protection).

29. *See City of Tshwane Metro. Municipality*, (2) SA para. 45 (holding that the defendant’s reasonable belief that electrical system operator candidates were incompetent was sufficient to constitute a protected disclosure).

30. *See id.* para. 2.

31. *See id.* paras. 14–19 (discussing that the only concrete evidence that

allegation qualified as a protected disclosure.<sup>32</sup> Indeed, the court specifically refused to adopt a “narrow and parsimonious construction of the word [information]” because it would be “inconsistent with the broad purposes of the Act.”<sup>33</sup> *Tshwane* reiterated the same standard as that found in *Vumba Intertrade v. Geometric Intertrade*, which laid out the original “reasonable belief” standard and also effectively established a lower threshold for interpreting whether a disclosure contains information.<sup>34</sup> South Africa has continued that reasonable belief approach in *Tshwane*.<sup>35</sup>

#### B. THE SPECIFIC OFFENSE APPROACH REQUIRES REASONABLE BELIEF AND MUST POINT TO A SPECIFIC BREACH OF LAW

The Specific Offense Approach is the model used by the United Kingdom.<sup>36</sup> This approach, similar to South Africa’s Reasonable Belief Approach, requires good faith and reasonable belief in an assertion, but it also requires any assertion or allegation to have concrete facts that indicate that a specific breach of obligation or criminal activity is likely to occur.<sup>37</sup>

The United Kingdom, which ratified UNCAC in 2006,<sup>38</sup> governs whistleblower protection through the Public Interest Disclosure Act (“PIDA”) and, to a lesser extent, the Employment Rights Act

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supported the allegations were the candidates’ test scores and the responses to the claimant’s emails, which dismissed his concerns).

32. *See id.* para. 41 (stating that because the allegation constituted “information,” since it mentioned the claimant’s concerns about the possible incompetency of the candidates, it was a protected disclosure).

33. *Id.* para. 42.

34. *See* MARTIN, *supra* note 5, at 45 (quoting *Vumba Intertrade CC*, (2) SA) (“The reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice.”).

35. *See City of Tshwane Metro. Municipality v. Eng’g Council of S. Afr.* 2009 (2) SA 333 (A) at 30 para. 45 (S. Afr.) (requiring reasonable belief, good faith, and a lack of an ulterior motive to render a communication into a protected disclosure).

36. *Cf.* *Goode v. Marks & Spencer*, [2010] UKEAT 0442/09, [36]-[38] (U.K.) (implementing an approach that requires a protected disclosure to specifically point to a “[failure] to comply with [a] legal obligation”).

37. *See id.* para. 28 (agreeing with the Employment Tribunal that the disclosed information must indicate that there is a breach of legal obligation).

38. *See Signatories to the United Nations Convention Against Corruption*, *supra* note 12.

(“ERA”).<sup>39</sup> The ERA was passed in 1996 and governs employment relations and rights in the U.K, including unfair dismissal.<sup>40</sup> In 1998, the United Kingdom enacted PIDA, incorporating it into revisions of the ERA, to specifically protect whistleblowers from reprisal by their employers.<sup>41</sup> To be considered a whistleblower, however, the discloser must make a qualifying disclosure as defined by PIDA.<sup>42</sup> As with the PDA in South Africa, PIDA does not define “information.”<sup>43</sup>

Interpreting what “information” and “reasonable belief” truly entail has been the task of the judiciary.<sup>44</sup> Most recently, the United Kingdom has examined the notion of what qualifies as a protected disclosure in *Goode v. Marks & Spencer*.<sup>45</sup> In *Goode*, an employee who had serious concerns regarding a redundancy scheme that was to be instituted by the employer voiced those concerns.<sup>46</sup> The court held that this disclosure did not rise to the level of a protected disclosure, reasoning that a mere statement of how the employee felt does not qualify as information.<sup>47</sup> With this holding, the Employment Appeals

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39. See Public Interest Disclosure Act, 1998, c. 23 (U.K.) (creating a whistleblower protection scheme in the United Kingdom) [hereinafter PIDA]; Employment Rights Act, 1996, c. 18 (U.K.) (dealing with whistleblower protection by incorporating PIDA and by governing wrongful terminations).

40. See Employment Rights Act, c. 18, §§ 94, 108, 110 (stating that employees have the right to not be unfairly dismissed by their employers, and establishing that grievances regarding unfair dismissal can be brought before an independent employment tribunal).

41. See PIDA, *supra* note 39 (noting that “Part IVA: Protected Disclosures” from PIDA is incorporated into the ERA and therefore any discussion of whistleblower protection in the United Kingdom necessarily involves the ERA as well as PIDA).

42. See *id.* § 43B(1) (“[A] ‘qualifying disclosure’ means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [listed offenses] . . .”).

43. See *generally id.* (omitting any definition of “information”).

44. See, e.g., *Cavendish Munro Prof'l Risks Mgmt. v. Geduld*, [2009] UKEAT/0195/09/DM, [15] (U.K.) (explaining that “information” does not include the raising of concerns, issues, or objections).

45. [2010] UKEAT 0442/09, [28] (U.K.).

46. See *id.* paras. 16–18, 20 (recounting how the claimant sent an internal email as well as an email to the Times voicing his disgust and disappointment in the proposed changes).

47. See *id.* paras. 36–37 (ruling that the employee’s concerns were simply an assertion of his position, and that his allegations included no information relating to the company’s breach of any legal obligation).

Tribunal indicated that any qualifying disclosure must specifically point to the underlying breach of a law or obligation, which in this case could not have occurred given that “[t]he redundancy scheme was discretionary.”<sup>48</sup>

The *Goode* decision was based on the standard recognized in *Cavendish Munro v. Geduld*.<sup>49</sup> Similarly to *Goode*, an employee was dismissed after raising concerns internally regarding employment practices that subjected him to unfair prejudice.<sup>50</sup> The Employment Tribunal agreed that this was a protected disclosure on the basis that the assertions indicated the possibility of unfair prejudice,<sup>51</sup> but upon appeal, the Employment Appeal Tribunal reversed on the same grounds that were later adopted in *Goode*.<sup>52</sup>

The standard based on these two cases narrow the interpretation of what constitutes “information” as laid down through a string of cases in the 2000s.<sup>53</sup> In *Babula v. Waltham College*, an American teaching in the United Kingdom heard from students that their former teacher was creating religious friction and hoped for a repeat of the September 11 disaster in London.<sup>54</sup> No action was taken by superiors after concerns were reported internally,<sup>55</sup> so he made an external

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48. *See id.* para. 29.

49. *See Cavendish Munro Prof'l Risks Mgmt.*, UKEAT/0195/09/DM, [20] (Acknowledging that there is a distinction between “information” and “allegation” recognized in the Employment Rights Act).

50. *See id.* para. 9 (stating that the claimant was dismissed as a result of his solicitors’ letter to the remaining two directors of the company).

51. *See id.* para. 10 (reasoning that the employee’s belief in the assertions was reasonable and well-founded).

52. *See id.* para. 26 (ruling that the claimant’s concerns were a statement of his position rather than a conveyance of information and were therefore not protected).

53. *See Babula v. Waltham Forest College*, [2007] EWCA (Civ) 174, [75] (Eng.) (declaring that protection is afforded to a disclosure based upon an objectively reasonable belief that the company has breached a legal obligation, even if the belief is ultimately wrong, or the disclosed information does not amount to a criminal offense); *Bolton School v. Evans*, [2006] UKEAT/0648/05/SM, [51] (U.K.) (implying that courts should err on the side of protection to encourage disclosures of possible breaches).

54. *See Babula*, EWCA (Civ) 174, para. 18 (discussing the former teacher’s positive reactions to the September 11 attacks).

55. *See id.* paras. 19–20 (remarking that a student’s concerns reported to her personal tutor, the head of the school, and the vice-principal, as well as the claimant’s reports to the former teacher’s supervisor, all went unheeded).

disclosure, which ultimately resulted in his resignation.<sup>56</sup> The court stated that this was a protected disclosure.<sup>57</sup> The court reasoned that the whistleblower should not necessarily have to be correct even in regards to the existence of an underlying breach.<sup>58</sup> This ruling overturned a prior case, *Kraus v. Penna*, which, similar to *Goode*, involved concerns over a redundancy scheme.<sup>59</sup>

Similarly to *Babula*, in *Bolton School v. Evans*, an employee deliberately broke into his employer's computer system in order to demonstrate that information was capable of being obtained in breach of the Data Protection Act of 1998.<sup>60</sup> He resigned under constructive dismissal after being disciplined.<sup>61</sup> The court stated that although ultimately it may prove that the occurrence of a breach was not necessarily probable, his information is powerful and material pointing to that direction, and therefore his disclosure is protected.<sup>62</sup> The recent narrowing of this interpretation is what has given rise to the United Kingdom's Specific Offense Approach.

### C. THE MULTIPLE HURDLES APPROACH REQUIRES

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56. *See id.* paras. 20–21 (stating that the claimant's reporting to the CIA and FBI resulted in his resignation).

57. *See id.* paras. 77–79 (asserting that even without hard facts to support the employee's concerns, a reasonable belief that criminal activity will occur is sufficient).

58. *See id.* paras. 48, 51 (explaining that even if evidence ultimately demonstrates that a disclosure, made in good faith, was inaccurate or wrong and that no breach was likely, the protections for disclosure are not lost).

59. *See Kraus v. Penna*, [2003] UKEAT/0360/03/ST, [21] (U.K.) (ruling that the disclosure must be based on a reasonable belief that a breach of law or legal obligation is likely). A redundancy scheme eliminates the position of an employee, so termination pursuant to a redundancy scheme has nothing to do with the employee's performance or misconduct. They are often used when a company restructures itself to become more competitive or when an employee's responsibilities are redistributed among multiple coworkers.

60. *See Bolton School v. Evans*, [2006] UKEAT/0648/05/SM, [12]–[14] (U.K.) (explaining how the claimant broke into the computer system after the head of the ICT project group determined that they did not need significant security protection on the network).

61. *See id.* para. 22 (detailing the claimant's contention that he was disciplined because of his qualifying disclosure).

62. *See id.* para. 52 (“[I]t would undermine the protection of this valuable legislation if employees were expected to anticipate and evaluate all potential defences, whether within the scope of their knowledge or not, when deciding whether or not to make that disclosure.”).

REASONABLE BELIEF, INDICATION OF A SPECIFIC BREACH OF LAW,  
DISCLOSURE OF UNKNOWN INFORMATION, AND REPORTING  
THROUGH EXTRA-EMPLOYMENT CHANNELS

The Multiple Hurdles Approach, followed by the United States, requires reasonable belief that a wrongdoing is occurring.<sup>63</sup> It also requires potential whistleblowers to specify the underlying conduct that they expect to result in unlawfulness or impropriety.<sup>64</sup> In addition, the information being disclosed could not have been known otherwise.<sup>65</sup> Finally, the disclosure must be made outside regular employment channels.<sup>66</sup>

In the federal public sector, whistleblower protection is largely governed by the Whistleblower Protection Act (“WPA”).<sup>67</sup> Although the U.S. whistleblower protection scheme is comprised of a patchwork of countless federal and state statutes,<sup>68</sup> the WPA is the focus of this analysis because it is the earliest and most well-known statute in the United States, and because it is representative of the issues that permeate through the other whistleblower provisions.<sup>69</sup> Passed in 1989, the WPA is codified as Section 2302(b)(8)

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63. See Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A) (2006).

64. See *Kahn v. Dep’t of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010) (explaining that a potential whistleblower cannot assert the existence of unlawfulness or impropriety without specifying the underlying conduct that is giving rise to the unlawfulness).

65. See *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1350 (Fed. Cir. 2001) (defining disclosure as something that must “reveal something that was hidden and not known.”).

66. See *id.* at 1352-54 (explaining that a disclosure made in connection with assigned employment duties, such as those of a law enforcement officer, does not qualify as a protected disclosure).

67. 5 U.S.C. § 2302.

68. See *Federal Whistleblower Protections*, NAT’L WHISTLEBLOWERS CENTER, [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=816&Itemid=129](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129) (last visited Apr. 4, 2012) (listing federal whistleblower protection statutes in the United States); see also Robert G. Vaughn, *State Whistleblowers Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581, 582 (1999) (stating that there are hundreds of state whistleblower protection statutes in the United States).

69. See Rebecca L. Dobias, Note, *Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?*, 13 FED. CIR. B.J. 117, 119 (2003) (describing the creation of the WPA and its effects on the proliferation of complaints received and addressed by the office responsible for whistleblower protection).

Prohibited Personnel Practices, and as the title indicates, prohibits retaliation against whistleblowers.<sup>70</sup>

Given the relatively older passage of the WPA, the judiciary has interpreted what is meant by “information” in the context of a protected disclosure.<sup>71</sup> The most recent standard for what constitutes a qualifying disclosure pursuant to the WPA was articulated in *Kahn v. Department of Justice*.<sup>72</sup> Kahn was a Special Agent Criminal Investigator with the DEA with the responsibility of planning and conducting complex criminal investigations, particularly in the field of drug trafficking.<sup>73</sup> Concerned about the unauthorized use of an informant with a criminal history, he reported his concerns to his superiors.<sup>74</sup> Ultimately, a breakdown of relations within the department prompted the transfer of Kahn to another field office.<sup>75</sup> Kahn initiated a claim for wrongful employment retaliation under the WPA,<sup>76</sup> and the court ultimately held that Kahn’s reports did not constitute protected disclosures.<sup>77</sup>

In its analysis, the court discussed at length the standard to be

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70. See *Huffman*, 263 F.3d at 1347 (stating that no retaliation can be made against a public employee for “any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”).

71. See, e.g., *Kahn v. Dep’t of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010) (interpreting a protected disclosure as a communication that is unknown and pertains to the underlying conduct of an act of unlawfulness).

72. See *id.* (“[A protected disclosure is] an employee communication (1) that discloses unknown information, (2) that an employee would reasonably believe is unlawful, and (3) that is outside the scope of the employee’s normal duties or communicated outside of normal channels.”).

73. See *id.* at 1308.

74. See *id.* at 1308-09 (discussing how the informant’s criminal history and recent release from prison could disqualify him as a DEA informant).

75. See *id.* at 1309-10 (explaining how numerous meetings between Kahn and his superiors regarding the use of an unregistered informant led to a deterioration in relations).

76. See *id.* at 1310 (claiming that despite being cleared of any wrongdoing, the claimant was transferred due to a “character flaw,” which the claimant asserted was a reprisal).

77. See *Kahn v. Dep’t of Justice*, 618 F.3d 1306, 1314 (Fed. Cir. 2010) (ruling that the claimant’s communications were not disclosures, primarily because his superiors already knew of the information contained in the communication).

followed regarding the WPA and qualifying disclosures.<sup>78</sup> As to the first element, “disclosure” is interpreted broadly to reflect WPA’s legislative history and intent.<sup>79</sup> Nevertheless, a disclosure must also “reveal something that was hidden and not known,” and it “must pertain to the underlying conduct, rather than to the asserted fact of its unlawfulness or impropriety.”<sup>80</sup> In other words, whistleblowers who report misconduct to their employers have not made a protected disclosure when it is the employer who knowingly engaged in the misconduct because the whistleblower did not “reveal something that was hidden and not known.”<sup>81</sup>

Regarding the second element pertaining to reasonable belief in unlawfulness, the United States, unlike South Africa and the United Kingdom, prescribes a test to determine whether a belief is actually reasonable.<sup>82</sup> This “disinterested observer” test asks whether a “disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence” a violation of any law, rule, or regulation.<sup>83</sup> This, however, does not mean that the petitioner must prove that an actual violation occurred.<sup>84</sup>

The third and final element states that for a disclosure to be

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78. *See id.* at 1312 (defining “protected disclosure” as any disclosure of unknown information which reflects a reasonable belief that unlawful conduct occurred).

79. *See id.* (citing *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1347-48 (Fed. Cir. 2001)) (describing how Congress altered the statutory language from the Civil Service Reform Act of 1978 to ensure a wide range of disclosures fell within the protection of the WPA).

80. *Id.* (quoting *Huffman*, 263 F.3d at 1350, 1350 n.2).

81. *See Huffman*, 263 F.3d at 1350 (“When an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a ‘disclosure’ of misconduct. If the misconduct occurred, the wrongdoer necessarily knew of the conduct already because he is the one engaged in the misconduct.”).

82. *See LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (prescribing the “disinterested observer” test as the appropriate means by which to ascertain reasonable belief).

83. *Id.*

84. *See Drake v. Agency for Int’l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008) (clarifying that the test is not whether the petitioner was able to prove a violation, “but rather could a disinterested observer . . . reasonably conclude that . . . a violation did occur”).

protected, an employee must communicate the information outside the scope of employment: either outside the scope of regular employment duties or outside of regular employment channels.<sup>85</sup> Applying the black letter law of the WPA, the court in *Kahn* found that because Kahn's communication was within the scope of his regular duties and made through regular employment channels, it was not a protected disclosure.<sup>86</sup>

#### D. A TYPICAL WHISTLEBLOWER CASE

Given the different approaches and the varying standards through which countries have interpreted "facts" in the whistleblowing context, a sample fact-pattern can highlight the differences of those approaches and the effects that those approaches have on the outcome of certain cases. A useful lens of analysis is a fact-pattern resembling the facts in *Tshwane*.<sup>87</sup>

This typical whistleblower case ("Typical Case") assumes the following facts: An employee ("Employee") is an electrical engineer whose responsibility as Managing Engineer at a public power system control center is to ensure that electrical power reaches the community safely and continuously. The Employee writes a letter to his superior, the Strategic Executive Officer of the Electricity Department, expressing concerns about the method in which new system operators are hired.<sup>88</sup> Specifically, the Employee is concerned

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85. See *Huffman*, 263 F.3d at 1352-54 (outlining three categories of employee communication, of which the latter two qualify as protected disclosures: (1) disclosures as part of normal duties made through normal channels, (2) disclosures as part of normal duties made outside normal channels, and (3) disclosures made outside normal or assigned duties).

86. See *Kahn v. Dep't of Justice*, 618 F.3d 1306, 1313-14 (Fed. Cir. 2010) (finding that (1) as "lead agent," Kahn's responsibilities included determining what was proper procedure and therefore his communication was within the scope of his normal duties; and (2) reporting his concerns to his superiors were made through regular channels).

87. See *City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (A) at 2-7 paras. 1-10 (S. Afr.) (presenting the facts of the case, which are similar to other whistleblower cases and raise issues that are pervasive throughout whistleblowing jurisprudence).

88. Cf. *id.* ¶ 2 (noting that this letter was also copied to the General Manager of Electricity Development and Energy Business, the Municipal Manager, the Department of Labour, and the Engineering Council).

that due to the important and potentially dangerous nature of the work, only highly-skilled engineers are qualified to fill a current shortage of workers.<sup>89</sup> The Employee is given permission to recruit such system operators and prepares a test to short-list the applicants. The applicants fare poorly, but nevertheless the highest scoring applicants are shortlisted. The Employee's supervisor deems the shortlisted candidates unacceptable because they are all white.<sup>90</sup> The Employee stresses the importance of hiring the most qualified candidates, but the supervisor only shortlists diverse candidates, none of whom are white. For these reasons, the Employee circulates the letter voicing his concerns. As a result, employment relations break down, the Employee is suspended, and disciplinary proceedings are initiated. Due to the belief that the letter is a protected disclosure, the Employee brings suit.

### III. ANALYSIS: IS THERE AN IDEAL APPROACH?

The Typical Case, modeled closely after the fact-pattern in *Tshwane*, highlights how the outcome of a case varies depending on which approach is used, thereby revealing the importance of an ideal approach. Additionally, the Typical Case is precisely a case where a potential whistleblower does not have all the information proving that wrongful conduct is occurring, yet the information that is present raises significant suspicion.<sup>91</sup> Given this incomplete puzzle, applying the facts of the Typical Case to the different approaches answers whether a potential whistleblower is protected, and whether that potential whistleblower is encouraged or discouraged to disclose.

When the Typical Case is applied to the Reasonable Belief

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89. *Cf. id.* ¶ 4 (noting that these engineers are responsible for working with high-voltage systems and ensuring safe and continuous power to the community).

90. *Cf. id.* ¶ 11 (observing the diversity hiring goals of South Africa's Employment Equity Act, but indicating that diversity candidates underperformed even when 10 percent was added to their scores).

91. *See, e.g., id.* ¶ 41 (discussing that the claimant's disclosure letter "contained information concerning the *possible* lack of competence of those who were likely to be appointed to the system operator posts") (emphasis added); *accord* Babula v. Waltham Forest College, [2007] EWCA (Civ) 174, [80] (Eng.) (stressing that typical employees do not have a sufficient understanding of criminal law to allow them to determine whether specific wrongdoing is occurring, or the evidence they have is sufficient to prove a criminal offense).

Approach, it shows how this approach offers a clear standard for potential whistleblowers, encourages them to disclose appropriate concerns, and best advances the purpose of UNCAC. In contrast, the Specific Offense Approach falls slightly short of that ideal because it restricts protection by requiring disclosures to point to a specific, underlying offense. Finally, the Multiple Hurdles Approach creates even more obstacles for protection and also upsets employer-employee relations.

A. THE REASONABLE BELIEF APPROACH BEST ADVANCES THE PURPOSE OF UNCAC AND OFFERS A CLEAR STANDARD FOR WHISTLEBLOWERS

Applying the Typical Case to the Reasonable Belief Approach yields an outcome that facilitates appropriate disclosures by erring on the side of protection and establishing a relatively simple standard that potential whistleblowers can understand.<sup>92</sup> By encouraging disclosures through protection, the Reasonable Belief Approach also advances the purpose of UNCAC.<sup>93</sup>

The standard set forth in South Africa is a simple and convenient standard that, with few other elements, examines whistleblowers' reasonable belief in their allegations.<sup>94</sup> Iterated in *Tshwane* and *Vumba*, as long as the whistleblower has a good faith and a reasonable belief that a wrongdoing is occurring, even if it is a subjective belief, the information disclosed qualifies as a protected disclosure, thereby prohibiting reprisal.<sup>95</sup> Nevertheless, the Reasonable Belief Approach does not give free reign to whistleblowers because it sets a lower parameter demarcating what is

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92. See *Bolton School v. Evans*, [2006] UKEAT/0648/05/SM, [51]-[52] (U.K.) (favoring an interpretation that extends protection for disclosures that have "potentially powerful and material evidence" that could help uncover wrongdoing).

93. See UNCAC, *supra* note 6, pmbl. (acknowledging that corruption can be prevented and eradicated only through the involvement and cooperation of the public sector, such as civil society and non-governmental organizations).

94. See *City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (A) at 30 para. 45 (S. Afr.) (listing additional but non-onerous requirements to protect a disclosure, namely that the whistleblower acted in good faith, with reasonable belief, and without a motive of personal gain).

95. See *id.* (stating that "[i]t would be surprising" if a disclosure was not protected where a whistleblower acted in good faith, "at considerable personal cost and not for personal gain").

reasonable belief from what is unreasonable belief.<sup>96</sup>

The Typical Case, drawn largely from the facts in *Tshwane*, illuminates how this approach facilitates appropriate disclosures. As in many typical whistleblower cases, all of the information necessary to prove a violation is not available to the discloser; indeed, logically speaking, if all the information was readily available, there would be little contention as to what would qualify as a protected disclosure. In the Typical Case and *Tshwane*, the disclosure involves an employee who, given his communication with supervisors and information relating to hiring patterns, raised his concerns that public safety was being compromised.<sup>97</sup> Understandably, societies have an interest in ensuring that public safety concerns are disclosed. This can effectively be done by protecting such disclosures, and whistleblower protection measures, such as UNCAC and South Africa's PDA, have been created for that very purpose.<sup>98</sup> Therefore, despite not having concrete evidence that a specific breach was occurring, the Employee in the Typical Case would be protected and potential public safety concerns would be addressed. With a higher standard, however, potential whistleblowers might question whether their disclosure would be protected and may opt to remain silent because that way, at the very least, they can be certain that they will not face reprisal from employers.<sup>99</sup>

#### B. THE SPECIFIC OFFENSE APPROACH RAISES THE BAR FOR PROTECTION BY UNFAIRLY REQUIRING DISCLOSURES TO POINT TO

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96. See MARTIN, *supra* note 5, at 45 (quoting *Vumba Intertrade CC v. Geometric Intertrade CC* 2009 (2) SA 1068 (W) at para. 50 (S. Afr.)) (noting that "blind belief" is insufficient).

97. See *City of Tshwane Metro. Municipality*, (2) SA, ¶¶ 2, 4 (discussing the claimant's concerns regarding questionable hiring practices and the related effects on public safety).

98. See MARTIN, *supra* note 5, at 45 (quoting *Vumba Intertrade CC*, (2) SA) (stating that the PDA seeks to establish a culture of whistleblowing); see also UNCAC, *supra* note 6, pmbl., art. 33 (highlighting the serious threats posed by corruption to nearly all aspects of society and establishing Article 33 as a means to combat corruption through whistleblower protection).

99. Cf. David Lewis, *The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers*, 39 INDUS. L. J. 432, 433 (2010) ("One consequence of this is that some people may choose not to report serious wrongdoing for fear that they may subsequently be deemed to have had an inappropriate objective.").

## A SPECIFIC OFFENSE

The Specific Offense Approach, employed by the United Kingdom, raises the bar for what qualifies as sufficient fact to trigger protection from reprisal.<sup>100</sup> Applying the Typical Case to the Specific Offense Approach shows why this approach potentially discourages appropriate disclosures because (a) it is more likely that a disclosed suspicion will be treated as an allegation rather than a disclosure of information, and (b) it effectively requires a potential whistleblower to have a much more acute understanding of which underlying offenses are being committed.<sup>101</sup>

On the first front, the Specific Offense Approach increases the likelihood that a disclosure will be placed in the “allegation” category rather than the “information” category, which will render it unprotected.<sup>102</sup> As *Goode* and *Cavendish Munro* hold, a qualifying disclosure must point to the underlying breach of a law or obligation.<sup>103</sup>

Similarly, on the second front, the Specific Offense Approach requires the whistleblower to have a much more acute understanding of the law.<sup>104</sup> This second front works in tandem with the first because if the whistleblower does not point to a specific underlying offense, the disclosure will likely be treated as an allegation and not as information.<sup>105</sup> Applying the Typical Case to the U.K. case law illustrates how these two fronts work together to discourage

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100. See, e.g., *Cavendish Munro Prof'l Risks Mgmt. v. Geduld*, [2009] UKEAT/0195/09/DM, [15] (U.K.) (“Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information.”).

101. See *id.* ¶¶ 20, 24-26 (distinguishing “information” and “an allegation” and establishing that information must convey facts); see also, e.g., *Goode v. Marks & Spencer*, [2010] UKEAT 0442/09, [37] (U.K.) (requiring that a whistleblower, in a disclosure, must specifically point to the underlying offense being committed).

102. See *Cavendish Munro Prof'l Risks Mgmt.*, UKEAT 0195/09/DM, [24] (declaring that a disclosure must contain information and that the ordinary meaning of “information” is to convey facts, otherwise, the disclosure is merely an allegation).

103. See *Goode*, UKEAT 0442/09, [56] (supporting the Tribunal’s findings that the employee’s statement regarding concerns about a redundancy scheme demonstrated no reasonable belief related to the breach of any law).

104. Cf. *id.* ¶¶ 27-28 (requiring the whistleblower to point to the underlying offense being committed, which necessitates an understanding of the law).

105. Cf. *Cavendish Munro Prof'l Risks Mgmt.*, UKEAT 0195/09/DM, [24].

appropriate disclosures.

If the Typical Case is applied to the standard set forth by *Cavendish Munro* and reaffirmed in *Goode*, the outcome would not be in the Employee's favor.<sup>106</sup> First and foremost, the Employee's communication (i.e. the letter) does not point to an underlying breach of a law or obligation.<sup>107</sup> Indeed, the employer in *Tshwane* considered diversity goals under the Employment Equity Act, balancing several goals, one of which is competence.<sup>108</sup> Moreover, the Employee's own test adds 10% to the scores of diverse candidates.<sup>109</sup> Hence, the Employee never points to a specific breach of law or obligation.<sup>110</sup> Rather, he simply raises concerns, balancing the need to advance employment equity with safety concerns.<sup>111</sup> These concerns, interpreted by *Goode* and *Cavendish Munro*, would be more akin to an allegation rather than to a disclosure of information, thereby precluding it from being a protected disclosure.<sup>112</sup>

As discussed above, the current standard that is derived from *Goode* and *Cavendish Munro* narrows the interpretation of what constitutes fact and information.<sup>113</sup> Indeed, in *Babula* and *Evans*, the courts followed an approach that more closely resembles the South African Reasonable Belief Approach.<sup>114</sup> The courts used specific

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106. *Cf. Goode*, UKEAT 0442\_09\_1504, [¶ 56] (requiring that a protected disclosure point to a breach of a legal obligation).

107. *Cf. City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (SCA) ¶¶ 27-28 (S. Afr.) (raising safety concerns stemming from the questionable hiring practices without pointing to the breach of a specific law).

108. *See id.* ¶ 11 (reflecting the discretionary nature of filling employee positions based on balancing competency with diversity).

109. *See id.* (indicating that the employee was aware of the Employment Equity Act's goals of filling positions with diverse candidates).

110. *Cf. id.* ¶ 28 (pointing to a mere concern regarding a discretionary practice rather than to an allegation that a specific breach of law occurred).

111. *Id.*

112. *See Cavendish Munro Prof'l Risks Mgmt. v. Geduld*, [2009] UKEAT/0195/09/DM, [20], [25] (U.K.) (stating that an allegation does not amount to information and therefore does not qualify as a protected disclosure).

113. *Compare id.* (stating that an allegation does not qualify as a protected disclosure), *with Babula v. Waltham Forest College*, [2007] EWCA (Civ) 174, [51] (U.K.) (stating that a disclosure should be encouraged, in some cases, even if it cannot point to the breach of a specific law or obligation).

114. *See Babula*, EWCA (Civ) 174, [81] (placing the emphasis of analysis on

language to stress the importance of reasonable concerns and the necessity to encourage such disclosures.<sup>115</sup> The court in *Babula*, for example, found that a protected disclosure did exist despite the claimant's inability to point to a specific violation.<sup>116</sup> *Evans* stressed the importance of encouraging disclosures even if it turns out that it was not probable that a wrongdoing was occurring.<sup>117</sup> Of course, such disclosures are best encouraged by ensuring that they will be classified as protected disclosures and ensuring that the discloser will be protected from reprisal.<sup>118</sup> Unfortunately, the recent and controlling cases that define the Specific Offense Approach have raised the standard and hence no longer encourage these types of disclosures.<sup>119</sup>

### C. THE MULTIPLE HURDLES APPROACH CREATES ADDITIONAL ELEMENTS THAT OBFUSCATE THE LAW AND UPSET EMPLOYER-EMPLOYEE RELATIONS

The Multiple Hurdles Approach employed by the United States is

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reasonable belief and good faith); *Bolton School v. Evans*, [2006] UKEAT/0648/05/SM, [42] (U.K.) (noting that the applicable section of the Employment Rights Act 1996 requires an employee's reasonable belief that there may be a failure to comply with a legal obligation); *see also City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (A) at 30 para. 45 (S. Afr.) (placing the emphasis of analysis on reasonable belief, good faith, and the absence of a motive of personal gain).

115. *See Babula*, EWCA (Civ) 174, [51] (discussing the materially important information that can be uncovered as a result of encouraging such disclosures).

116. *See id.* ¶¶ 74-75 (indicating that a reasonable person could still believe that wrongdoing is occurring despite not being able to point to a breach of a specific law or obligation).

117. *See Evans*, UKEAT 0648/05/SM, [51] (declaring that the rationale for protecting these types of disclosures is to encourage disclosure of potentially powerful material that could point to a wrongdoing).

118. *See generally* Marie Chêne, *Good Practice in Whistleblowing Protection Legislation (WPL)*, U4 ANTI-CORRUPTION RESOURCE CENTER (July 1, 2009), <http://www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/> (reviewing best practices regarding whistleblowing protection legislation, including the objectives and scope of such legislation, and various types of disclosures, such as "good faith" and public disclosures).

119. *See, e.g., Cavendish Munro Prof'l Risks Mgmt. v. Geduld*, [2009] UKEAT/0195/09/DM, [20] (U.K.) (raising the bar of what constitutes protected disclosures by categorizing many reported concerns as allegations rather than information).

the strictest approach when it comes to interpreting what constitutes sufficient fact to qualify as a protected disclosure. This model involves several elements that effectively amount to obstacles which a communication must overcome to render it a protected disclosure.<sup>120</sup> Applying the Typical Case to these elements reveals the inherent complications with the Multiple Hurdles Approach and why this approach effectively discourages appropriate disclosures.

The first step in the Multiple Hurdles Approach, the requirement that the information be a disclosure, means that it must be unknown to the recipient of the communication and it must pertain to the underlying conduct.<sup>121</sup> This is a cumbersome obstacle because whistleblowing is most useful in exactly those instances where a wrongdoer knows of and therefore consciously decides to continue the wrongdoing. In the Typical Case, the Employee's internal communication would not qualify as a protected disclosure because his superior already knew of his own conduct.<sup>122</sup> An approach that requires a lack of knowledge amounts to greater protection for a culpable employer and less protection for a genuine whistleblower.<sup>123</sup>

In the Typical Case, the Employee could make external communications (i.e., the letters to the Department of Labour and to the Engineering Council) as a way to overcome this obstacle of knowledge because external authorities are unaware of internal operations.<sup>124</sup> Even though a potential whistleblower under the

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120. See *Kahn v. Dep't of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010) (requiring that the information be a disclosure, based on a reasonable belief, and communicated outside the scope of regular employment duties or regular employment channels).

121. See *id.* (stating that if the recipient of the communication already knew of his conduct, the communication was known and it automatically does not qualify as a protected disclosure).

122. Cf. *City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (A) at 31 para. 47 (S. Afr.) (providing an example of where a claimant communicated concerns to his superiors when the superior already knew of the conduct and continued with the questionable hiring process).

123. See *id.* ("Such a construction would undermine the whole purpose of the PDA because it has the result that the more culpable the employer in the conduct giving rise to the report and the greater its knowledge of wrongdoing, the less would be the protection enjoyed by the employee.").

124. See *id.* ¶ 2 (stating that the claimant disclosed the concerns externally after the internal communications went unaddressed).

Multiple Hurdles Approach might be able to overcome such obstacles by making external disclosures, such preference for external disclosures runs counter to the purposes of an effective whistleblower protection scheme.<sup>125</sup> Additionally, one of the main concerns of giving too much leeway to whistleblower rights is that employers desire loyalty from their employees and expect a certain degree of confidentiality in their business processes.<sup>126</sup> By encouraging whistleblowers to disclose information externally, the rights of employers will often be breached.<sup>127</sup> Indeed, in *Tshwane*, one of the main points of contention was that an external disclosure was made, which is contrary to the loyalty expected from employees.<sup>128</sup> Thus an effective whistleblower protection scheme should encourage internal disclosures before external disclosures.<sup>129</sup> Hence, the requirement of lack of knowledge is the opposite of the type of model that should be advanced.<sup>130</sup>

The second aspect of the first element is that a disclosure must pertain to the underlying conduct rather than to the assertion that a wrongdoing has occurred.<sup>131</sup> This resembles the United Kingdom's

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125. See Callahan et al., *supra* note 2, at 905 (underscoring some of the advantages of internal disclosures, including lower organizational costs). *But see id.* at 891 (suggesting that in the United States, external reporting is preferred because priority is placed on exposure over confidentiality).

126. See *id.* at 890-91 (discussing the United Kingdom 1996 Employment Rights Act's emphasis on internal whistleblowing stemming from a duty of confidentiality to one's employer).

127. See *id.* at 905 (suggesting that internal disclosures allow for the "correction of misunderstandings, reducing the likelihood that [an employer] will unfairly suffer harm due to external exposure").

128. See *City of Tshwane Metro. Municipality v. Eng'g Council of S. Afr.* 2009 (2) SA 333 (A) at 19 para. 29 (S. Afr.) (summarizing the employer's letter to the claimant stating that making external disclosures "calls for strong disciplinary measures" lest it become a recurring event that would undermine employment relations).

129. See *Chêne*, *supra* note 118, at 5 (positing that the best practice is to prefer internal reporting over external reporting, as long as internal reporting mechanisms exist).

130. Cf. H. Vincent McKnight et al., *Cause of Action by Employee for Retaliation and Reprisal Pursuant to the False Claims Act*, 31 U.S.C.A. § 3730(h), 22 CAUSES OF ACTION 2D 217 § 32 (2003) (highlighting the difficulties of proving knowledge through direct evidence).

131. See *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1350 n.2 (Fed. Cir. 2001) ("[T]he disclosure must pertain to the underlying conduct, rather than to the

Specific Offense Approach in its delineation between allegations and information.<sup>132</sup> As *Babula* and *Evans* considered, serious and warranted concerns should be encouraged because a typical employee cannot be expected to know or understand the specific law being breached or the specific facts that give rise to that breach.<sup>133</sup> Taken one step forward, it is unreasonable to expect that typical employees will have the required knowledge of the law to support their concerns or to expect those employees to conduct legal research to assure themselves that they will be protected.<sup>134</sup> Such expectations add to uncertainty and thereby discourage potential whistleblowers from communicating reasonable concerns.<sup>135</sup>

The second element, reasonable belief that the assertions in a disclosure are true, resembles the requirements found in all of the approaches.<sup>136</sup> Understandably, without a requirement for reasonable belief, frivolous disclosures cannot be prevented.<sup>137</sup> The way in

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asserted fact of its unlawfulness or impropriety, in order for the disclosure to be protected by the WPA.”).

132. See *Cavendish Munro Prof'l Risks Mgmt. v. Geduld*, [2009] UKEAT/0195/09/DM, [20], [26] (U.K.) (explaining that an allegation does not constitute information and therefore does not qualify as a protected disclosure).

133. See, e.g., *Babula v. Waltham Forest College*, [2007] EWCA (Civ) 174, [80] (Eng.) (“To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems . . . unrealistic . . .”).

134. See, e.g., *Kratzer v. Welsh Companies*, 771 N.W.2d 14, 26 (Minn. 2009) (Meyer, J., dissenting) (pointing to the unfairness in expecting potential whistleblowers to “have enough knowledge of the law to know if a set of alleged facts would, if proven, be a violation as a matter of law”).

135. See MINISTER OF STATE SERVICES, REVIEW OF THE OPERATION OF THE PROTECTED DISCLOSURES ACT 2000: REPORT TO THE MINISTER OF STATE SERVICES ¶ 6.2 (2003), available at <http://www.beehive.govt.nz/Documents/Files/ACFF62C.pdf> (noting that without effective whistleblower protection, potential whistleblowers are deterred from making disclosures of wrongdoing for fear of suffering personally).

136. See, e.g., *City of Tshwane Metro. Municipality v. Eng's Council of S. Afr.* 2009 (2) SA 333 (A) at 30 para. 45 (S. Afr.) (requiring reasonable belief that allegations contained in a disclosure are “substantially true”); accord UNCAC, *supra* note 6, art. 33 (requiring reasonable grounds and good faith to trigger protection for a disclosure).

137. See *Chêne*, *supra* note 118, at 4 (asserting that the whistleblower’s motive should not be the focus of the inquiry and observing that requiring disclosures

which this second element differs from the similar requirement found in the Reasonable Belief and Specific Offense Approaches is that the reasonable belief element is clearly defined, and an easily-administered test (the disinterested observer test) is set forth.<sup>138</sup> Giving potential whistleblowers a clear standard removes the risk of them having to guess as to whether their disclosures will be protected.<sup>139</sup>

Finally, the third element, the requirement that the communication be made outside the scope of regular employment duties or regular employment channels, is an onerous obstacle that hinders the implementation of an effective whistleblower scheme.<sup>140</sup> In the Typical Case, the letter written to the Employee's superior would not qualify as a protected disclosure because it was communicated within the scope of his duties as a recruiter of the candidates, and it was communicated within regular employment channels via an email to his superior. To the contrary, letters to the Department of Labour and the Engineering Council would constitute communication outside regular employment channels. While these external communications would qualify as protected disclosures under the Multiple Hurdles Approach, it makes little sense to encourage external disclosures rather than internal disclosures.<sup>141</sup>

Given the above analysis, two of the three elements of the Multiple Hurdles Approach, the requirement that the information is unknown and the requirement that the disclosure be made outside the scope or channels of regular employment, encourage external

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"based on 'an honest belief on reasonable grounds'" may have the effect of wrongly focusing on the whistleblower's motives rather than on the alleged misconduct).

138. See *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) ("[A] disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [would] reasonably conclude that the actions of the government evidence [the violation of an applicable law, rule, or regulation]").

139. See MINISTER OF STATE SERVICES, *supra* note 135, ¶¶ 5.3, 8.18 (recommending that an effective whistleblower protection scheme should create clear mechanisms to remove uncertainty that could discourage potential whistleblowers).

140. See *Chêne*, *supra* note 118, at 5 (promoting internal disclosures as the first outlet prior to resorting to external disclosures).

141. See Callahan et al., *supra* note 2, at 905 (highlighting the benefits of internal disclosures, including reduced organizational costs).

disclosures over internal disclosures and hence upset employer-employee relations.<sup>142</sup> On the other hand, the second element, “reasonableness,” runs through each approach, is clearly defined, and has an implementable test; therefore, it serves less as an obstacle and more as an illumination of the law.<sup>143</sup>

#### IV. RECOMMENDATIONS

Applying the Typical Case to the various approaches sheds light on a useful perspective that ultimately identifies ways to improve whistleblower protection schemes in UNCAC countries. The recommendations come in three categories: First, the South African Reasonable Belief Approach is the best model and should be advanced both in countries that follow a different approach and in states that have not interpreted what constitutes “fact,” or equivalently, “information.” Second, in order to make the standard clear and easy to follow, UNCAC should clarify the appropriate elements and designate an appropriate test for evaluating reasonable belief to remove the guesswork surrounding what constitutes sufficient information. Finally, institutions should be established in UNCAC countries so that they can monitor and facilitate whistleblower protection claims.

##### A. THE REASONABLE BELIEF APPROACH SHOULD BE ADVANCED IN ALL STATE PARTIES

The Reasonable Belief Approach is preferable over the other approaches for several reasons. First, it advances the purpose of UNCAC and whistleblower protection in general because it facilitates reasonable disclosures that could uncover corrupt activities and other forms of wrongdoing.<sup>144</sup> It does so by creating a clear and intuitive standard which simply requires reasonable belief that a

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142. *See id.* (suggesting that internal disclosures allow misunderstandings to be corrected, lessening the risk that an employer unfairly be subject to harm from an external disclosure).

143. *See Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 157 (2d Cir. 2010) (indicating that well-defined standards offer clarity and predictability).

144. *See UNCAC*, *supra* note 6, pmbl. (acknowledging that involvement of individuals and the civil society as a whole is crucial to combating corruption).

violation is occurring or may occur.<sup>145</sup> It also does not put the investigatory burden on the whistleblower.<sup>146</sup> Moreover, the Reasonable Belief Approach is preferable for employers as well because by protecting whistleblowers that make internal disclosures, it naturally encourages internal disclosures over external disclosures. This way, the Reasonable Belief Approach gives credence to the expectations of employee loyalty, and keeps confidential and sensitive information from the public.<sup>147</sup> Unlike the Multiple Hurdles Approach's requirement of using extra-employment channels, it allows a disclosure to be handled internally and smoothly.<sup>148</sup>

The United Nations, via the Conference of the State Parties to the UNCAC, should designate the Reasonable Belief Approach as the best practice in whistleblower cases.<sup>149</sup> It should also specify that the approach should be implemented without including additional hurdles such as those found in the Specific Offense Approach and the Multiple Hurdles Approach. By recommending the Reasonable Belief Approach, State Parties that follow a different approach or those that have not interpreted the issue of "fact" can immediately follow the Reasonable Belief Approach, enabling the residents of these countries to better understand both the process and that their governments and the international community encourage appropriate

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145. See Lewis, *supra* note 99, at 433 ("[S]ome people may choose not to report serious wrongdoing for fear that they may subsequently be deemed to have had an inappropriate objective.").

146. Cf. *Kratzer v. Welsh Companies*, 771 N.W.2d 14, 26 (Minn. 2009) (Meyer, J., dissenting) (recognizing that if the "developing trend" towards narrow construction of "violation or suspected violation" continues, employees suspecting wrongdoing who are incorrect in their understanding of the law will lose protection afforded by the whistleblower statute).

147. See Jenny Mendelsohn, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 WASH. U. GLOBAL STUD. L. REV. 723, 741 (2009) (quoting Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241, 242 (1987)) ("Employers also often prefer internal reports since these reports 'prevent the negative publicity, investigations, and administrative and legal actions that usually ensue after external whistleblowing.'").

148. See Callahan et al., *supra* note 2, at 905 (discussing the possible benefits of internal disclosures).

149. See UNCAC, *supra* note 6, art. 63 (establishing the Conference of the State Parties to the Convention with the purpose of ensuring implementation of the Convention).

disclosures.<sup>150</sup>

B. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION SHOULD CLARIFY THE APPROPRIATE TEST TO DETERMINE WHAT CONSTITUTES “REASONABLE BELIEF”

Regardless of which approach the United Nations might support, any standard should be clear, simple, and uniform. Although the obstacles found within the Multiple Hurdles Approach blur the standard and do not create a coherent and ideal approach, the “disinterested observer” test that determines whether reasonable belief exists (the second element of the Multiple Hurdles Approach) is intuitive and appropriate.<sup>151</sup> This reasonable person test has been advanced in many legal fields and has been considered historically effective.<sup>152</sup> In addition, if the “disinterested observer” test is incorporated into the Reasonable Belief Approach, it would clarify an already easy-to-follow approach and would create a self-contained standard that leaves little room for misinterpretation.

The Conference of the State Parties to the UNCAC should declare the “disinterested observer” test as the designated test to be used when determining whether reasonable belief exists. If this test is advanced in tandem with the Reasonable Belief Approach, State Parties would be able to create a streamlined judicial culture that can efficiently handle whistleblower cases without wasting resources on resolving ambiguities.

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150. See, e.g., MARTIN, *supra* note 5, at 104 (underscoring the importance of effective whistleblower protection schemes so that potential whistleblowers are certain that they will be protected if they make a disclosure).

151. See *Kahn v. Dep’t of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010) (quoting *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)) (stating that the proper test is whether “a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [would] reasonably conclude that the actions of the government evidence [a violation of any law, rule, or regulation]”); see also Federal Circuit Bar Association, *Cases and Recent Developments*, 9 FED. CIR. B.J. 269, 289-91 (1999) (suggesting that the “disinterested observer” test can strike a balance by acknowledging the subjectivity of reasonable belief while also accounting for the possibility of an ulterior motive).

152. See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881) (espousing the “reasonable person” theory in civil law and touting its benefits versus other approaches).

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C. INSTITUTIONS SHOULD BE ESTABLISHED TO MONITOR AND FACILITATE THE PROPER APPLICATION OF THE STANDARD

Finally, regardless of what the proper approach is and regardless of how it is implemented, institutions need to be established in Member States to ensure that the law is not being deliberately misapplied by corrupt entities.<sup>153</sup> Indeed, since the purpose of UNCAC is to help eradicate corruption, the need for these institutions is most important in areas where corruption is ingrained and resistant to change.<sup>154</sup>

If UNCAC directs State Parties to adopt the Reasonable Belief Approach and the “disinterested observer” test, these monitoring bodies will be doubly efficient because they can advance one, clear standard regardless of which jurisdiction they monitor. This way, Member States will have clear instructions on how to adjudicate whistleblower claims. Even more importantly, potential whistleblowers will be equipped with clarity and will therefore not hesitate to disclose important information that could be vital to the public interest.<sup>155</sup> Indeed, in the fight against corruption, a clear, easy-to-follow standard coupled with a competent institution supporting that standard will create uniformity and help prevent corrupt nations, where such measures are most needed, from deliberately misapplying the standard.

## V. CONCLUSION

Whistleblowers are crucial to the battle against corruption and other types of wrongdoing because they allow for early detection of such wrongdoing. As a result, nations and international organizations have recently begun implementing whistleblower protection

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153. See MARTIN, *supra* note 5, at 7-8, 32-33, 35-36 (recognizing that the presence of institutions eases potential whistleblowers' worries that they will face reprisal from disclosures because of corruption in the country).

154. See UNCAC, *supra* note 6, art. 1 (explaining that the purpose of UNCAC is to prevent and combat corruption by implementing effective measures, promoting international cooperation and assistance, and promoting integrity and accountability).

155. See MARTIN, *supra* note 5, at 7-8, 32-33, 35-36 (highlighting the importance of institutions to assure potential whistleblowers that they will not face reprisal).

schemes. UNCAC, via Article 33, is one such multinational effort. The meaning of “fact” in the context of Article 33 is analyzed differently by various Member States, of which South Africa utilizes the ideal approach: the Reasonable Belief Approach. By directing State Parties to implement this approach and to use the “disinterested observer” test when evaluating whistleblower claims, the global community will have made one momentous step forward in the battle to eradicate corruption.