

Submission to the thematic report of the Special Rapporteur on Freedom of Opinion and Expression to the UN Human Rights Council: “Freedom of Opinion and Expression and Sustainable Development - Why Voice Matters”

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EXECUTIVE SUMMARY

This submission addresses the following issues relating to Freedom of Opinion and Expression and Sustainable Development:

A. Right to freedom of opinion and expression and the achievement of the SDGs: A focus on crime, whistleblowers, and journalists.

Findings (Part A)

- The crimes of the powerful (e.g., corruption and tax abuse) as well as organized crime are detrimental to the achievement of SDGs. In this context, tax abuses are underestimated and not directly covered adequately at the international level. Also, such crimes are extremely difficult to unveil and journalists as well as whistleblowers and leakers play a crucial role in that regard. Unfortunately, they are often retaliated against and the applicable legal frameworks appear to be still weak and inadequate.

Recommendations (Part A)

- Establish adequate and effective protection of whistleblowers and offer adequate rewards extending the scope of application also to leakers.
- Introduce a dedicated international convention for the fight against tax abusive practices aimed at ensuring adequate transparency and the effective protection of the reporting persons.
- Adopt an initiative aimed at protecting journalists inspired by Forbidden Stories at the international level.

B. Laws, policies, and practices to facilitate public participation: A focus on the United Kingdom.

Findings (Part B)

- Although the Freedom of Information Act 2000 was enacted in the United Kingdom, it failed to create an adequately transparent and accountable public environment. Information can be easily suppressed by the public administration and, as a result, public participation is constantly hampered. This is the result of structural issues (absence of a publicly available list of relevant pieces of information), normative deficiencies (too numerous and vague built-in exemptions), and lack of culture (continuous reluctance to operate transparently). Finally, no right to information exists concerning corporate activities.

Recommendations (Part B)

- Limit the applicability of the exemptions to disclose the information present in the Freedom of Information Act 2000 where the requests for information come from investigative journalists, researchers involved in academic activities, or NGOs and other civil society organizations.
- Oblige the public administration to explain in detail the reasons for rejection and include a fast-track judicial procedure for appealing.
- Introduce a legal instrument to activate the right of freedom of information concerning corporate activities where the request is justified because it aims at protecting the public interest or well-being and does not involve the disclosure of trade secrets.

FULL SUBMISSION

1. Overview

1.1. Authors

This submission is made by the authors in their personal capacity as academic experts.

Specifically, Dr. Costantino Grasso is an expert in the area of corporate and economic crime, corporate social responsibility, and business ethics. He serves as an Associate Professor in Business and Law at Manchester Law School, as a Member of the Research Center for Business Transformation, as a Visiting Researcher at Boston College Law School, and as an International Expert for the Council of Europe in the area of Corruption and Good Governance. Dr. Grasso, who is included in the anti-corruption Knowledge Hub of Transparency International, has recently coordinated two international research projects, which covered topics relevant to this submission.¹ Dr. Donato Vozza is an expert in the area of economic crime and business integrity. He serves as a Lecturer in Law at the Faculty of Business and Law of the University of Roehampton and as a member of the Centre for Sustainability and Responsible Management.

Both the authors are Founders and Editors of the Corporate Crime Observatory (www.corporatecrime.co.uk), as well as Editors of the Corporate Social Responsibility and Business Ethics Blog (<https://corporatesocialresponsibilityblog.com>), which are two innovative international platforms established by independent academics and experts from different countries and backgrounds devoted to promoting the analysis and discussion of corporate and economic crime issues as well as other forms of corporate irresponsible behavior around the world.

1.2. Reasons for the submission and focus

The authors are submitting this document to support, with their expert knowledge, the production of the Special Rapporteur's thematic report to be presented to the HRC, 53rd session.

This submission addresses the following issues relating to the relationship between Freedom of Opinion and Expression and Sustainable Development: Right to freedom of opinion and expression and the achievement of the SDGs, with an international focus on

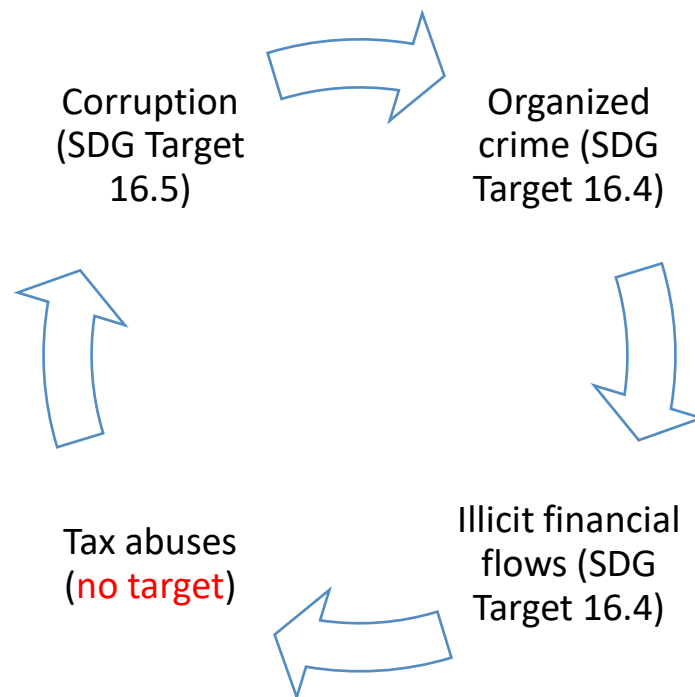
¹ He coordinated "Whistling at the Fake: The Crucial Role of Whistleblowers in Countering Disinformation," which was a NATO-funded multidisciplinary research project aimed at addressing the gap of citizen comprehension of the forms, means, and impacts of disinformation, as well as at exploring the crucial role that whistleblowers and other knowledgeable insiders play in exposing misleading and hostile information activities. He also served as the Principal Investigator of "VIRTEU", which was an EU-funded high-profile legal research project aimed at exploring the interconnections between tax crimes and corruption.

crime, whistleblowers, and journalists (**Part 2**); Laws, policies, and practices to facilitate public participation, with a national focus on the United Kingdom (**Part 3**).

The opinions included in this document are based on outcomes of innovative research projects and studies conducted by the authors.² They have neither been published nor submitted for publication elsewhere.

2. Right to freedom of opinion and expression and the achievement of the SDGs in the area of the “crimes of powerful”

The following section includes examples of how the exercise of the freedom of opinion and expression contributes to the achievement of the SDGs and to what extent the current international and national legal frameworks do not adequately protect such fundamental freedoms. This analysis aims at unveiling the challenges that the individuals that exercise the freedom of opinion and expression face when it is related to criminal activities and in particular to the so-called “crimes of the powerful.”³ Such pervasive criminal phenomena appear to be intimately interconnected serving the interest of elitist groups or criminal organizations. Examples of such interconnections are the ones that link organized crime, illicit financial flows (SDG Target 16.4), corruption (SDG Target 16.5), and tax abuses.⁴



² See, e.g., supra note 1.

³ See generally Vincenzo Ruggiero, *Power and Crime*, Routledge, 2015, at 2-5.

⁴ For a recent study that explored the interconnections between tax abuses and corrupt practices see Diane Ring and Costantino Grasso, ‘Beyond Bribery: Exploring the Intimate Interconnections Between Corruption and Tax Crimes’ (2022) 4 *Law and Contemporary Problems* 7, available online at <https://lcp.law.duke.edu/article/beyond-bribery-ring-vol85-iss4>.

2.1. Crime, SDGs, and Whistleblowers

Organized crimes and, even more corruption, have a serious impact on SDGs.⁵ Corruption is one of the most relevant causes of distortion of justice, which weakens institutions, society, and the rule of law. In this context, tax abuses are assuming increasing importance in that they appear to be instrumental to the perpetration of other crimes as well as unethical behaviors and, in general, to the perpetuation of elitist economic interests, societal inequalities, and the exploitation of public funds. At the same time, illicit financial flows generated by criminal activities represent another serious threat.

In this field, whistleblowers, journalists, and other members of civil society play an important role in fostering public debate. In particular, it has been demonstrated that they, by speaking the truth and through state protection, have a substantial role in reducing corruption and bribery.⁶ Moreover, the relevance of tax abuses has been unveiled over the last decade only thanks to well-publicized leaks of tax data and the work of whistleblowers that have revealed the secret offshore financial holdings of high-net-worth individuals and the tax evasion and minimization practices of various taxpayers, financial institutions, and tax havens.⁷ Those courageous individuals that acted as enablers of public participation experienced retaliation also at the hands of the public authorities.⁸ In that regard, it is extremely important to enhance the protection of whistleblowers, as was attempted through the adoption of the EU Whistleblowing Directive,⁹ and offer adequate rewards.

However, at the moment, differently from what happens with organized crime and corruption, no sufficient attention is given to tax crime and other forms of tax abuses at the international level.¹⁰

As a result, also given the global dimension of multinationals' tax abuse, for a response to be effective, it should be advocated the adoption of a dedicated international convention for the fight against tax abusive practices and the protection of the reporting persons who unveil them.¹¹

⁵ Donato Vozza and Salvatore Coluccello, Transnational Organized Crime and UN Sustainable Development Goals, in Walter Leal Filho et al. (eds) *Peace, Justice and Strong Institutions*, Encyclopedia of the UN Sustainable Development Goals, Springer, 2021.

⁶ See The European Parliament Corruption Scandal: TRT World Interview, *Corporate Crime Observatory*, Jan. 31, 2023, <<https://www.corporatecrime.co.uk/post/eu-corruption-scandal-trt>>.

⁷ See Shu-Yi Oei and Diane Ring, Leak-Driven Law, (2018) 65 *UCLA Law Review*, p. 536.

⁸ Donato Vozza and Umut Turksen, When the State Keeps It on the Hush: On the Limits to the Punishment of Whistleblowers, in Costantino Grasso (ed.) *Whistleblowers: Voices of Justice*, Springer International, forthcoming.

⁹ Costantino Grasso and Liemertje Julia Sieders, The New Harmonized European Legal Framework for the Protection of Whistleblowers: The EU Whistleblowing Directive, in Costantino Grasso (ed.) *Whistleblowers: Voices of Justice*, Springer International, forthcoming.

¹⁰ Lorena Bachmaier Winter & Donato Vozza, Corruption, Tax Evasion, and the Distortion of Justice: Global Challenges and International Responses, (2023) 85 *Law and Contemporary Problems*, pp. 84-88, <<https://lcp.law.duke.edu/article/corruption-tax-evasion-and-the-distortion-of-justice-winter-vol85-iss4>>.

¹¹ *Ibid*, pp. 96-100.

2.2. Journalists as enablers of public participation in the fight against crime

Journalists, by reporting upon matters of public interest, play a crucial role in countering these serious crimes and fostering sustainable development goals. However, journalists are often victims of retaliations from criminals and they are often not adequately protected. According to the Committee to Protect Journalists, it is likely that criminals killed 279 journalists from 1992 to 2023. Worrisomly, the figure of journalists killed because of their investigation of corrupt practices is significantly higher with 320 murders during the same period of time.¹²

All states should be accountable for the lack of prevention of the breach of the right to life of journalists (as they work in the public interest) and the lack of adequate and appropriate investigations following unlawful killings. Relevant issues of impunity for crimes against journalists interest many countries. As the Council of Europe has highlighted many of its members have not adequately investigated crimes against journalists.¹³ The killings generate a disturbing chilling effect and create a dangerous “wall of silence.”

At the present time, apart from a few exceptions related to journalist investigations focuses on mafia-type criminal organizations,¹⁴ there are no adequate systems to protect the life of journalists, bloggers, and other courageous individuals, who unveil and disseminate information related to those crimes. Journalists tried to fill such a gap through initiatives such as Forbidden Stories,¹⁵ which was launched after the killing of Daphne Curana Galizia.¹⁶ It works in a simple but at the same time effective way ensuring that the investigations of killed journalists do not disappear with them. The system consists of the establishment of a SafeBox Network where journalists could safely include the evidence gathered so that in case of murder the related stories will be continued to be followed by a dedicated international task force of journalists. Such a project demonstrated to be essential to exert external pressure (e.g., from the European Union institutions)¹⁷ on the Maltese government and led to investigations and prosecutions.

¹² Journalists and Media Workers Killed - between 1992 and 2023, *Committee to Protect Journalists*, <<https://cpj.org/data/killed/>>, accessed on Feb. 3, 2023.

¹³ 2 November – International Day to end impunity for crimes against journalists, *Human Rights Channel* <<https://human-rights-channel.coe.int/end-impunity-for-crimes-against-journalists-en.html>>.

¹⁴ For example, the round-the-clock police protection offered in Italy to journalists because of threats from organized criminal groups. See Attila Mong, ‘I was the first to lose my freedom’: How police protection impacts Italy’s investigative reporters, *Committee to Protect Journalists*, Oct. 10, 2019, <<https://cpj.org/2019/10/italy-mafia-reporters-police-protection/>>

¹⁵ Forbidden Stories, <<https://forbiddenstories.org/case/the-daphne-project/>>.

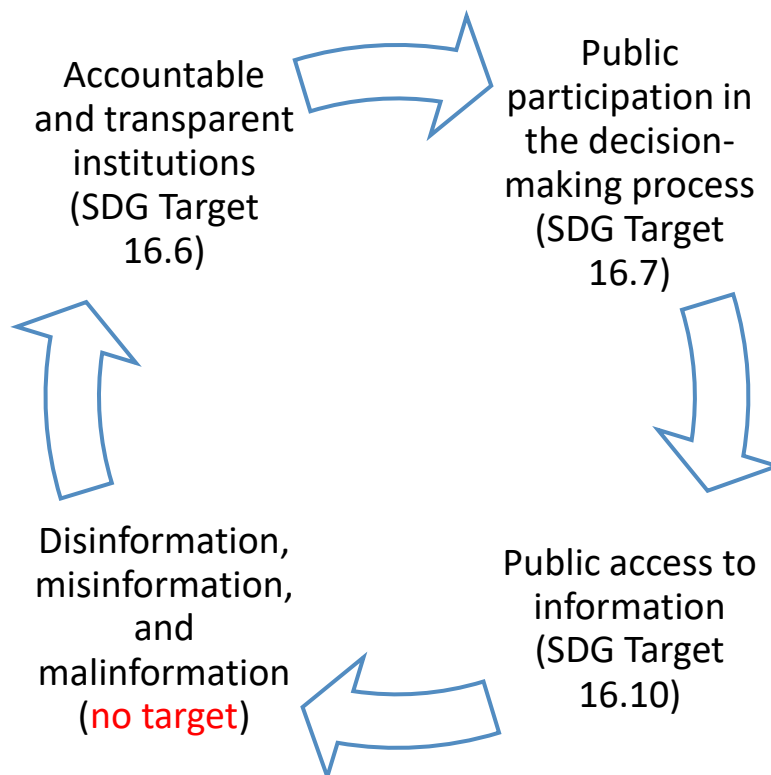
¹⁶ Costantino Grasso, We must do better to protect whistleblowers and investigators like Daphne Caruana Galizia, *The Conversation*, Oct. 19, 2017 <<https://theconversation.com/we-must-do-better-to-protect-whistleblowers-and-investigators-like-daphne-caruana-galizia-85914>>.

¹⁷ Daphne Caruana Galizia murder: accountability and reforms “deficient”, MEPs say, *News European Parliament*, Oct. 20, 2022 <<https://www.europarl.europa.eu/news/en/press-room/20221014IPR43219/daphne-caruana-galizia-murder-accountability-and-reforms-deficient-meps-say>>

Forbidden Stories is a meritorious and crucial initiative that should be supported, if not adopted, at the international level by a trustworthy institution such as the United Nations so as to ensure sufficient funds to run the project worldwide, an adequate level of independent investigations, and mount on the involved public and private parties.

3. Laws, policies, and practices in the United Kingdom

The right to freedom of expression as well as the right to education and information (SDG Target 16.10) play a fundamental role in assuring an adequate level of public participation. As it emerged from the research carried out during the project Whistling at the Fake,¹⁸ although, censorship and violence are still used to hamper the pursuit and dissemination of truth, the exercise of these rights may be jeopardized, and public participation compromised, using subtler and more difficult to comprehend phenomena (SDG Target 16.7).



On the one hand, we have disinformation, misinformation, and malinformation that can be defined as follows:

- **Disinformation** represents the intentional, active or passive, dissemination of fake news or misleading information.
- **Misinformation** occurs when misleading information is spread without intent, for example with negligence or even in good faith.

¹⁸ The outcomes of the project Whistling at the Fake are available online on the Corporate Crime Observatory at the following link: www.corporatecrime.co.uk/whistling-at-the-fake.

- **Malinformation** is the use of genuine information aimed at hiding other pieces of relevant information, for example diverting attention away from something else.¹⁹

On the other, public participation in the decision-making process (SDG Target 16.7) may be severely hampered by the suppression of information. In western democracies, overclassification is emerging as a national security issue that generates public distrust in government and thwarts public participation.²⁰ Suppression of information may be achieved even when documents are declassified through the abuse of redaction methods, which can represent a way of circumventing declassification. In that regard, although the typical method is using a black marker to block out the sensitive material,²¹ it emerged that in the United Kingdom reduction is applied using asterisks instead of pages or passages being blacked out.²² This is a matter of concern in that when the document is disclosed, the reader cannot appreciate how many pieces of information have been removed – it could be one word, one paragraph, one page, or even more pages. The consequence is that there is no sense of understanding of what is missing.²³

To grant members of civil society access to fundamental pieces of information and assure public participation, the Freedom of Information Act 2000²⁴ was introduced in the United Kingdom. The idea under the act is to provide public access to information held by public authorities, not only obliging public authorities to publish certain information about their activities but also, and more relevantly, to entitle members of the public to request information from public authorities.²⁵ As the judiciary had the chance to explain, the purpose of this potentially revolutionary legal instrument was to eventually alter the relationship between the state and society to enhance public accountability through transparency (SDG Target 16.6). However, after 20 years, it is emerging that the legal instrument failed to achieve such a result. In that regard, it is possible to identify three types of challenges:

¹⁹ Costantino Grasso, Whistling at the Fake International Final Conference - Day 1 - Opening Session, *Corporate Crime Observatory*, video recording at 11:45 (May 5, 2022), <www.corporatecrime.co.uk/whistling-at-the-fake-final-conference-day1-intro>.

²⁰ See Sadie Gurman, Aruna Viswanatha, and Tarini Parti, Garland Names Robert Hur Special Counsel to Investigate Biden Documents, *The Wall Street Journal*, Jan. 12, 2023.

²¹ See, e.g., p. 130 of the 2014 Report of the Senate Select Committee on Intelligence Committee Study of the CIA's Detention and Interrogation Program, which is available online at the following link: www.corporatecrime.co.uk/files/ugd/860044_cfb4e46ab7b74f18b7762510a9e2e71c.pdf

²² See, e.g., the 2020 Intelligence and Security Committee of Parliament Report on Russia, which is available online at the following link: www.corporatecrime.co.uk/files/ugd/860044_4b5721a0f41d4ec6a389c03a0294635e.pdf

²³ Diane Ring, Whistling at the Fake International Roundtable "Disinformation and the Public Sector" - Session 2, *Corporate Crime Observatory*, video recording at 26:44 (Feb. 25, 2022), <www.corporatecrime.co.uk/whistling-at-the-fake-roundtable-public-sector>.

²⁴ Freedom of Information Act 2000, c. 36, available online at www.legislation.gov.uk/ukpga/2000/36/contents.

²⁵ See What is the Freedom of Information Act?, *Information Commissioner's Office*, <<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/>>.

1) There are too many built-in exemptions that have been included in the legislation. Among them, the public department may consider the information request as entailing prohibitive time and costs (section 12), and it may reject the request to balance the public interest in disclosure against the public interest in favor of withholding the information with the aim ability to maintain the normal execution of operations within the Department (section 36). This problematic aspect is aggravated by the fact that the authorities do not have to explain the reasons for the rejection but merely mention the exemption utilized. This generates the paradoxical situation of having an inherent lack of transparency concerning the functioning of a legal instrument aimed at enhancing transparency and public participation. It also thwarts the chances of a review through the appeal procedure with has administrative rather than judicial nature.²⁶

2) The Freedom of Information Act 2000 does not provide people with real freedom of information in that it confers a mere chance to activate a right of access to information. In the absence of a list or other publicly available repository, the members of the public are not aware of what information is held by the public administration so they can only guess what may be there and ask about that.²⁷

3) There is a continuous reluctance of public departments to operate openly and transparently. Through simple statistical analysis, it is possible to demonstrate that there has been a huge pushback by the public administration. We have passed from 58% of information requests granted in full in 2009²⁸ to 39.79% in 2021,²⁹ i.e., an 18% increase in rejections.

Another thorny issue is that, although multinational corporations affect the lives of people more than perhaps anything else these days, this legislation does not apply to them because they are private entities, not public bodies. Corporate activities are characterized by a disturbing level of asymmetric information and firms continue to operate like black boxes³⁰ abusing the fact that no freedom of information law enables people to learn how they operate. Part of what has allowed such opacity is that companies have legal personality and as such enjoy all the privacy allowed to individuals. There is not only a lack of transparency concerning their business operations but also concerning the various products, including food, drink, and medicine, they

²⁶ Apart from the merely theoretical possibility of activating the extremely complex and high standard procedure of judicial review.

²⁷ Prem Sikka, VIRTEU Roundtable "Institutional Corruption and Avoidance of Taxation", video recording at 1:09:21 (Mar. 12, 2021), <www.corporatecrime.co.uk/virteu-institutional-corruption>.

²⁸ Freedom of Information Act 2000 - 2009 Annual Statistics on implementation, Apr. 29, 2010, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217860/foi-statistics-report-2009.pdf>.

²⁹ See National statistics - Freedom of Information statistics: annual 2021 bulletin, Apr. 27, 2022, <<https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2021/freedom-of-information-statistics-annual-2021-bulletin>>.

³⁰ Rana Foroohar, Corporations can no longer remain black boxes, *The Financial Times*, Nov. 6, 2022.

produce and sell.³¹ The irresponsible behavior of Johnson and Johnson about the presence of asbestos in the baby talc is emblematic of the seriousness of this issue and the consequences that it may exert. Although internal documents showed that the company was aware of the fact that its powder was sometimes tainted with carcinogenic asbestos, Johnson and Johnson kept that information from regulators and the public even during lawsuits.³²

³¹ Prem Sikka, VIRTEU Roundtable "Institutional Corruption and Avoidance of Taxation", video recording at 25:57 (Mar. 12, 2021), <www.corporatecrime.co.uk/virteu-institutional-corruption>.

³² Lisa Girion, Powder Keg, Reuters, Dec. 14, 2018, <www.reuters.com/investigates/special-report/johnsonandjohnson-cancer>.