

# INTERNATIONAL ANTI-CORRUPTION CONFERENCE 2024

Vilnius, Lithuania 18-21 June 2024

## SESSION REPORT

*Please know you may design the structure of this report to better suit the session. It's important to capture the key outcomes and solutions proposed for the future.*

### **From Silence to Safety: Strengthening Legal Protection Frameworks to empower Whistleblowers**

**Date:** 19 June 2024

**Time:** 8:30 AM - 10:00 AM (GMT +3)

#### **Report prepared by:**

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National Whistleblower Center/Kohn, Kohn & Colapinto

#### **Moderated by:**

Jaime Chavez-Alor

Associate Executive Director

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#### **Panellists:**

- Samantha Feinstein  
Government Accountability Project
- Carlos G. Guerrero Orozco  
Derechos Humanos y Litigio Estratégico Mexicano
- Marie Terracol  
Transparency International
- Asiath Rilweena  
Transparency International Maldives
- Louise Portas  
UNODC
- Wim Vandekerckhove  
EDHEC Business School
- Liezl Groenewald  
The Ethics Institute & Whistleblowers House, South Africa

- Stephen Kohn  
National Whistleblower Center

### **Share the thematic focus of the session, its purpose and corruption risks?**

Most agree that whistleblowers are key to shed light on powerholders secret wrongdoing, but empowering and protecting whistleblowers is quite challenging. The interactive session will unfold the transformative potential of effective whistleblower frameworks, delve into the challenges faced by whistleblowers and discuss best practice and practical strategies from various regions, including legislative and advocacy actions, for enhancing whistleblower protection and support.

### **Summary of panellists' contributions & discussion points (please be as detailed as possible)**

#### ***Carlos Guerrero Orozco:***

Creating new legal frameworks, which include intentional vocabulary and specific definitions for “whistleblowers,” is key to transforming the concept of whistleblowing. In Mexico for instance, the translated word for “whistleblower” (“*denunciante*”) carries a negative connotation. Therefore, the government implemented the concept of an “alertor” (“*alertador*”), which is someone who reports information that can lead to an administrative or civil case, providing vital information about illegal activity. The new word was created to encourage participation: it distinguishes what it means to be an “*alertador*” under this new legal framework from what it means to be a stigmatized “*denunciante*.”

However, it’s important to question whether new definitions for whistleblowing and governments’ efforts to encourage reporting are actually impacting the level of protection available to whistleblowers. In the case of Mexico, the “*alertadores*” are only entitled to protection if they report bribery and embezzlement, but whistleblowers are not offered protection for other areas. When governments think about changing the legal language of whistleblowing as a means of changing perception – and with it participation -- of whistleblowers, it is important to think beyond whether the word itself is derogatory or neutral. The language in use must have a clearly understood definition through which citizens can understand what level of protection would be offered to them. Otherwise, even if the word is not derogatory, it is legally vague, which means whistleblowers are more inclined to view reporting as a high-risk activity. Creating new vocabulary for whistleblowing with a precise definition under new legal frameworks is important, both to remove cultural reporting barriers and to clarify the scope of protection available.

Improper translation of the word for “whistleblowing” can lead to engrained misunderstanding, which is why the translations for the word “whistleblowing” at the 10<sup>th</sup> Conference of States Parties to the UN Convention Against Corruption was such a hotly debated topic.

#### ***Liezl Groenewald***

The three goals of whistleblower legislation are to: (1) encourage reporting (2) protect whistleblowers, and (3) require investigations. This third area is where many countries in Africa really lack implementation.

Many African countries afford very little protection to whistleblowers. There is a dominant culture of distrust due to high retaliation. Namibia is case in point – they’ve had

whistleblower protection law since 2017 and profess a decentralized approach to the bodies and powers responsible for whistleblowing. Unlike other African countries, which tend to have a central authority to receive reports and ensure they are investigated, Namibian whistleblowers can report to any of the authorities that the law has appointed, as well as civil society, depending on the nature of the disclosure. On paper, this law provides good protection in terms of retaliation. However, for instance, Johannes Stefansson, the fish rot whistleblower, was not afforded any protection under the law. He has suffered severe retaliation to the point that his health has suffered, and he is waiting for the implementation of another law to return and testify. Although Namibia has had their whistleblower law for a long time, it has not been implemented properly.

Uganda also stands out in the sense that they have a robust law, which criminalizes the retaliation of whistleblowers and establishes an authorized officer. If that officer does not act upon a report, then they commit an offense under the law and can be imprisoned or fined.

Kenya has had a long journey to develop their whistleblowing retaliation policies, going back to 2003, which was early. They ratified the UNCAC and signed the African Union Convention on preventing and combatting corruption, which both required legal mechanisms to protect whistleblowers. However, Kenya still lacks an overarching whistleblower protection law. Provisions to safeguard reporting persons are scattered in the constitution and in different laws, like the anti-bribery laws. In 2015, civil society in Kenya stepped in and recommended The Disclosure Bill of 2019, which required amending other bills related to anti-bribery and anti-money laundering. The 2019 whistleblower bill is aimed at strengthening the protection of whistleblowers, promoting a culture of whistleblowing in the country, and providing safeguards. However, its challenges include lack of political will, cultural nuances when it comes to who is a whistleblower, and a lack of resources.

### ***Marie Terracol***

In the EU, the EU Directive that was adopted in 2019 was a game changer for the protection of whistleblowers. It sets minimum standards that EU member states have to meet, and while there are weaknesses and room for improvement (there always is), it constitutes a solid foundation for effective whistleblower protection. Transparency International was a long-time advocate of an EU Directive on whistleblower protection and was very involved in the process of its adoption, pushing best practices. Now all EU countries have adopted or amended whistleblower protection law to meet the new EU standards. Additionally, the 10 countries that are candidate to join the EU will have to align with the directive.

The directive's strengths include:

1. Whistleblowers can make reports internally to their organisation or directly to the competent authorities. Disclosure to the public is possible, in certain circumstances.
2. It requires organizations to set up internal whistleblowing systems, and they have an obligation to follow up on reports and keep the whistleblowers informed on actions taken and outcomes
3. There are strong protections of whistleblowers' identities with minimal exceptions, as well as safeguards
4. It protects whistleblowers against all forms of retaliation, including civil and criminal - with sanctions and remedies attached
5. The motives of a whistleblower in reporting information that they believe to be true is irrelevant to the granting of protection - no "good faith" requirement, which can

be very challenging for whistleblowers and provide a loophole for elongating a case or undermining whistleblowers with valid claims.

6. When a whistleblower suffers detriment, the employer is the one who has to prove that it was not linked to their disclosure.

Some of the major issues with the directive include that:

1. One is that none of the EU countries managed to comply with all the EU standards properly, and TI is working that
2. The EU directive has a limited and fragmented scope - for various reasons - but it expressly allows member states to choose a wider scope for their national law. Unfortunately, only eight member states have adopted legislation with comprehensive and consistent material scope. The other countries have adopted legislation with fragmented or limited scope, to various extents. It takes a lawyer to determine which case falls under the national law. It is intimidating and dissuasive to whistleblowers, instead of making it easy to them to speak up. It will also create many implementation challenges for everyone else involved - whistleblowers, public institutions, companies, competent authorities and judges.

### ***Asiath Rilweena***

There has been a Whistleblower Protection Act in the Maldives since 2019. TI Maldives' advocacy in this area started in 2016 following the arrest and prosecution of a whistleblower, who was a bank manager, and leaked bank statements about that exposed one of the biggest corruption scandal in the country. The whistleblower was held without charge for over 4 months, extending his detention 14 times, and was in house arrest close to 5 months. Despite the pressure, the Whistleblower was convicted, with a reduced sentence, for releasing sensitive and confidential customer information.

Even though his whistleblowing must have been protected under the Penal Code, he was not protected in reality because many public officials were implicated. The same code was used to convict him as a criminal.

In the wake of this case, Transparency Maldives started working drafting a new whistleblower bill based on Transparency International's International Principles for Whistleblower Legislation. The Bill was presented to the parliament in 2018 and was enacted in 2019.

The new law provided a broad definition of "wrongdoings" and broadens the definition of "whistleblowers" to include public and private sector employees as well as individuals outside traditional employee/employer relationships. It offers anonymity and confidentiality, allows for disclosures to be made with reasonable belief, places the burden of proof on the employer, and provides protection against retaliation even in the cases of mistaken whistleblowing,

Although the new law has existed since 2019, there has been a lack of political will amongst institutions responsible for implementing and complying with the act. There were delays in establishing the Whistleblower Protection Unit in its first year of existence, and there was a very small budget given for the unit to carry out their mandate. Last year, it was reported that only USD \$3,000 was given to implement programs.

As a Civil Society Organization, Transparency Maldives has been working with oversight bodies on capacity building and with communities to raise awareness around

whistleblowing. The big issue, though, is that people are still not aware that legal whistleblower protections exist, so they resort to other means to disclose information, using anonymous social media accounts, which make them more vulnerable and can potentially take away the protections given under the act. There are also instances where the government tries to discover who leaked the information.

There has been an increase in number of people who report cases to the Whistleblower Protection Unit, with about 30 cases reported last year. Only two of the cases were investigated by the unit, with the rest being forwarded to the relevant departments. Political will and commitment are necessary for the system to work, as are financial and technical resources to set up the systems, improve the implementation, and raise public awareness of the bill.

### ***Louise Portas***

Article 33 of the UN Convention Against Corruption (UNCAC) requests States parties to consider taking measures to provide protection for reporting persons. It is very broad, but the article does make a distinction between reporting persons and witnesses/victims. The UNCAC was adopted in 2003, which was the very early stages of whistleblowing in international law. Article 33 should now be read in the context of the evolution of the international standards on whistleblowing since then. In 2013, the Organization of American States passed a model whistleblowing law. In 2019, The G20 Principles on Whistleblowing and the European Union Whistleblower Directive were passed. Around this time, the term “whistleblowing” began appearing on the international scene and becoming more precisely defined. In 2021, the International Organization for Standardization passed ISO37002, a guideline on whistleblowing. Of all of those international standards, UNCAC is the only one that is almost universally ratified and is legally binding.

In December 2023, the Conference of States Parties to UNCAC adopted the first ever Resolution on reporting persons (the Resolution 10/8). The resolution recognizes whistleblowers as a category of reporting persons who are made aware of wrongdoing in the context of professional activity or work related environment. In this regard, it requests UNODC, as the guardian of UNCAC, to continue and expand its technical assistance provision to States parties, upon request, on issues pertaining to whistleblower protection.

One of the major sources of confusion about the term whistleblowing is conflation between whistleblowers and witnesses. It’s critical to clarify exactly who qualifies as a whistleblower under the law as countries develop their frameworks. UNODC is thus receiving increasing and ever specific technical assistance requests from States parties that wish to develop and strengthen their whistleblower reporting and protection frameworks and mechanisms. In addition, one emerging technical assistance activity that UNODC is providing is to support States parties and institutions to develop inclusive and gender sensitive whistleblowing systems.

### ***Samantha Feinstein***

There’s been a global revolution in whistleblowing, which we began to see before the pandemic, but which only accelerated during and after the pandemic because it became clear that lives quite literally depend on transparency, accountability, and reporting. Yet, we witnessed the suppression of free-speech worldwide during that time.

Whistleblowers are our eyes and our ears. The United States, as the first country with a comprehensive framework for whistleblowing, became the testing ground for whistleblower

laws. There are about 60 different US whistleblowing laws, which are all ineffective in their own unique ways, but it's through these failures that we get the best practice. That's why some of the newer laws like EU directive are the gold standard and have catalysed the next wave of countries adopting whistleblower laws.

About 170 countries have some form of a whistleblower law, whether its comprehensive or sectoral. Currently, all EU and all NATO countries have a whistleblower law. Of UNCAC member states, about 33% have a comprehensive whistleblower law. An additional 20% have sectoral whistleblower laws. The Government Accountability Project and the International Bar Association teamed up to compare whistleblower legislation worldwide to the 20 best practices. The best whistleblower frameworks comply with 16 out of 20 best practices. However, most fell significantly below. Canada met the fewest best practices meeting only 1 out of 20 (though Government Accountability Project and other advocates worked on a bill that is in parliament right now). The new EU directive has motivated other countries to match its standards, particularly international companies that operate in the EU (since it requires large companies to have an internal reporting mechanism), so the current moment provides a good opportunity to universalize it.

The study also revealed some major trends – one of which is a lack of implementation of whistleblower protection laws. The UK and US have the largest sample of published case decisions in whistleblowers retaliation cases, and the data reveals that only roughly 10% of whistleblowers win their cases on the merits, meaning about 90% are losing.

Other problems identified in the case study include second classes rights for national security whistleblowers, a lack of protection against SLAPP suits (19 countries did not have any at all), and there is a prevalence of motives test for whistleblowers. The take away is that more action and support is needed on the technical assistance side; independent investigative agencies must be properly funded and supported; and the private sector has an opportunity to step up where the governments are failing to pass strong laws protecting whistleblowers.

### ***Wim Vandekerckhove***

ISO37002, or the Whistleblowing Management Systems Guideline establishes operational standards for whistleblowing, and ISO37001(directly before it) establishes operational standards to fight bribery. The ISOs reflect a consensus in what best practice looks like. For instance, if a state or company is going to have a whistleblower channel, it describes how to operate it, what procedures you need, etc. There were 160 experts from 35 different countries that developed the standard. The ISO standard compliments legislation like the EU directive, which requires the implementation of internal reporting mechanisms for 50+ person companies, but which lacks legal requirements for the procedures of these internal reporting mechanism. For instance, it does not specify how confidentiality should be protected, how the follow up should be conducted, or how the program should be structured.

From experience talking to people who actually run these systems, there is a minority of organizations who actually do a good job internal reporting and another minority of dangerous companies whose internal reporting structures (or lack thereof) are deliberately designed to impede accountability and deter whistleblowers. The majority of companies are goodwilled but have ineffective internal reporting. When organizations make mistakes, they're not good at admitting it; they try to cover it up. The ISO can be very helpful for this middle majority block of companies.

The whistleblowing standards and best-practices published by Transparency International, the International Anti-Corruption Conference, and the ISO all reflect the same principles, but the added value of the ISO standard is that it's written as a management system standard, explaining who needs to do what, how, and when. How do you triage? How do you close an investigation? How do you take care of an investigation? What kind of protection mechanisms are already in place and when are they implemented? What happens with data afterward?

### ***Stephen Kohn***

Powerful transnational whistleblower laws in the United States are critical to flipping the risk dynamic that usually plagues whistleblowers. These laws, which all provide extraordinary protections through anonymity and monetary compensation, have mobilized whistleblowers to come forward with valuable information, proving that when properly protected and incentivized, whistleblowers are the most effective anti-corruption tool. The transnational laws cover four primary areas: (1) bribery of government officials (2) money laundering (3) commodities fraud (4) securities fraud.

Nearly 15 years of empirical evidence has demonstrated that the most powerful corrupt entities in the world can be held accountable from these laws. Consequently, prior scepticism about the payment of awards to whistleblowers is coming to an end. In 2014, the United Kingdom issued a report condemning reward laws. Now, the Director of the UK's serious fraud office has completely reversed that position based on empirical evidence. In the announcement of this policy reversal, the SFO Director said, "I think we should pay whistleblowers. If you look at the example of the United States, their system allows that, and I think 86% of the \$2.2 billion in civil settlements and judgments recovered by the US Department of Justice were based on whistleblower information. Since 2012, over 700 UK whistleblowers have engaged US law enforcement."

Just as 700 whistleblowers from the UK can come to the United States, whistleblowers from every country can come (we've documented that whistleblowers from 135 countries have reported and received rewards under just one of the United States' transnational whistleblower laws).

In December, 2022, the U.S. Congress passed the Anti-Money laundering Whistleblower Improvement Act. This law is the most powerful transnational anti-corruption law in history. The National Whistleblower Center (NWC) took the lead to get this law passed, and it was fully endorsed by every major whistleblower organization in the United States including Government Accountability Project and Transparency International USA. NWC explained to Congress that whistleblowers have been key in identifying \$240 billion flowing from Russia into the US. The result was unanimous support. That law now in place.

The question now is where do we go from here? We recommend that the United States enhance guidance about the various protections – education is needed to help potential whistleblowers. This brings me to the OECD audit of the US Anti-Bribery program which concludes that the US transnational laws are highly effective models. However, they also recommended that the United States enhance guidance about the various protections, noting that this education has not yet been implemented. They specifically stated that education is needed, "to help potential whistleblowers." The OECD's analysis reflects that there is an incredible set of laws in place. They work, they hold companies accountable, and they hold the corrupt accountable, but there's widespread ignorance throughout the world

on how these laws work and even that they exist. The OECD pointed out that many whistleblowers are not getting the compensation support they are entitled to. There are whistleblower who come forward, report the corrupt entity, lead to a sanction, and do everything else right, but due to a lack of awareness of the nuances in how these laws work, they can't get justice and are denied awards.

As an anti-corruption community, we cannot sit on the sidelines. People need to know how these laws. The National Whistleblower Center is working on education and implementation and is eager to build collaborative relationships to support these goals internationally.

### **Interventions from the Audience**

- (1) There is a need for a regional whistleblower framework for the African Union, and support is needed, just as Transparency International supported the European Union in the EU whistleblower framework. Given the prevalence of armed conflicts in Africa, price gouging by the defense industry is common, elections are notoriously corrupt, Africa continues to suffer from the Dutch disease and extractive industries, corrupt corporations continue to intervene in the continent.
- (2) Zambia is working to protect the identity of the whistleblower proactively before making laws that guarantee that protection since it's so difficult to actually provide. Recently, they introduced an anonymous online whistleblower system where whistleblowers are encouraged to report to the commission. Confidence in the system is growing. The reports received so far reveal problems in some of the offices of the Commission, some of which show problems in profits related to protection of business loans. Zambia is working on reviewing loans and will add this to the overwhelming technical support request.
- (3) There has been a lot of discussion of whistleblowers for human rights without acknowledging that whistleblowers are also human rights activists. In strengthening legal protection frameworks, it's important to not ignore the authorities in charge of enforcing them. We need to understand and identify if we need to have distinct authorities in charge of investigating/enforcement, especially when it's the same authorities tasked with investigating who are charged with retaliation.
- (4) African Parliamentarians Against Corruption provides a platform for Civil Society to work with the legislature. How can we link into the transnational laws so that we can give the whistleblowers transnational protection?
- (5) There is no whistleblowing protection law in Panama. In elections 3 months ago, there was a pledge that many candidates for parliaments signed onto, which included whistleblower protection. The number of parliamentarians supporting this has increased exponentially since then, though still not a majority. The 2020 Anti-corruption bill included rewards to whistleblowers, but some of the prosecutors argued that rewards might complicate their ability to have a conviction because they believed the defense could argue that people would put forward a complaint only because they want a reward.
- (6) Ecuador adopted the Dodd-frank system. This year, the first 3 rewards were paid. However, there were some issues with the program. There is a lot of secrecy involved with the agency, including who deserves a reward and why. When we do the legal transplant of these institutions, there needs to be awareness of the conditions in different countries because we could be building some traps.
- (7) In Ethiopia implemented whistleblower rewards without protections for whistleblowers. There is a lot of secrecy within the program, and it is unclear why certain people receive the amount of money that they do and why others are denied an award.



- (8) The role of civil society who are working on the ground has been highly significant in getting effective laws passed, and remains crucial to ensure that the laws implemented are designed with an understanding of how power dynamics actually function in different contexts.
- (9) Punishments for retaliation too often go over looked. It's important to figure out all the various tools for protecting whistleblowers before focusing on rewards.

### **Key recommendations, opportunities for scaling-up, and calls to actions**

- Continue providing technical assistance to countries to improve whistleblower reporting and protection mechanisms; encourage countries to continue taking advantage of UNCAC technical assistance.
  - Encourage the use of new legal frameworks which do not simply copy-paste frameworks that work in one nation, but which:
    - Work with civil society on the grassroots level to understand the needs in different national contexts,
    - Translate key words like “whistleblower” with a sensitivity to towards stigmas associated with this word and its translation,
    - Clarify the protections available to whistleblowers and the scope of reporting persons who can qualify as a whistleblower under the law.
  - Educate potential whistleblowers internationally about transnational laws so that they can effectively combat corruption through these mechanisms, even if there country does not have a safe and effective whistleblower program.
  - Strengthen implementation of whistleblower laws, improve enforcement capacity, and expand training to the public in countries with newer whistleblower laws.
  - Advocate for protections for National Security and public sector whistleblowers, which countries worldwide generally rank low in.
  - Work with EU countries to expand the scope of whistleblowing beyond what is required in the EU directive.
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### **Rapporteur's name**

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### **Date submitted**

22 June 2024

**Action! This report needs to be emailed to [iacc-av@transparency.org](mailto:iacc-av@transparency.org) within 24 hours of the session. If you wish to update the report, please do so by 21 July. Thank you.**