

Symposium on the Protection of Whistleblowers

30 October 2017, Geneva, Switzerland



During the week of the PSI Congress held in Geneva, 29 October – 3 November 2017, Public Services International and the Friedrich Ebert Foundation (FES) organised a one-day Symposium on the Protection of Whistleblowers at the International Labour Office (ILO), Geneva, on 30 October.

This report presents a summary of the discussions that took place during the event, which brought together key speakers and panellists on issues related to the protection of whistleblowers, together with more than 120 PSI affiliates and guests, who addressed the situation faced by whistleblowers when they denounce wrongdoings, how public sector trade unions can assist them, and the best way to protect whistleblowers at the international level.

*The symposium was facilitated by **Ms. Nozipho Mbanjwa**, author and journalist for CNBC Africa.*

Background

Fraud and wrongdoing are more likely to occur in organizations that are closed and secretive. Whistleblowers play a pivotal role in supporting transparency and accountability in both the public and private sectors – whistleblowers bring to light illegal activities such as tax evasion, collusion and others that are contrary to the public interest. Whistleblowing can save lives, the environment and money. However, in disclosing relevant information whistleblowers often risk their jobs, freedom, or even their lives.

Despite the progress achieved in the implementation of whistleblower protection frameworks, some high-profile cases have also evidenced their shortcomings – the lack of dedicated and comprehensive laws is one of them, whereas the frameworks that protect them from harassment and threats fail to protect their jobs.

PSI, with the support of its affiliates, is working to elaborate further on the key elements that should be included in a robust whistleblower protection system and to campaign for an international legal framework that builds upon national or regional initiatives, ensuring that workers who disclose

wrongdoing – especially those of the independent audit institutions, customs, tax revenue agencies, and judicial bodies – are protected from reprisal and are rewarded for doing what is fair and just.

Opening

PSI General Secretary, **Rosa Pavanelli**, in her opening remarks, acknowledged that the protection of whistleblowers is one of the most important issues to be examined during Congress week. Over the last thirty years, corruption has expanded from bribes and payoffs to become an enormous machine that erodes the very foundation and principles of democracy.

Hubert Schillinger, Director of the Geneva office of Friedrich Ebert Foundation (FES), explained the FES's activity supporting trade unions nationally and internationally, with representatives in over 70 countries. FES has cooperated with PSI in strategic issues over recent years, including campaigning and awareness on tax evasion and trade. PSI has also contributed to the FES work on the 2030 agenda for sustainable development and contributed to the report *Reclaiming policies for the public*.

Panel 1:

Heroes and villains: are whistleblowers heads and tails of the same coin?

While contributing to a critical and charged debate, by revealing uncomfortable facts, whistleblowers are often perceived as either patriots or traitors. The panellists for this session included **Wim Vandekerckhove**, Lecturer at Greenwich University, UK, **Tom Stamatakis**, Chairman of the International Council of Police Representative Associations (ICPRA), **Florence Hartmann**, former journalist at *Le Monde* and spokesperson for the ICTUY Prosecution and author of *Lanceurs d'Alerte* in 2014, **Joaquín Gil**, journalist at *El País*, Spain, and **Carlos Carrión Crespo**, Public Sector Specialist, ILO.

Who's blowing the whistle?

Public perception of a whistleblower is someone who sees wrongdoing and decides whether or not to blow the whistle. However, the reality is not so clear-cut. Whistleblowing is a protracted process. Typically, a person will see something that is fundamentally wrong in their workplace, and considers that public harm can come from that wrongdoing. They will raise their concern with the organisation that they work for. If there's no response, they will try just once more. If they do not raise it or if they stop after just two attempts, it's because they know that they will probably suffer retaliation. They may lose their job, or their life may even be at threat. In that case, they may raise the concern outside their organisation. Only as a last resort will they go to the media. Research in the UK and Australia shows that only 1% of whistleblowers go to the media. It has also shown that 7% of all workers experience some form of retaliation when they raise a concern about something that they consider as unethical. Retaliation is also often protracted. The whistleblower may miss a promotion, get demoted or relocated, or their job responsibilities may suddenly change. These subtle forms of retaliation can build up, leading to the person's dismissal.

The complexity of being a whistleblower

There are many cases of whistleblowing that are dealt with internally, and they never reach the public arena. Those that do, have happened in organisations that don't want to stop their illegal activity, that want to carry on being corrupt and remove the person who has denounced their wrongdoing. As for the whistleblower, they find themselves in a position where they have to choose between their moral duty to defend the public interest, their duty of allegiance to their hierarchy with everything it brings in terms of subordination, obedience, loyalty, commitment and sometimes compromise. Speaking out breaks trust, clashes with the attitude of self-preservation of the majority which requires them to keep quiet, not create any waves and not pick a fight with those who are more powerful. What to do? Keep quiet and betray the general interest, or speak out and betray your own team? If whistleblowers have to break the law, it's not because they want to. We

can use the allegory of going through a red light to avoid an accident and potentially save someone's life. You can't go through a red light when you feel like it, but if it means saving a life, it's acceptable to break the highway code. For whistleblowing, the question to ask is if confidentiality is more important about what the whistleblower is raising the alert about.

Should whistleblowers be given incentives?

The United States government pays whistleblowers if they denounce tax evasion. But if a whistleblower denounces wrongdoing that affects the environment, for example, or education, they will not receive any money. Financial incentives are only offered in case of tax evasion or fraud. And money cannot help a whistleblower who has lost their job or who has been prosecuted and has to pay legal fees.

Journalism vs whistleblowers

Journalists are not whistleblowers, but they can sometimes be actors in bringing corruption to the public eye and denouncing the corruptors. The most important corruption scandal in Latin America was exposed by two Spanish journalists, Joaquín Gil and José María Irujo. They exposed the case of Brazilian construction company Odebrecht, which had 168,000 employees and branches in 28 countries.ⁱⁱ The company admitted paying millions of euros in bribes to governments in 12 countries, in return for signing public work contracts. The former CEO of the company, Marcelo Odebrecht, is now in prison. Gil and Irujo interviewed Rodrico Tacla Durán, who worked for the company's structure operations department. He said Odebrecht bribed more than 1,000 people around the world. He is not a whistleblower. He is under investigation by the Spanish high court, accused of bribery, money laundering and belonging to a criminal organisation. He knows what happened with Odebrecht and the details of the political time bomb that has already had an influence on Presidents Michel Temer of Brazil, Manuel Santos of Colombia and Danilo Medina of the Dominican Republic, along with former leaders of Peru and Brazil. Even though he is not a whistleblower, his cooperation with the US department of justice and the detailed secrets he

shared with the Spanish journalists have been indispensable in revealing this huge corruption scandal.

The role of the judiciary

Protection of whistleblowers is inadequate. Even within the police, there is a huge stigma to raise issues that may put the integrity of the institution at risk. If individual police officers do not support the actions of a police institution or services because they feel those actions do not respect human rights or citizens' entitlement to liberty, there is a huge stigma and an impact on them. There is the additional requirement to provide real evidence of misconduct or corruption and that can sometimes be interpreted as being dismissive or treating the whistleblower in an inappropriate way. Even in countries with independent statutory frameworks and state whistleblower legislation, the protection remains inadequate.

There are a series of ILO instruments that do provide some protection to whistleblowers. These include Convention 158 on Termination of Employmentⁱⁱⁱ. This Convention includes in its Article 5, "the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities" shall not constitute a valid reason for termination.

Convention 151^{iv} is broader. In its Article 9, it includes the protection for civil and political rights, which includes the respect for the right to speak, to be free of jail or being killed for exercising those rights. However, there are limitations. Article 9 of Convention 151 is meant to protect freedom of association and right to collective bargaining, so article 9 needs to be used solely in the context of exercise of freedom of association.

Organisational culture, national culture

When talking about whistleblowing, it is easy to find excuses for behaviour, often based on an idea of culture. This was true a few decades ago when some countries were considered more prone to corruption than others. But in those parts of the world, and elsewhere, we have seen very strong

anti-corruption protests and it is now universally recognised that corruption is not acceptable.

In organisations there usually reigns a culture that outlines the unwritten rules of the organisation, it makes people feel comfortable and points them to a certain kind of behaviour and attitudes. But organisational culture can influence people to accept attitudes that are ingrained in some organisations and may normalise corrupt behaviour, even at high government level.

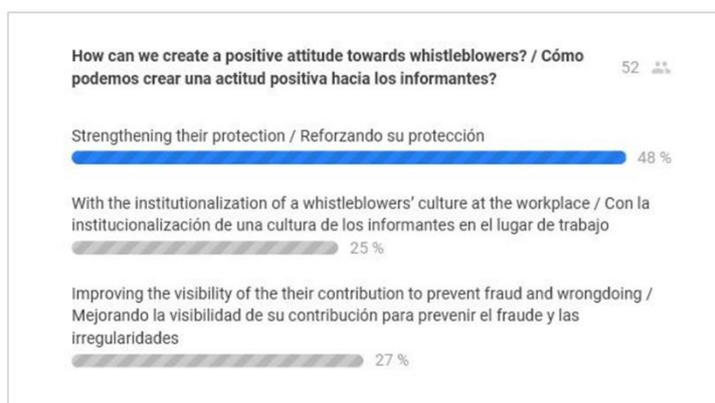
To strengthen the protection of whistleblowers, organisations need to create independent institutions to allow issues to be brought forward, where people can feel that when they raise the issue it will be heard and properly investigated.

The issue of confidentiality

Whistleblowers are often accused of not respecting confidentiality, but it is important to respect the proportion of the "crime" of the whistleblower against that of the wrongdoing against which they are blowing the whistle. Confidentiality, trade secrets, national security – all these are used as reasons to punish whistleblowers. One solution is to improve the visibility of the contribution that whistleblowing can have in the prevention of fraud and wrongdoing. There is a need to improve visibility, strengthen whistleblowers' image by highlighting the image of their contribution to reinforce their protection and create an institutionalised culture of zero tolerance and of support for whistleblowers.

How can we create a positive attitude towards whistleblowers?

In response to this question, 48% of the participants said that strengthening the protection of whistleblowers was vital.



Panel 2:

Challenging power: a whistleblowers' (un)fairy tale

Whistleblowers have provided many of the most important revelations in recent decades, exposing facts that criminal bands, corporations or even governments tried to hide. Panellists revealed the dangers and consequences of their courageous actions. The panellists for this session included **Darrell Whitman**, former investigation with the US Whistleblower Protection Program, **Annie Enriquez-Geron**, General Secretary of Public Services Labour Independent Confederation of the Philippines (PSILINK), **Javier Hurtado**, Office of the Controller General, Colombia, and **Miranda Brown**, Federation of International Civil Servants' Associations (Geneva).

Each of the panellists explained how their life has been changed since they blew the whistle. Here are their stories:

Annie Enriquez Geron, Philippines

“My first experience of whistleblowing was in 2003. I worked for a public institution, the Technical Education and Skills Development Authority (TESDA), that had organised a programme to issue artists with record books so that they could work as entertainers in Japan. But TESDA was offering the certificate against payment. Young girls with no singing qualifications were paying to obtain the certificate. My union exposed the corruption and within six months, the General Director of TESDA was held responsible and was dismissed. And those who blew the whistle were charged for libel for giving interviews and speaking out in public.

The second case cost me my job. It was a case of overpricing of training, technical books, national education training supplies, and materials and equipment. The union discovered that items costing less than one hundred pesos were being resold at 10,000 - 15,000 pesos. There were also cases where items were paid for, but not delivered. There was even a ghost scholarship for out of school youth and unemployed adults for which scholarship vouchers were issued but people did

not actually receive the training. All this was paid for by public money.

When civil servants denounce this kind of activity in their workplace, it is seen as insubordination and misconduct. I lost the job I'd had for thirty years; my husband was dismissed because we were working in the same agency. I had to put my daughter into hiding. The case is still ongoing. I have not been reinstated in my job but I'm employed in another public institution. In my experience, whistleblowing brings dismissal, harassment - the life and security of your family is also at stake and your career as a civil servant is finished. But I have no regrets. I would not hesitate to do the same thing again.”

Darrell Whitman, USA

“I was an investigator with the federal whistleblower protection program from 2010 to 2015. My job as investigator was to protect whistleblowers. As a union activist and civil rights activists, I was glad to have a job doing something I believed in. But unfortunately, it was quite the opposite.

Over the last forty years a very cooperative relationship between major corporations in the US government has built up and I discovered that the whistleblower protection program had been fundamentally corrupted by those relationships to an extent that it creates a very substantial risk to public health safety and financial security. Several major events over the last ten years can trace back to the failure to protect whistleblowers, including the 2008 financial meltdown that was known by my agency as early as 2006 and never reported for any kind of action.

I was investigator for a current case concerning Wells Fargo Bank. Over 60 people inside the bank became whistleblowers when the bank defrauded 3.5 million customers over a period of almost eight years. As a lawyer, I'm supposed to be an officer of the court and I have a duty to protect the law. As I worked my way up through the system, from my local supervisor who was the source of many of these violations of law, to the area director who covered up for the supervisor, I gradually realized this pattern existed throughout

my region and I reported it. Ultimately the whistleblowing resulted in the purge of all the investigators that were attorneys in my region.

I sent documentation to the Secretary of Labor, who is now chair of the Democratic Party. I was put under investigation as were the entire investigative staff in my region. My employment was terminated in 2015, and my colleagues were moved or fired. One of the whistleblowers I worked with had a stroke and is medically incapacitated. It's not an uncommon story, people pay a very high price.

We learnt that Fed Ex has been collaborating with the Federal Aviation Administration (FAA) to attack whistleblowers by removing their licenses. Major corporations and agencies have led the federal government to believe that their duty is to protect corporations. If you work for one of them, the retaliation will go beyond your job, your workplace, even your community.

Javier Hurtado, Colombia

In the health services in Colombia, public money is being siphoned off into the pockets of the former public prosecutor for Columbia. He worked for the health company, and there was no evidence that he had withdrawn money. It was his word against that of two rank and file servants - they were put in prison for two months and have had threats to their lives as well as that of their families. They still face criminal charges.

In another case against the former president of the republic, Álvaro Uribe, our office identified situations where he had used his power to increase the yield of his private land and used public investment in order to increase productivity of his land through irrigation. We discovered that the funds were going straight to the benefit of his family. When the situation was revealed, one of the managers in the office started to receive threats and he now has a bodyguard because he still under threat.

There have been cases where people have spoken about armed groups functioning even within the civil service. People continue to be threatened.

Miranda Brown, Australia/Switzerland

I'm a whistleblower at the United Nations and a former international civil servant. People look to the United Nations to set the benchmark for whistleblower protection, but sadly that is not the case at the UN.

I worked at the World Intellectual Property Organization (WIPO), based in Geneva, where I discovered with some other colleagues that the organization had been shipping American I.T. equipment and computers to North Korea and Iran without the agreement of the member states, nor the governing body of the organization.

I tried to encourage the director general of the organization to report these shipments to the member states. Not only did he refuse, he banned me from talking about it to member states. When I reported the situation to the member states, I was subject to harassment and ostracism, and I lost my job. During the same period, the US Congress opened an investigation into the shipment and I testified before the US Congress in relation to WIPO's engagement with North Korea and Iran.

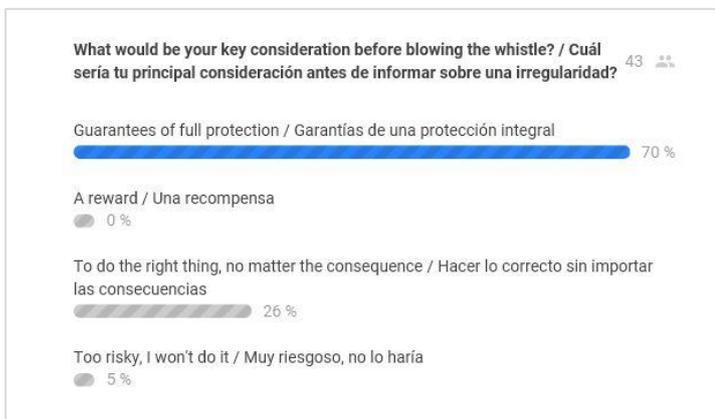
I then went to work for the UN's human rights office. My supervisor, Anders Kompass, was the director of the field operations and technical cooperation division. In the summer of 2014, he came across a report of child sexual abuse by peacekeepers in the Central African Republic and realised that no action had been taken to stop the abuse and he reported it to the French government. The French authorities dispatched a team of investigators to Bangui and it stopped. Nine months later, Anders Kompass was suspended from duty for reporting these allegations to the French government.

I became a whistleblower at the UN Human Rights Office when I reported the abuse of authority against Anders and the child sexual abuse to the other member states. At the UN, if you are on a fixed term contract, your contract is just simply not renewed and that's what happened to me at the Human Rights Office.

In the UN, there are tribunals but there no real protections for UN staff. Would I blow the whistle again? Of course I would. I didn't see myself as it a whistleblower. I just thought I was doing my job.

What would your key consideration be, before blowing the whistle?

A poll raised this question. The overwhelming response from the participants (70%) was that “full protection” would be the main consideration.



Panel 3:

Preventing, detecting and fighting corruption: emerging trends in effective whistleblower schemes

In this session, panellists discussed how the protection of whistleblowers has evolved and presented state-of-the-art legislation that effectively protects them. The panellists for this session included: **Tom Devine**, Legal director of Government Accountability Project (GAP), **Veera Littmarck**, Attorney at Law and Legal Adviser of ST Union (Sweden), **Delphine Pollet-Panoussis**, PhD in public law and co-editor of the book *Les lanceurs d'alerte: quelle protection juridique? Quelles limites?*, and **Scott Chamberlain**, Director of Labour Relations and General Counsel Association of Canadian Financial Officers.

We are in the middle of a global legal revolution for freedom of speech, at least in some parts of the world. There is a cultural revolution of acceptance for whistleblowers and internationally, the law is changing.

In addition to freedom of speech, for whistleblower laws to be effective, the legal burdens of proof must be such that people can provide evidence without facing a wall of impossible legislation. Whistleblowers must have access to due process in a fair forum, where whistleblowers can have a full hearing to convince the institution that retaliated against you to change its mind, not a kangaroo court such as in the United Nations. The defendant must be able to have a fair day in court. They need effective remedies – in many countries whistleblowers may win their case but the compensation is so low and the consequences so high that they're still financially ruined, or the remedy was so late that it didn't matter anymore because they've already gone bankrupt or lost their home.

USA

Freedom of speech has been effective in countering corruption in the United States since the law was revised in 1986. Due to whistleblower action on government fraud contracts, the US government has gone from collecting about ten million dollars a year to over a billion dollars a year against fraud. In the last few years it's been over three billion dollars a year. It was effective concerning the World Bank where President Paul Wolfowitz was going to lead a crusade against corruption worldwide, and thanks to whistleblowers it became apparent that his main qualifications were how to engage in corruption and he had to resign after a few months. In the environment, whistleblowers exposed a company in Pacific Northwest which held a press conference, saying they lost track of 5,000 gallons of radioactive waste, whereas in fact they had lost track of 440 billion gallons of radioactive waste from their own records.

Sweden

In Sweden, two new acts of legislation came into force in January 2017. Even before the legislation came into force, trade union members in Sweden benefitted from legal aid in case of legal problems in the workplace and the right to freedom of speech, freedom of press and public access to information, giving rights to all public employees

to inform the press either anonymously or not. As privatisation has grown in Sweden, the new law has given the same rights to those working in the private sector and this is a big breakthrough for freedom of speech and the freedom of giving information to the media.

The new legislation also brings protection to workers who report serious irregularities. However, they must report "in the right way", ie, only criminal offences that could result in imprisonment. The reporter also needs to go through the employer, using internal channels, and only in cases where the internal channels do not produce results can people report externally.

Canada

In Canada, whistleblower legislation is still work in progress for the trade unions. They encourage other countries not to look for an "off the shelf" model but to use a system that will work best in their country's jurisdiction, highlighting that the best whistleblower legislation takes the most effective aspects from other jurisdictions that match the community, country, jurisdiction and offers the best responsive to its needs.

Canadian unions describe whistleblowing as an essential transparency and accountability tool which contributes to the progress in many of the struggles unionists are working towards. Having appropriate whistleblower protection can contribute to gender equality, to tax fairness, to end the privatization of public services.

United Kingdom

In the United Kingdom, when someone discovers illegal or unlawful actions, they first must inform their hierarchical superior using internal channels. It is only if their initial reporting does not lead to any action that the person can reach out external authorities. If at that point they realise that nothing is being done, the final step is to reveal the information on the public stage, then turn to the media. In many cases in rulings handed down by the European Court of Human Rights, the fact that a whistleblower respected these various phases, going first to the hierarchical superior then to the administrative authority and only then going to the

media, it is often seen as proof of good faith on the part of the whistleblower, namely that they did everything possible to try to change the situation before informing the media.

Even though the UK was pioneer in whistleblower protection and its law of 1998 is one of the world's best whistleblower laws, it has a lot of flaws. For example, none of the decisions are reported decisions so it is not possible to research how the law has been interpreted in other situations. It is also compromised by the Official Secrets Act – there a supremacy of law provision in the UK, so that free speech rights can trump those national security barriers.

Do we need an international framework to protect whistleblowers?

There are major gaps between countries when it comes to whistleblower protection. Around 60 countries have legal protection for whistleblowers, and of those around 50 have protection in specific fields such as corruption, environmental legislation for example. About ten countries have global whistleblower protection, regardless of the sector in which applies. The first country to bring in global protection was the United Kingdom in 1998, it was followed by others including Hungary, Ireland, Serbia, France, South Africa, Ghana, Uganda, New Zealand, Japan and Korea. The protection differs from one country to another and this raises the question: should there be international standards which allow for more uniform protection in different countries?

Council of Europe

The Council of Europe's ministerial committee submitted a document in April 2014 on how to obtain good protection of whistleblowers. The document concluded that the legislation and protection should be global, to ensure that protection is on equal footing regardless of what sector is concerned by the whistleblowing. Good whistleblower protection calls for protection in cases of all potential direct and indirect retaliation, including sanctions and penalties. Firing must be cancelled and fully prevented by law. In civil, administrative and criminal wrongdoing, more specifically in the field of criminal wrongdoing, if a

whistleblower has been tried because they shared something that was protected by law, as soon as they are recognized as a whistleblower, they should not be sentenced. The whistleblower should also be freed of the burden of proof and considered as acting in good faith.

Good practice - Serbia

The case of Serbia is an example of good practice in whistleblower protection. The country adopted a whistleblower law 18 months ago and over 50 percent of the cases have been successful. The law was developed from the grass roots with all stakeholders represented, from the companies to unions, prosecutors, parliamentarians, the media, NGOs, international experts. The whistleblowers had an input to the law, as did the population through town hall meetings throughout the country. As a result, the law had a lot more legitimacy when it was passed, and characteristically, its article on freedom of speech had no arbitrary loopholes such as context, formality, timing or audience.

Twenty pointers for whistleblower protection

1. Public freedom of expression.
2. Freedom of speech with no loopholes so that it covers all of the abuses of power that threaten society.
3. The right to refuse to violate the law so that you can walk the talk and not just make noise about it.
4. Protection against "spillover retaliation" - effective whistleblowing may involve more than one person.
5. Protection for all citizens, not just employees. In Serbia, for example, companies can blow the whistle against government abuses of power such as extortion against them; newspapers have whistleblower protection because journalists get retaliation from the government.
6. Confidentiality protection - if they don't know that you're the whistleblower it's the best protection against retaliation.
7. Protection against unconventional harassment.
8. Shielding from gag orders - sometimes a prerequisite of employment is that you've waived your rights or some other law will supersede the whistleblower law. Supremacy must be with the whistleblower rights.
9. Essential support services - one reason the

Serbian work so effectively is that there was so much training there. A judge cannot issue a decision in that country without being certified as having been trained that they know what the laws mean and the outreach has been extreme.

10. A whistleblower has a right to a genuine day in court, independent of conflicts of interest.
11. Effective arbitration.
12. Realistic standards to prove rights, without the burden of proof.
13. A realistic time frame to act on your rights - some laws only give thirty days and people don't even know they have rights before it's too late to use them.
14. No loopholes compensation so that direct and indirect effects of retaliation are covered.
15. Interim relief - cases can take years to play out and interim relief can shorten the length of cases while avoiding financial hardship to the whistleblower.
16. Attorney fees and other costs.
17. Transfer preference, so that a whistleblower doesn't need to work for their boss in order to be defeated in a lawsuit.
18. Effective corrective action.
19. Enfranchising the whistleblower to make a difference.
20. Regular reviews of the law.

How can international law protect whistleblowers?

The nature of unjust, fraudulent and corrupt activities isn't confined within borders. There are parallels between international cooperation in whistleblowing and that of tax fairness. Several countries have effective legislation for their nationals who commit corrupt activities abroad, but is it possible to apply the same laws to whistleblowing?

The International Labour Organization has developed some international standards that can be applied to whistleblowers. However, some of these instruments are not binding on states. They guide states in adopting legislation, but there is a call for a Convention on the issue that would ideally be ratified by states to ensure better harmonization of whistleblower legislation.

On the European Union level, an EU directive is being discussed on whistleblower protection in Europe, which aims to improve protection in EU member countries. The directive would put in

place a European authority on whistleblowing. The question then would be how to apply an international framework on the protection of whistleblowers.

Have improvements in legislation in countries with whistleblowers protection also improved the quality and quantity of whistleblowers?

In Canada, despite existing legislation, a five-year review, published ten years after the legislation came into force, showed that there had been very few successful complaints. It demonstrated that the best practices from ten years ago needed to be reviewed, and that domestic legislation is important to make workers feel protected and safe. Another interesting phenomenon is that as whistleblower rights get stronger, retaliation increases in both volume and intensity. Levels of retaliation are directly related to the fact that whistleblowers are making more of a difference than ever before. It's more dangerous than ever before so whistleblowers need stronger rights.

These need to take account of:

- the nature of corruption and abuse of power which are very universal.
- the tactics for retaliation.
- the unique legal systems and procedures of each nation.

What can unions help with when legislation is not enough?

Many of today's whistleblower laws are Trojan horses - a more effective way for whistleblowers to blow the whistle without fear is through solidarity and campaigns for the truth rather than reliance on written legislation.

Trade unions can also guide their members through existing legislation. Some have referred whistleblowers to the media, or filed grievances through the labour relations process. Some cases fall under the legislation for health and safety complaints, while some are reported as harassment. The union can use many tools to help their members.

What are the big challenges for whistleblowers' protection in the future?

To this question, 44% of responders considered that the lack of an international framework was the biggest challenge.



Panel 4:

Unions as a force for transparency: how to strengthen the successful partnership between unions and whistleblowers

This panel, facilitated by **Anna Biondi**, Deputy Director of ACTRAV, examined the ongoing campaigns by UITOC, Whistleblower EU, and others, and addressed the insights that emerged during the symposium and how these translate into shared efforts and directions for unions to follow-up and to build future alliances. The panellists for this session were: **Nadja Salson**, EPSU and Whistleblower EU (Belgium), **Sergio Hemsani**, UITOC (Argentina), **Pierre Habbard**, Trade Union Advisory Committee to the OECD (TUAC) and **Richard Perron**, President SPGQ (Canada).

Anna Biondi introduced the session, expanding on the ILO standards that had already been introduced during the first panel. She mentioned the Digest of the Freedom of Association Committee^v, which is mostly involved with the infringements of trade union rights, but some clauses of it can enlarge the scope of provision for whistleblowers' protection. She also mentioned the adoption in March 2017 of the amended version of the Tripartite Declaration on

Multinational Enterprises and Social Policy^{vi}, which gives access to the remedy and the examination of grievances for

“Any worker who acts individually or jointly with other workers and considers that he or she has grounds for a grievance should be able to submit such grievance without suffering any prejudice whatsoever as a result and have such a grievance examined through an appropriate procedure.”

In Europe

A coalition of European trade unions, several NGOs including Transparency International, a number of academics and some political groups in the European Parliament have been campaigning for the last year for an European legal framework on whistleblower protection. Trade union strength and public sector ethics are vital, in view of the austerity measures in Europe and beyond with cuts in jobs, wages and in trade union rights, all of which contribute to creating a very bad climate for whistleblower protection.

The need for European legislation has become urgent as people realise that whistleblowers play a vital role to prevent, report, or remedy wrongdoings. The EPSU campaign on tax fairness and tax transparency was a starting point. There are a number of tax scandals, including LuxLeaks. However, during the same period, the European Commission adopted a European directive on trade secrets. The LuxLeaks scandal exposed the very official tax status between the Luxembourg administration and companies to reduce tax payments, on which everybody agreed on the need to legislate and stop tax dumping in Europe. At the same time, the European Commission and European governments were extending a very broad definition of trade secrets which could include restructuring and relocation plans. The trade secret directive, after a number of amendments, offered a very small window of opportunity for EU legislation on whistleblower protection.

Three years after LuxLeaks was exposed, not a single company has been sanctioned and the two whistleblowers Antoine Deltour and Raphael Halet,

have been sentenced to a suspended prison term.

The coalition published a petition, which is still running. It has 80,000 signatures and the target is 100,000 signatures. The question is no longer about the need for EU legislation, but the nature of the legislation. The first measures to protect whistleblowers were in the public sector, but when there is corruption in the public sector there is a private corrupter so whistleblowers need horizontal protection. Whistleblower rights are workers' rights - the protection can go beyond the employee/employment relationship and it must cover the employment relationship for present and past employees. Trade unions should use the strong European treaty legal base on workers' rights.

There is also a clear consensus on the need of a European legal framework to help protect cross-border cases. The LuxLeaks tax scandal is an example of this, it's a French employee working for a multinational in Luxembourg and for many of recent cases there is a cross-border dimension to be taken into account.

One year after the launch of the coalition, the European Parliament has voted in favour of putting in place a new EU legislation. The report of the European Parliament has been circulated but there is no draft directive yet. This is the European Parliament's own initiative and unfortunately the European Parliament has no legal right of initiative, only the European Commission has at the European Union level. However, it provides a good starting point and it allows to keep the issue on the agenda.

Business Europe represents the employers group at European level and they are fiercely in favour of keeping whistleblower protection as an internal matter. However, the European parliament voted in favour of having both internal and public disclosure channels. The ball is now in the camp of the European Commission. The President of the Commission, Jean-Claude Juncker, promised that there would be proposal on the table by the end of the year, and the coalition remains hopeful that the European Commission will indeed issue a proper legislative proposal.

For trade unions, it's extremely important to have a European position from the ETUC and it would be extremely useful that PSI and its allies reinforce those demands and come together to press for an international legal framework.

A campaign for an ILO standard

Workers in justice, tax collectors, and independent audit bodies are a category of whistleblowers that have access to sensitive information for the fight against corruption within the State, they are therefore “qualified whistleblowers”.

These workers have the mission of alerting, preventing, judging and reporting on acts that are detrimental to the public good, transparency and good governance of public policies. While doing their job, these workers are subject to harassment and violence by corrupt public and private sectors that seek to penetrate, co-opt and weaken the role of the institutions that protect the State and the quality of public services.

These workers detect most acts of corruption early in the process, but unfortunately, in doing so, they are subject to the same reprisals as other whistleblowers, losing not only their jobs but sometimes even their lives.

If these qualified whistleblowers do not benefit from the necessary working conditions that guarantee the free exercise of their functions, the fight against corruption is seriously weakened. Corruption is a global issue, so the fight against it requires international labour and trade union strategies.

The International Union of Workers of Control Bodies (UITOC), PSI, and the Network that brings together the unions of the Public Control, Justice and Tax Inspectors of Argentina (APOC, UEJN, CLTJ and AEFIP), have been building international alliances between trade unions and non-governmental organisations for more than a decade.

One of their major ongoing projects is the campaign for the adoption of an ILO standard that protects the decent working conditions of these workers and would allow workers who are subject

to objective labour violence to report it and be protected by their unions before receiving any sanctions or having their job transferred to another area.

Good governance is needed to balance the alarming increase in inequality and social injustice that constitute the main threat to peace and progress. Corruption is a result of the actions of undisciplined and dominated officials who do not fulfil their function of protecting public policies.

For these reasons, an international alliance for the protection of whistleblowers is needed, which values and showcases their work, and in which we can share global tools and campaigns to strengthen the defence of their rights.

At national level - the case of Quebec

In Québec, Canada, the SPGQ used a 2011 PSI study on corruption and whistleblowers to carry out a case study on the situation in Quebec. With the aim of adopting a law to protect whistleblowers, they made several recommendations to the government:

- the burden of proof on victims of reprisals
- the law must be comprehensive and not sector-specific
- it must be administered by an independent body (the ombudsman in Quebec in this case)
- the law must be applicable to the private sector when these companies have contracts with public bodies
- its description must not limit the definition of the acts of reprisals that should be covered.

A tripartite meeting in 2014 discussed the eventuality of an international convention on whistleblowers. There was resistance from some government representatives, but members of the employers' group reacted well to the workers' documents and recommendations. This achieve a consensus that an international convention would include measures to protect whistleblowers.

This in turn gave unions in Quebec the necessary background to provide an incentive to the Quebec

government to apply the recommendations that had been put forward. A law was adopted after many years of struggle in Quebec. Although it's not perfect (for example, it doesn't cover the Municipal sector) it includes the elements listed above.

The union is now putting pressure on the Canadian government to follow Quebec's example on a national level.

Trade Union Advisory Committee to the OECD (TUAC)

The Trade Union Advisory Committee to the OECD, TUAC works closely with PSI, the ILO and the International Trade Union Confederation (ITUC) to represent the voice of the labour movement at the OECD.

The discussion of whistleblower protection of the OECD is at the convergence of different policy issues.

1. Historically, the OECD has taken a stand on corruption in the private sector with the convention of 97 on bribery and corruption which was followed by the recommendation which is a non-binding standard.^{vii}
2. On responsible business conduct, the OECD revised their Guidelines for Multinational Enterprises in 2011 - it includes a general principle of protection of whistleblowers.^{viii}
3. On money laundering, the OECD is housing the Financial Action Task Force on money laundering.^{ix}
4. On tax - without whistleblowers there would be no agenda on tax evasion and tax avoidance.^x
5. On corporate governance with the influence of the US: the Dodd-Frank Act^{xi} and the earlier Sarbanes Oxley Act^{xii} These acts contain some non-binding wording on protection of whistleblowers.
6. On public sector integrity - the OECD has published a recommendation that that all 35 OECD countries are supposed to apply for their own public sector administration.^{xiii}

Working with TUAC, PSI has been working to try to influence the outcome of that text, but the results are mixed. PSI has managed to include wording on the protection of whistleblowers as well as on the role of unions in ensuring an environment that is conducive to openness.

Within the OECD, TUAC has to deal with BIAC, the Business and Industry Advisory Committee. BIAC is trying to keep the conversation at the level of reporting internally, having the entire conversation on whistleblower protection limited to internal business and by opposition to push for an international standard or convention on what they call self-declaration or self-disclosure. This means that in case of corruption, a business or public administration would voluntarily report back on cases of corruption. However, this would also allow them to reduce their liability.

This is another reason to push for international standards involving the whole international labour movement. The OECD is influential within the EU countries, and also within the G20.

Protecting whistleblowers matters for corruption, but OECD surveys show that when businesses are asked what are the main topics that your company has to deal with, fraud comes first, followed by occupational health and safety, and thirdly, industrial relations. Tax evasion comes afterwards. Whistleblower protection is a core key instrument, it matters for the accountability of business, for the accountability of public administration and for trade union action.

From the floor

A participant drew attention to two cases of corruption in Colombia. The major energy company in the country was up for sale but there was only one bidder, and there was no bidding. As the law states that bidding for this auction was obligatory, a fund purchased the company. The second case concerns a water treatment plant planned for Bogota. A decision was made to install a water plant, but the unions suspected corruption when authorities changed their mind, saying that ten years down the road the plant would not be well used.

A participant from Venezuela explained that whistleblowers in the country can be accused of betraying the country - those who report situations of corruption are imprisoned with criminal charges. The legal system itself is corrupt: judges are appointed by the party in government and anyone who opposes the government's party does not benefit from the rule of law when it comes to his or her defence. He asked what a trade union organization can do when the rule of law is so corrupt, especially when the legal system is so corrupt, how can they come before the ILO to blow the whistle and guarantee protection for workers?

One of the panellists said he was surprised to learn that there had been only seven whistleblower cases before the ILO administrative tribunal from 2013-15. He suggested that PSI and ILO upgrade the ILO whistleblower system. Only about two out of the twenty best practices standards are reflected in the current practices and people have to make a written complaint to an ethics office that is staffed by one person, the cases of the tribunal take three to four years and a decision that is challenged as retaliation is upheld if there is a rational basis for it.

Another participant from Colombia explained that four years ago the unions held three Latin American summits and shared various cases of whistleblowing on the national board, with an international focus. They now hoped that the ILO would take action. She mentioned that in Colombia the unions feel that the ILO is closed-minded about the topic of corruption and they hope for a broader approach so that trade unionists and workers are protected, while seeking transparency in the country. When trade union members report corruption in Colombia, they are sometimes assassinated. Colombia is at the top of the list in terms of deaths due to reporting corruption and they want to ensure national protection for trade unions in the country and full protection when they act as whistleblowers.

Another participant said that what unions can do is to represent workers. The rate for union membership for example in Quebec is 80 percent in the public sector and 40 percent in the private sector. In the US, there has been a real drop in

trade union membership so the role of unions is to think about how to support all workers, whether or not they are members of unions, and they need legislative frameworks protecting all workers. Unions have a role to play, not least to ensure that whistleblowers are not alone.

A panellist added that historically, there have always been individuals to shed light on wrongdoing, and trade unions have picked up those concerns. It has changed from individual concern affecting many people to a collective concern. In the case of EU legislation, each country will need to transpose it into domestic legislation so it has a binding interest. All legislation needs domestic mechanisms, domestic legislation, trade unions, trust in the public sector and in the work of civil servants to implement the legislation and to make it work.

Another panellist suggested that it was important to open a single window for assistance on the ILO guidelines to help whistleblowers. He stated the need for global trade union solidarity promoting global work of trade unions, and that we need to show that trade unions are not part of the problem but part of a solution in ending corruption.

Another panellist highlighted the fact that tax evasion represents 5,000 billion dollars per year. That sum could put an end to the link between corruption and tax evasion. All countries need to develop a culture of fighting corruption. For example, in the United States there are services that are very strong in fighting corruption, but the US electoral system opens the door for private companies influencing the outcome of elections. We need a culture to fight corruption - it must be an international culture so that trade unions facing corruption in their countries highlight what is going on elsewhere in the world.

Conclusion

The symposium addressed the complexity that surrounds both the figure of whistleblower and its protection. However, it is very clear – on the one hand – the fundamental role of whistleblowers in fighting against corruption and – on the other – the risks they face. The participants expressed their

shock at the situation of some workers who have lost their jobs and sometimes their lives when exposing corrupt practices in their workplace.

The overriding message of the Symposium focused on the importance of having a complete and uniform legislation that protects whistleblowers. This will only be possible if there is an international framework for effective protection of whistleblowers.

ⁱ <https://www.2030spotlight.org/en>

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https://elpais.com/internacional/2017/09/29/actualidad/1506703470_585468.html

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http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158

^{iv}

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312296

^v

http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_090632/lang-en/index.htm

^{vi} http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

It was agreed that PSI, together with affiliated and associated organizations, will work proactively on the adoption of instruments for the protection of whistleblowers and, in particular, on the adoption of an international ILO standard for the protection of whistleblowers, especially those of the independent audit bodies.

^{vii}

<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

^{viii}

<http://www.oecd.org/daf/inv/mne/2011update.htm>

^{ix}

<https://www.oecd.org/cleangovbiz/toolkit/moneylaundering.htm>

^x <http://www.oecd.org/ctp/fightingtaxevasion.htm>

^{xi} <http://dodd-frank.com/summary-of-corporate-governance-provisions-in-the-dodd-frank-act/>

^{xii}

http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27

^{xiii}

<http://www.oecd.org/gov/ethics/recommendation-public-integrity.htm>