



The protection of sources and whistleblowers

Submission to the United Nations Special Rapporteur on
the Right to Freedom of Opinion and Expression by
Association for Progressive Communications (APC)

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1. Introduction

APC welcomes the opportunity to comment on the protection of sources and whistleblowers for the October 2015 report of the Special Rapporteur on the Protection of the Right to Freedom of Opinion and Expression to the UN General Assembly.

Whistleblowers¹ reveal misconduct at great personal and professional risk. They are routinely subject to harassment, job termination, arrest, and even physical attacks for exposing wrongdoing. Whistleblowers need strong legal protections to protect them from retaliation and enable them to report offences safely and freely.

But even in contexts where laws in place to protect whistleblowers are lacking, they are rarely enforced or are completely ignored. The courageous actions of whistleblowers defend human rights, save lives and billions of dollars in public funds, contribute to making governments more transparent and companies more accountable. ICTs have played a pivotal role in aiding whistleblowers and sources as well as in generally enabling more transparency. They also pose challenges to the protection of whistleblowers and sources.

APC is an international network and non-profit organisation that has endeavoured to use information technology for justice for the last 25 years. We advocate for everyone to have affordable access to a free and open internet to improve our lives and create a more just world. APC believes that the ability to use the internet to make governments more accountable and transparent at global and national levels should be promoted and protected.

Our submission focuses on the global and national contexts for the protection of sources and whistleblowers, with highlights on the technical considerations and limitations on the practice of these rights. While presenting cases on violations by states on the practice of whistleblowing, especially those within the context of national security, we also expose how unsecure online communications can impact the protection of sources, and share local perspectives from practicing journalists and human rights defenders. We end with providing specific recommendations.

1 For the purpose of this submission we use the definition of the term 'whistleblower' used by the Special Rapporteur in his call for comments: "...any person who reports or discloses information of a threat or harm to the public interest in the context of their work-based relationship."

2. Protection of Sources and Whistleblowers and Law

2.1 Protection of Sources and Whistleblowers in International Law

A growing number of international instruments recognise the importance of whistleblowers and require or encourage states to adopt measures to protect disclosure. Whistleblowing is an integral part of freedom of expression, protected under Article 19 of the ICCPR as well as other standards such as UN Convention against Corruption.²

The UN Human Rights Committee noted in its General Comment no. 34 that:

“States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.”

Furthermore, the Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation (2008) of the four special mandates stated that:

“Normal rules on the protection of confidentiality of journalists’ sources of information –including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means -should apply in the context of anti-terrorist actions as at other times.”

The UN Convention against Corruption binds all of its signatory countries to consider legal provisions to protect people who report corruption-related offences from retaliation. In Article 33 (Protection of reporting persons), it provides for whistleblower protection:

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

The implementation of Article 33 in domestic legal systems is crucial for the protection of whistleblowers and for their contributions to be taken seriously.

2.2 Protection of Sources and Whistleblowers in National Laws and Jurisprudence

Nearly a third of UN member states already have some laws covering whistleblower activity³. Most European countries expressly protect the confidentiality of journalistic sources.

Nonetheless, some frameworks, such as those in the United States and United Kingdom, have proved seriously inadequate when the information disclosed concerns the activities of the state itself, especially when national security is invoked. There has been an increasing trend in the United States of America to file charges of espionage against government employees or contractors that have uncovered misconduct or any conduct

2 https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

3 <https://wikileaks.org/w/images/c/c0/Silencingsources.pdf>

that violates human rights, with the Obama administration charging eight whistleblowers under the Espionage Act.

In an Inter-American Convention for Human Rights (IACHR) hearing on Freedom of Expression and Communications Surveillance by the United States⁴, held on October 28, 2013, participating organizations indicated that regulations that would protect informants from retaliation for the disclosure of information of public interest are not truly available to personnel from the national security sector. The current regulations take the form of a Presidential Policy Directive issued in October 2012 and do not apply to contractors or members of the armed forces, do not have legal mechanisms to redress retaliations, and create a discretionary administrative review mechanism whose decisions would not be binding on the intelligence agencies.

They further stated that the laws of the United States for the criminal prosecution of public servants who disclose or leak national security information and the protection of whistleblowers do not meet international standards on freedom of expression and information. They asserted that the offenses defined in the laws are vague and overly broad, and do not require intent or harm. The offenses and the penalties also fail to take proper account of the public interest of the information disclosed, and they fail to provide protections to security sector whistleblowers. Finally, the penalties established for the disclosure of classified information, particularly pursuant to the Espionage Act of 1917, were said to be disproportionately severe.

Middle East

Most Middle Eastern countries lack laws protecting whistleblowers. In the Gulf Cooperation Council countries, the lack of whistleblower protection laws in general has led some progressive thinking governmental departments to implement their own programmes. The Omani State General Reserve Fund, a sovereign wealth fund, adopted its own wide-ranging whistleblowing programme aimed at encouraging the reporting of illegal practices.

Furthermore, the private sector in the Middle East, mostly multi-nationals with their headquarters in Europe, have led their own initiatives to protect whistleblowers that expose corruption and illegal activities in their own organisations. Very few local corporations and companies implement such programs.⁵

On the 24th of June, 2010, the National Network for the Right of Access to Information in Lebanon submitted a draft law on whistleblower protection to the Lebanese parliament. The draft law was approved by the Administration and Justice parliamentary committee in March 2015. It is now waiting to be submitted to the general assembly to be voted on.⁶

Jordan also has no laws to guarantee the protection of whistleblowers. Additionally, the Anti-Corruption Commission Law of 2006, stipulates that claims of corruption, which are proved false, may result in the punishment of the complainant.⁷ On the 13th of April, 2014, Bahrain arrested a person who leaked papers proving that Jordan has sent gendarme forces to Bahrain, a claim which both countries have repeatedly denied.⁸

In 2010, 21 members of the Arab League signed an Arab Anti-Corruption Convention (all

4 <http://www.oas.org/cidh/audiencias/hearings.aspx?lang=es&session=132>

5 <http://omanlawblog.curtis.com/2014/04/whistleblowing-policy-in-oman.html>

6 <http://transparency-lebanon.org/Ar/whatwedodetails/1/26/0>

7 https://www.globalintegrity.org/global_year/2011

8 <http://en.gerasanews.com/bahrain-arrests-responsible-of-leaked-information/>

except Somalia). While the treaty contains some protections for sources and whistleblowers, they are inadequate and limited to the scope of reprisals by non-state actors. Furthermore, 15 of 22 Arab States have so far ratified or acceded to the United Nations Convention against Corruption (UNCAC). Yet, none of these countries have modified their national laws to be in line with the convention, except for Algeria, which passed a new whistleblower protection act in 2014.⁹

The Americas

In the Americas, the constitutions of Brazil, Paraguay, Argentina, and Ecuador provide for explicit source protection; protection is granted in legislation in El Salvador, Peru, Chile, Brazil, Uruguay, Venezuela, and Panama. Within the Organization of American States (OAS) the Inter-american Convention Against Corruption (1996)¹⁰ states in its article 3 that States Parties should consider the implementation of:

“ 8. Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.”

The OAS has developed a draft model law to facilitate the protection of whistleblowers when reporting of acts of corruption¹¹.

Differently from many parts of the world, the OAS approach represents an effort to consider the protection of whistleblowers under the same agenda as human rights. Through the mechanisms offered by the Inter-American System of Human Rights (ISHR), for example, it can promote changes at the public policy level and build institutional frameworks for protection of whistleblowers. It also allows for more visibility for this issue, encouraging its incorporation in national and international forums. This demonstrates how the Inter-American Convention on Human Rights (IACHR) can be complementary to national regulations on whistleblowers protection¹².

9 [http://www.ad.gov.eg/Admin/EditorDocs/Int_Cooperation/
%D9%82%D8%B1%D8%A7%D8%B1%20%D8%A7%D9%84%D8%AA%D9%88%D9%82%D9%8A
%D8%B9%20%D8%B9%D9%84%D9%89%20%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A
%D8%A9%20%D9%85%D9%83%D8%A7%D9%81%D8%AD
%D8%A9%20%D8%A7%D9%84%D9%81%D8%B3%D8%A7%D8%AF.pdf](http://www.ad.gov.eg/Admin/EditorDocs/Int_Cooperation/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%A7%D9%84%D8%AA%D9%88%D9%82%D9%8A%D8%B9%20%D8%B9%D9%84%D9%89%20%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A9%20%D9%85%D9%83%D8%A7%D9%81%D8%AD%D8%A9%20%D8%A7%D9%84%D9%81%D8%B3%D8%A7%D8%AF.pdf)

10 <https://www.oas.org/juridico/english/treaties/b-58.html>

11 http://www.oas.org/juridico/english/draft_model_reporting.pdf

12 <http://www.cdh.uchile.cl/media/publicaciones/pdf/99.pdf>

3. Technical Considerations and Limitations to Whistleblowing and Protection of Sources

3.1 Electronic Surveillance and Protection of Sources

With the proliferation of electronic surveillance over the previous decade, the safety of anonymous sources and whistleblowers no longer depends only on ethical and legal protections, but also on information security. Even if ethical and legal protections are in place, mass surveillance risks rendering them meaningless. The Snowden revelations in 2013, themselves a proof of the importance of whistleblowing, have revealed the extent of electronic surveillance and the prevalence of such practices across all electronic communications platforms.

However, the majority of journalists and civil society organisations still exchange confidential information over regular phone lines, text messages and unencrypted email. This is a significant challenge especially within the context of state or corporate surveillance, as the relevant actors can sidestep the legal protection of sources and whistleblowers, and identify their identities by other means.

The UNESCO global study on freedom of expression, access, privacy and ethics online¹³ posed this challenge, asking:

“...whether the protection of the confidentiality of journalistic sources should be similar to, or dramatically different, in the online digital media environment, where it is possible to technically track networks of communication. In this light, should there be greater or different kinds of protections for journalists in protecting the confidentiality of their sources?”

3.2 Protection of Sources Beyond Traditional Journalism

Civil society and human rights defenders, like journalists, often depend on sources for their work. However, the right to preserve the confidentiality of sources is usually referred to, both in international and domestic law, as a right of journalists. NGO activists and academic commentators, and other professions that rely on being middlemen to carry information of public interest to the public deserve the same protections, to ensure that sources are not deterred from conveying important information to them.

This is why some international bodies have opted to entirely avoid use of the term ‘journalist’. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission for Human Rights states:

“Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”

Other bodies have formulated wider definitions of the word journalist, such as the Recommendation adopted by the Council of Europe’s Committee of Ministers, which states:

“The term ‘journalist’ means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.”

¹³ <http://www.unesco.org/new/en/internetstudy>

The UNESCO internet study¹⁴ included proposals to expand the definition of 'journalist' to include social media producers and human rights advocates in the context of source protection coverage.

It also notes that:

“Updating regulation that protects the confidentiality of journalists’ sources to include digital aspects, was underlined as being central to press freedom in research specially commissioned from the World Association of Newspapers and New Publishers (WAN-IFRA) as a contribution towards this study.”

3.3 Leak Platforms

The gaps in protection to whistleblowers, as well as the rise of ICTs and the ease of electronic transmission has given rise to new online platforms that enable whistleblowers to publish information anonymously. The global nature of the internet has enabled this information to stay available online. One such platform is Wikileaks, which is a journalistic organisation that provides a secure online “dropbox”, enabling anonymous whistleblowers to deliver information without placing themselves at great risk.

This has inspired internet activists to create similar platforms, such as Globaleaks and Associated Whistleblowing Press. Whilst not journalistic institution themselves, and not involved in publishing information, these platforms enable and support whistleblowing and investigative journalism. Globaleaks, for example, is an open source platform that enables institutions to install anonymous, and secure whistleblowing platforms. The platform has been implemented by over 24 institutions at the time of the writing of this report.¹⁵ One notable implementation is AfriLeaks¹⁶ designed specifically to support investigative journalism in Africa.

These types of secure platforms have failed however, to prevent significant reprisals against people who have leaked documents to them. Chelsea Manning, the 27-year-old US Army private who provided WikiLeaks with classified military documents in 2009 and 2010, is currently serving a 35-year prison sentence. American hacktivist Jeremy Hammond, 30 is serving a decade for his part in stealing private data from an intelligence firm that was later published by WikiLeaks. And in January 2015, writer Barrett Brown, 33, was dealt a 5.5 year sentence, in part for aiding Hammond after the hack occurred.

The platform itself and other related internet platforms was also subject to attacks. The US government has succeeded in pressuring several online platforms, such as Google, to surrender private data of people associated with Wikileaks. US companies have also come under intense political pressure to remove any connection to, or support for, WikiLeaks. After the 2010 US diplomatic cable leak, Amazon stopped hosting the website on its servers, and a distributed denial of service attack forced a domain name service to drop the Wikileaks domain, essentially removing a well known address for the website from the internet’s address book.

In a more recent case of reprisals, email service provider Lavabit was forced to close down in 2013 after it was asked by the US government to compromise its entire privacy system for the sake of eavesdropping on a single customer, largely presumed to be

14 <http://www.unesco.org/new/en/internetstudy>

15 <https://en.wikipedia.org/wiki/GlobaLeaks#Implementations>

16 <https://www.afrileaks.org/>

Edward Snowden, a whistleblower that revealed mass surveillance and misconduct by the US National Security Agency.

3.4 Issues Raised at APC Member in Bulgaria, Bluelink, Meeting on Protection of Sources

APC Member Bluelink held a public meeting for journalists and civil society in Sofia, Bulgaria on June 6th, 2015, to discuss whistleblowing and protection of sources. The upcoming study by the Special Rapporteur on protection of sources was discussed, and participants called for an expanded definition of whistleblowers and sources, as well as an expanded definition of who is entitled to the right of protection of sources.

Furthermore, participants discussed the differences between disclosing information to media through a mediator, such as a journalistic or civil society institution, and platforms that disclose all information without mediation such as Wikileaks. Some noted that unmediated platforms are sometimes, even if unintentionally, less invested in protecting their sources, due to a lack of understanding of the risks the whistleblowers are facing. Unmediated whistleblowing can also have privacy implications and release information that might put certain people at risk. Another risk of unmediated whistleblowing is that these platforms can be vulnerable to deliberate efforts to spread misinformation. Verification of information can also be particularly challenging for these platforms.

Another issue that was discussed was the advantages the internet has to offer to potential whistleblowers, as they have the power to decide where and when to disclose information. Whistleblowers can choose to disclose information in countries other than their own to take advantage of a stronger protection of sources. Participants also noted that whistleblowing doesn't work in countries where there is no rule of law, citing Bulgaria as an example – despite being a member of EU, it has been placed under supervision because of that.

4. Recommendations

The APC Internet Rights Charter¹⁷ clearly states that:

- The internet must be protected from all attempts to silence critical voices and to censor social and political content or debate.
- Organisations, communities and individuals should be free to use the internet to organise and engage in protest.
- All information, including scientific and social research, that is produced with the support of public funds should be freely available to all.

As the world's longest-running online progressive network founded in 1990, APC has been troubled by trends over the last decade that show that such rights are increasingly violated and believes that the attempts to censor leak platforms provide additional reasons for concern.

The vulnerability of whistleblowers is a serious protection gap in the implementation of the right seek or impart information. APC supports the recommendations made by Frank La Rue, the former UN Special Rapporteur on Freedom of Opinion and Expression and Catalina Botero Marino, the Inter-American Commission on Human Rights (IACHR) Special Rapporteur for Freedom of Expression, namely; "Any attempt to impose subsequent liability on [Government "Whistleblowers"] who disseminate classified information should be grounded in previously established laws enforced by impartial and independent legal systems with full respect for due process guarantees, including the right to appeal."¹⁸

Furthermore, we make the following recommendations:

- Given the recent examples of serious retaliation against whistleblowers, we believe that their international protection must be strengthened and that it is time for the international community to consider concrete steps to bridge this protection gap.
- States and international bodies regulating the protection of sources should allow the practice of that right to be applied to a wider definition than traditional journalists. Furthermore, they should ensure that protection of sources and whistleblowers goes beyond corruption and extends to those who reveal human rights violations.
- States should not attempt to silence critical voices and information pertaining to the public interest particularly those hosted in jurisdictions outside its own.
- States and the internet community should explicitly reject any form of online content control that limits freedom of expression and information, particularly information that contributes to more transparent governance, empowers citizens to hold their governments accountable, and reveals violations of human rights.
- States should respect the right to privacy online and not seek to circumvent the protection of sources and whistleblower anonymity by monitoring electronic communication or requesting private information from intermediaries.

17 <http://www.apc.org/en/node/5677/>

18 <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=829>

- States should accede and ratify the UN Convention against Corruption, and seek to implement Article 33 of said convention into their domestic legal systems.
- Online whistleblowing technologies such as leak platforms and other forms of secure, anonymous online communications tools remove many of the technological barriers to ensuring the safety and enables protection of sources and whistleblowers. As such, states and international bodies have a duty to protect such technologies and to promote them.
- Journalistic institutions, civil society, and other organisations dealing with confidential sources need to institute capacity building programs to their staff regarding secure online communications and establish secure protocols for sourcing privileged information.
- Civil society, citizen journalists, and other platforms that handle privileged information revealing misconduct or abuses need to use the name code of conduct established by journalistic institutions and pay attention to the privacy implications of information that they release.