

To the attention of: Mr. David Kaye

UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

## **Submission to the study on the protection of sources and whistleblowers<sup>1</sup>**

by Guido Strack, LL.M. (Cologne)

### **1. Introduction**

Some 14 years ago I began my journey as a whistleblower within the European Commission. It took me some years to notice that for me as for many other whistleblowers it became a life-changing event which ruined my professional career, my family and my health. I took up the fight launching numerous freedom of information requests, internal and ombudsman complaints and court cases which led to little more than more trouble and frustration. I learned a lot about how accountability and transparency are often foreseen by law and promised by organizational and political leaders but rarely ever practiced in real life. The content of my whistleblowing – fraud or at least waste of several million EURO – was never thoroughly investigated, nor was anybody held to account. In my view the highest courts in Europe treated me unfairly and did not respect my fundamental human rights that should be guaranteed by Art. 6, 8, 10 and 13 of the European Convention on Human Rights. As a public official I was not allowed to speak to the media, and the European Commission had shown before that non-respect of this rule leads to dismissal and economic defeat. Thus I always tried to respect the law and reached out for journalists only at a very late stage and with information which legally had become part of the public domain, just to learn that my story was too complex and too difficult to tell, not sexy enough and meanwhile too old for any journalist to dig into its details. I think it would still be a good example to discover fundamental weaknesses of the EU system.<sup>2</sup>

Apart from pursuing my own case I also co-founded and for more than eight years chaired Whistleblower-Netzwerk Germany, tried to help other whistleblowers, worked with scientists and on studies, made advocacy work, drafted bills and became an expert witness on whistleblowing at the German Bundestag<sup>3</sup>, the European Parliament<sup>4</sup> and the Council of

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<sup>1</sup> In reply to: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ProtectionOfSources.aspx>

<sup>2</sup> Short descriptions of my case in English are available at <http://www.whistleblower-net.de/whistleblowing/fall-beispiele-fur-whistleblowing/ausstellung/ausstellung-guido-strack-en/> and

<http://www.voxeurop.eu/en/content/article/1028391-guido-strack-downfall-whistleblower?xtor=RSS-18> a documentation in German and some key documents can be found at <http://ans.Tageslicht.de/strack>. I would especially point your attention to the case chronology

(<http://www.anstageslicht.de/geschichtenansicht/kapitelansicht/kat/arglist-taeuschung-und-betrug/story/guido-strack-ein-eu-beamter-gegen-olaf/kapitel/chronologie-der-nicht-enden-wollenden-geschichte.html>), the final case report of OLAF and my analysis of it (both available in English at:

<http://www.anstageslicht.de/geschichtenansicht/kapitelansicht/kat/arglist-taeuschung-und-betrug/story/guido-strack-ein-eu-beamter-gegen-olaf/kapitel/der-final-case-report-von-olaf.html>).

<sup>3</sup> My written statements of 2008 (<http://www.whistleblower-net.de/was-wir-wollen/gesetzliche-regelungen/stellungnahme-g-strack-fur-die-bundestagsanhörung-2008/>), 2012([http://whistleblower-net.de/pdf/Stellungnahme\\_GS\\_BT\\_20120305\\_endg.pdf](http://whistleblower-net.de/pdf/Stellungnahme_GS_BT_20120305_endg.pdf)) and 2015

Europe. Though whistleblowing has become a much more recognized issue in Germany and Europe as a whole, it is my impression that still a lot of people connect it only with a very few high-level cases (like Snowden and Manning) and are much more interested in hero stories than in supporting typical whistleblowers. Those in power more and more have realized that due to rising public attention and support, they needed to change their wording from condemning all snitches to a more differentiated approach. However most of those in power, at least in Germany and at the EU level, still resist any meaningful changes that would guarantee effective whistleblower protection, enforceable rights for whistleblowers, thorough investigations, real accountability and a better alternative to silence for those who disclose wrongdoing and risks.

On 29.10.2014, after having read some positive statements of yours about whistleblowing, I reached out for your help by writing you an email, but I never got any reply<sup>5</sup>. Thus I now wonder if you are just one of those publicly claiming to fight for whistleblowers but leaving them alone in the rain or if you really want to help. Being it as it be, after some reflection I decided to answer your call for submissions and give you a second chance, hoping that this time I will get a reply. Due to time restrictions I will only make some short specific remarks but enrich them by pointing you to more material which had been produced by me and/or Whistleblower-Netzwerk e.V. in the past. As I stepped down as chairman of that NGO a few months ago, my submission is done in a purely private capacity. If you have any questions in relation to it I would be more than happy to answer them and I would also be very pleased if you look into my case as a concrete situation which exemplifies the challenges faced by sources and whistleblowers in international governmental organizations.

## **2. Rethinking the subjects of your study**

I think that both key subjects of your study – “sources” and “whistleblowers” - are closely related and that there are a lot of similarities. Bases on my experience, however, I will concentrate on the whistleblower part .

I think your study would fall short of what is needed and is in danger of missing the key point of whistleblowing if you just concentrate on “protections available to whistleblowers”. Instead you should concentrate on answering the question: What does it need for those noticing or suspecting wrongdoing, human rights violations, corruption, abuses of power or other threats or harms to the public interest to speak up, to be listened to and thus to initiate processes of accountability, change and reform that lead to healthier, less corrupt, more transparent, accountable, just and more democratic behavior of human beings, private and public organizations and societies as a whole? Thus besides pure protection, promotion of whistleblowing and creating environments that allow for whistleblowing to happen and to be successful is key!

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(<http://www.bundestag.de/blob/354568/a1ddb82b3c4d8cbc28b7c049ba83c14d/stellungnahmen-data.pdf> ) give a good overview about the situation for whistleblowers in Germany and contain a lot of proposals for improvements (the Bundestag has meanwhile rejected the proposed bills). A country study about the situation in Germany in English is available at [http://whistleblower-net.de/pdf/TI\\_EU27\\_Germany\\_WBNW.pdf](http://whistleblower-net.de/pdf/TI_EU27_Germany_WBNW.pdf) .

<sup>4</sup> The material of the hearing in the CONT Committee of the European Parliament can be found at:

[http://www.anstageslicht.de/fileadmin/user\\_upload/AT\\_GS\\_20110525.pdf](http://www.anstageslicht.de/fileadmin/user_upload/AT_GS_20110525.pdf)

<sup>5</sup> If you did not receive that email or if you cannot access it anymore I would be ready to resent it on request.

I understand that your mandate is limited to the promotion and protection of the right to freedom of opinion and expression. The European Court of Human Rights in Strasbourg has found in several judgements that whistleblowing is protected under Art. 10 of the European Convention of Human Rights and the same of course should be true for Art. 19 of the Universal Declaration of Human Rights. Thus whistleblowing is a form of exercising an individual human right.

But whistleblowing is much more than just that. It is first and foremost a service to the recipient of the whistleblowing and to the organisation or the society as a whole who stands behind that recipient and who by the whistleblowing receives valuable information. It is obvious that this is the case if the whistleblowers report relates to real wrongdoing or dangers but even an erroneous (but not intentionally false) report of a whistleblower is valuable as it shows that a specific situation leads to misunderstandings which themselves could lead to unadapt activities, loss of trust and other negative and costly developments which is good to know about early.

It seems that in your call you try to capture this specific element of whistleblowing by referring to the term “public interest”. My experience, however, makes me a bit skeptical about that term due to its vagueness. The big risk of using it for me is that it will not be clearly and objectively defined but it will be those in power who define what is in the public interest and in fact it will be their personal interests which dominate this. Even normal people on the street tend to show this understanding equating public interest with their own private interest. If they are orientated via safety and fearing terrorism they tend to see Snowden as a traitor and if they are skeptical about surveillance they see her/him as a hero. Independent judges might somehow be able to correct the personal interest and power-based definition of the public interest but for the key problem of whistleblowing – providing a better alternative to silence – they usually come too late. Even where there is access to such courts it usually takes them several levels and several years and a complex balancing of a lot of factors to decide an individual case. For the concerned whistleblower this is a long and psychologically and economically exhausting journey with an incalculable outcome and big risks. This is not encouraging to others who find themselves in a situation where they just might have become witness of a new wrongdoing forced with a choice between the alternatives of “neglect, exit or voice”. If society wants to know about what might be going wrong, it must strive to make the choice for voice (which in this context more or less equals whistleblowing) easier. Having nothing to gain but a long, insecure fight isn't that much of an incentive to speak up.

As for the definition of the term “public interest” it should be made clear that revealing any possible breach of a legal norm set up by public bodies would always be in the public interest (otherwise there would not be a legitimate interest for the norm to exist) and that also whistleblowing aiming to serve the preservation of public goods (like public and individual health, the environment, democracy and an accountable public administration, the functioning of the economic or the legal system and the public budget) and human rights should also always be considered to be in the public interest.

### **3. What should be done**

I think what is needed is active promotion of a better understanding of whistleblowing, its obstacles and a higher cultural acceptance of it.

#### *3.1, Clarifying the benefits of whistleblowing*

To achieve this first of all the benefits of whistleblowing should be made clear: whistleblowing is one means of the individual enjoying freedom of expression. Whistleblowing enables better democratic processes as knowledge by the people is a prerequisite for governance by the people. Whistleblowing could be an effective means for controlling power and the misuse that any power carries with it as an inherent risk: sunlight is the best disinfectant. When it comes to the economy, whistleblowing is important for assuring fairer competitions as it increases the risk for wrongdoers to be caught and sanctioned. In each enterprise and each organization improvement of risk communication and power free error communication which should go hand in hand with the promotion of whistleblowing are important for assuring stability, sustainability, and a higher innovativeness. Whistleblowing also serves better compliance with public legal and even ethical norms and supports the rule of law principle. Whistleblowing could thus be seen and should be actively promoted already in schools and vocational training as putting the “sapere aude” of enlightenment from philosophy into practice and thus servicing the public interest in many ways.

The fears linked to whistleblowing, namely to undermine important loyalties, to enhance the surveillance state and to promote false allegations and thus the risk to harm the human rights of those accused of wrongdoing should also be openly addressed. When it comes to loyalties it is important to make clear that whistleblowing in most situations should be offered to the individual as a choice and not as a duty thus also enabling him in a specific case to come to the conscious decision to put loyalty above whistleblowing and to stay silent. On the other hand it should be made clear that loyalty as well should be understood as a free conscious choice and not as an automatism or a duty under pressure of power holders, hierarchies or in-groups. Besides the possibility of a being loyal to a specific individual, there is also loyalty to an organization or society as a whole or to groups like victims or taxpayers. Once again, promoting whistleblowing boils down to promoting “sapere aude” instead of blind loyalty or willful blindness. This includes promoting one’s own ethical reflections on the legitimacy even of any kind of orders, including legal norms which would be a good counterforce against any totalitarian state policies.

### 3.2. *Addressing the fears linked to whistleblowing*

The final fear, i.e. that to harm those wrongly accused is legitimate and needs specific attention. Indeed risk communication often tends to include a blame factor and sticking that blame on someone could lead to unjustified loss of reputation and harm. There are several strategies to deal with this problem:

- The first is to encourage blame-free or nonviolent communication that concentrates on the four components: observation (of the specific facts as distinct from our evaluation of meaning and significance), feelings, needs and request. This also includes to look for the real and often complex and structural roots of problems instead of just identifying a scapegoat on whom to put the blame.
- The second strategy should be to enable whistleblowers to report to dedicated recipients instead of disclosing every whistleblowing message to the wider public. These specific recipients – within the organization or on a public authority level - would then be responsible for independently analyzing, investigating and following up on the content of the message of the whistleblower and at the same time for protecting the whistleblower and anyone accused by him (until the wrongdoing of the accused or intentionally false reporting can be proved in a just and fair procedure). This does not mean that the freedom of expression of the whistleblower should be limited to reporting to these specific recipients as the only choice. Disclosure directly or through media to third parties and the public in general should be possible even as a first choice but it seems legitimate to apply the general limitations arising from the rights of others and public needs that are expressed in Art. 10§2 of the European Charter of Human Rights and in Art. 19§3 of the International Covenant on Civil and Political Rights and to enter into a more open and thus less foreseeable balancing process in that case. I will go into more details about all that in the next chapter.
- Finally, the third main strategy would be to acknowledge that even perfect whistleblowing policies and laws and their perfect application cannot avoid the fact that in some situations whistleblowing might still lead to undeserved damages (for whistleblowers as well as for those wrongly accused). However a whistleblower should not be held responsible for the damages of someone falsely accused if the whistleblower did not intentionally make false allegations. Any other approach would mean that a potential whistleblower would bear an incalculable risk and that for someone suspecting a wrongdoing it would be the most reasonable approach to stay silent. This in turn does and will lead to much bigger damages for society (by not realizing the benefits of whistleblowing as explained above) than to compensate the damages of those unintentionally wrongly accused. Using the same argument societies and states should also to compensate whistleblowers who are not able to obtain full compensation for damages from the wrongdoers. Only this approach would allow whistleblowers to come forward even if they know that doing this would cost them their job by causing the bankruptcy or shutdown of their employers. One solution for financing those public supports for whistleblowers and wrongly accused would be to redirect parts of the penalty payments collected from those wrongdoers who got caught because of whistleblowing into a public fund.

### 3.3. *Addressing the fears of potential whistleblowers*

Looking at the obstacles and the reasons why whistleblowing does not take place science has identified three main fears that whistleblowing policies should address.

- The first fear is that the whistleblowing might not be able to change the bad situation, i.e. to stop a wrongdoing or risk or to hold someone who is responsible to account. If it is expected to be useless whistleblowing will not happen. To counter this expectation it is necessary to make clear that whistleblowing can lead to change. The potential whistleblower would therefore need to be able to know to whom s/he can report and have trust into the recipient of his whistleblowing to effectively follow it up. To establish trust publicly known examples of cases where the reporting lead to a difference are needed, especially examples of cases in which addressees were able to successfully overcome powerful opponents. I personally think that it also would be very helpful to allow the whistleblower to use the legal system to control the quality of the follow-up on his whistleblowing. I.e. whistleblowers should have an enforceable legal right to an independent and thorough investigation of their reports and the right to challenge the correctness of investigations in court. The EU-Courts in their decisions T-4/05 and C-237/06<sup>6</sup> denied me that right, finding that despite me as an EU-official having a duty to report I had no standing to challenge the correctness of the investigation before the courts. The argument was that I could have a standing only to claim violations of my own rights and not to claim violations of the public interest. The result of such jurisdiction in my view is that the public interest has no one to raise it and thus is unserved and only misused by those in power.
- The second fear of potential whistleblowers is that whistleblowing violates loyalty expectations and the hidden psychological codes of society and that it thus is not seen as an culturally acceptable behavior. In this context it is interesting to know that people with Asperger Syndrome that are unable to read the hidden codes are more likely to become whistleblowers. Social psychology and its experiments have revealed some of the codes like groupthink, obedience to authority, diffusion of responsibility, the bystander effect or the strategies our brains use to overcome cognitive dissonance by doublethink or willful blindness enabling us to ignore or justify behavior that opposes our views and values. Its important to promote knowledge about these processes and their costs to make whistleblowing easier and to increase the chances of whistleblowers to be heard.
- The fear to suffer reprisals finally is the third reason hindering whistleblowing. Here it is important to protect whistleblowers against such reprisals and to give them effective means to make use of such protections in courts. One key element is a shift of the burden of proof, e.g. when after a whistleblowing there is a negative change of the employment situation of the whistleblower it should be for the employer to prove that the negative change was in no way related to the whistleblowing. Any kind of reprisals and discriminations, i.e. all negative changes of situations or justified future (e.g. career and job-prolongation) expectations that could be related to the whistleblowing must be covered and the whistleblower must be able to achieve full

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<sup>6</sup> <http://curia.europa.eu/juris/liste.jsf?language=de&jur=C.T.F&num=T-4/05&td=ALL> and <http://curia.europa.eu/juris/liste.jsf?num=C-237/06&language=de>

compensation of material but also immaterial damages as well as immediate action to avoid such damages from occurring.

### 3.4. *Distinguishing reporting and disclosing*

The Council of Europe's Recommendation on whistleblowing<sup>7</sup> wisely distinguishes between three forms of whistleblowing: internal reporting, reporting to public authorities and disclosure to third parties and the public.

In my understanding of whistleblowing reporting and a good legal and factual reporting infrastructure is the key for the success of whistleblowing while disclosure is a necessary rescue system. By good legal and factual reporting infrastructure I mean that for any situation in which whistleblowing could happen, any potential whistleblower would be aware to have a choice of several reporting channels which should fulfill the criteria to be able and willing to receive and investigate the report of the whistleblower in an independent and fair process that in case that wrongdoing or risks are found also leads to adequate follow-up and correction measures and that the whistleblower has an enforceable legal right to challenge the correctness of that process in independent courts of law. Reporting bodies should also have responsibilities to protect the rights of the whistleblower and the ones accused, and must be sufficiently competent and equipped to fulfill their tasks.

Reporting structures should be set up internally within organizations as a lot of whistleblowers prefer to solve problems internally and as organizations could gain a lot of benefits from such structures. On the other hand it is obvious that there are limitations to the possible independence of internal reporting structures, e.g. if the whistleblowing is about systemic non-compliance of the organization with the law that at least in the short term leads to enormous economic benefits for the organization. Therefore in addition to internal reporting structures it is of utmost importance that a whistleblower whenever there is a suspicion that laws could be broken or that risks for public interests (e.g. for the health of people, the environment, human rights or the financial interests of public bodies) could occur has the unconditioned right to report to a structure available at a designated public authority. For me this is also a consequence of the monopoly of force of the states and of the human right to petition. Due to the fact that whistleblowers always face a risk of retaliation and discrimination organizations and public authorities should also allow and prepare for the reporting to be made anonymously, e.g. by establishing technical systems that allow for anonymous two way communication. I consider it counterproductive that in Germany and elsewhere the right to petition can only be used in a non-anonymous form.

When talking about disclosure to third parties, media and the public as a whole I cannot see that it is possible to establish many obligations on the part of the recipients of the whistleblowing. Especially there can't be any obligations to independently investigate and follow up on the content of the disclosure and typically the recipients will have no competences for legally sanctioning wrongdoers and correcting the situation. While reporting can and should be structured by good infrastructure and laws disclosure will always remain more unstructured which means that a positive outcome for the whistleblower and the society

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<sup>7</sup> Recommendation CM/Rec(2014)7 available via [http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/protecting\\_whistleblowers\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/protecting_whistleblowers_en.asp) .

depends on a lot of luck and that the whistleblower will face a much higher risk, at least if s/he does not manage to stay anonymous.

Staying anonymous should of course be supported by the right of journalists not to reveal their sources. However, this does not automatically mean that the whistleblower will really manage to stay anonymous. There is always a risk to be identified because of the content of the disclosed information itself. In the age of mass surveillance there is also a risk that the communication with the journalist is monitored and traced. There is a risk that the whistleblower, due to the often enormous psychological pressure, reveals her/his identity and the risk that journalists make mistakes. One key problem is also that most whistleblowers start with an open reporting or at least with asking questions about doubtful situations at their workplace and that in such cases later anonymity is almost impossible. Thus the right of journalists to protect their source is important for whistleblower protection, but far from sufficient (in an ideal world it should not only be a right of journalist but also a duty of journalists vis a vis the whistleblowers to protect the identity of whistleblowers)<sup>8</sup>.

### 3.5. *Using the human right of freedom of expression to protect whistleblowers*

The current problem of the usage of the freedom of expression in whistleblower contexts in my view is that the balancing process used by human rights courts is far too vague and too incalculable to allow whistleblowers to know how to act to be protected. Another problem is that the courts based on the freedom of expression seem to be oriented too much via disclosure situations while the special situation of a prescribed reporting is not sufficiently privileged.

In my view there should not be any kind of protection for non-whistleblowers, i.e. those who intentionally provide false information. However it should be the other parties burden to prove that such an intentional misinformation took place. Showing that the whistleblowers information was false and that s/he acted with some form of negligence (i.e. could have known that the information was false) in my view should not be sufficient to hold the whistleblower to account. This at least not in a reporting situation where it is the task of the recipient to investigate the truthfulness of the information. But also in other situations establishing such an obligation for a whistleblower to investigate the truthfulness of his allegations is counterproductive as it increases the burden and cultivates a culture of silence. The negligence test is also dangerous as it will typically be conducted by a judge with all the knowledge available to her/him at the end of a long process while a potential whistleblower typically has to make the choice between voice and neglect with very little information and within a short time. Obligations like the term "in good faith and on reasonable grounds" may seem justified on first sight, but in reality create a big hurdle for whistleblowing to happen in practice as they open the door for smear campaigns against whistleblowers and for balancing approaches of judges who know better afterwards (and as the Heinisch-Case of

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<sup>8</sup> Another issue is that in the times of the internet 2.0 everybody can easily become author and publisher while the right to protect sources is even where it exists often restricted to professional journalist. From a freedom of expression point of view I think that anybody who authors or publishes should enjoy the same rights as journalist to protect sources (including rights like the one to be exempted from mass surveillance and seizures).

the European Court of Human Rights<sup>9</sup> shows different judges on different levels also often have different opinions concerning negligence that no whistleblower is able to foresee). If society would like to reveal all benefits of whistleblowing these obligations should be dropped or at least be reduced to an absolute minimum.

In all other situations the motivations of the whistleblower should not play any role. While some whistleblowers have it, demanding a totally altruistic motivation would only lead to even further decreasing whistleblowing and thus its possible benefits. What really counts is that the recipient has the possibility to know and to (re)act thanks to the information provided by the whistleblower.

As mentioned before internal reporting and reporting to competent public authorities must always be permitted without any further conditions. It is the responsibility of the public to establish a reporting infrastructure and practice that is available, known, independent and working along the above mentioned criteria. Erroneous reporting, as long as it is not intentionally false should enjoy the same full level of protection as correct reporting.

In disclosure cases (i.e. external whistleblowing to non-prescribed recipients) whistleblowing must also be seen as a form of free expression and its legality should always be tested according to the criteria of Art. 10§2 of the European Charter of Human Rights and Art. 19§3 of the International Covenant on Civil and Political Rights. However, even here it would be helpful to establish some criteria that allow a (potential) whistleblower to better know in advance if and under which conditions her/his disclosure would be legally permitted. States and the international communities should set up such criteria and I would propose the following:

As it needs a legitimate interest to limit the freedom of expression, the first question which should always be asked is, if in the concrete case the party who limited the freedom of expression of the whistleblower or who sanctioned her/him is able to prove the existence of such a legitimate interests that is necessary in a democratic society for reasons of the assurance of rights of third persons or public interests.

Contrary to the current situation in my view this must include a assessment if a secret which is to be protected by sanctioning the whistleblower for breaking it deserves this protection. For example, information that would need to be made public anyhow, e.g. under freedom of information laws or due to reporting obligations of enterprises should not be overprotected. Also breaches of law and dangers to the public interest typically should not deserve protection. Therefore the truthfulness of the allegations of a whistleblower should always be assessed before sanctioning her/him. Thus a whistleblower who disclosed really existing dangers and wrongdoings normally should be protected.

The situation is of course more difficult if the whistleblower acted erroneously. But here as well s/he should in my view also be protected for disclosing the information to the public when s/he previously used a reporting channel and doing this encountered breaches of her/his rights or manipulations of the investigation. In that case it is obvious that the disclosure could have been avoided by correct treatment of the report thus it is the reporting

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<sup>9</sup> <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105777> the leading case was Guja/Moldova <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016>

recipient who should be held responsible for any damages arising from the disclosure. A similar argument should be valid if the whistleblower can show that due to mistreatment of previous cases s/he legitimately assumed that the reporting channel would not work properly.

Finally for all those cases which cannot be solved by applying the above mentioned criteria there would still be a need to enter into a process of balancing the different interest to be able to establish if there was a legitimate reason to limit the whistleblower's right to freedom of expression exercised by her/his disclosure. In this balancing process the courts should include not only the interest of the employer and/or secret holder and of third parties that might suffer from the disclose but also the seriousness of the risk or wrongdoing and the importance of the public interests the whistleblower wanted to serve, her/his knowledge, experience and risk assessment at the time of his whistleblowing. Based on the idea that whistleblowing as such is important and beneficial for the public and that a too restrictive approach would lead to less whistleblowing courts should limit freedom of expression only when the legitimate interests of the third parties or the public's secrecy interests clearly outweigh those interests striking pro whistleblowing. And even in those cases sanctions imposed on whistleblowers should only be allowed as long as they are proportionate to a real damage which the whistleblowing lead to.

Wherever whistleblowing is permitted, discrimination and retaliation related to it must be forbidden, made good if it happens, and those responsible for discriminations must be risking sanctions. The latter point is important, as up to now the only persons facing risks are typically the whistleblowers while those ignoring whistleblowing, discriminating whistleblowers or falsifying investigations and covering up wrongdoings most of the time can go on with their careers or are even rewarded by those abusing powers which they served.

#### **4. Whistleblowing in an international context**

While arguing with human rights laws most of the statements made up to now fit both, national and international contexts and could be used as guidelines how national laws should provide a whistleblower-friendly environment. At the end of my contribution I would like to address the roles, the international community and the sphere of international law should play in achieving this goal.

International law should provide a gold or at least a minimum standard, on how national norms should deal with whistleblowing<sup>10</sup>. The above mentioned international norms provide some guidance, but up to now they are not used to the extent possible. While recommendations like the one of the Council of Europe are a good first step they should be developed further to more concrete and binding instruments of international law that guarantee protection of the individual whistleblowers, and like Art. 10§2 of the European Convention on Human Rights allow external control by international courts. The fight against corruption and the instruments developed there are important, but it should be acknowledged that whistleblowing is an important tool not only in the fight against corruption but also in

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<sup>10</sup> On request of the parliament of Iceland we also prepared a proposal in English which is available at [http://whistleblower-net.de/pdf/WBNW\\_Response\\_IMMI\\_incl\\_Annexes.pdf](http://whistleblower-net.de/pdf/WBNW_Response_IMMI_incl_Annexes.pdf).

On pages 12ff. of this submission you will also find a presentation "10 Principles for good Whistleblowing-Laws" which I gave in London in 2009 which sums up some of the key points of my proposals for national whistleblower laws.

many other areas. Thus, apart from sectoral approaches, the aim should be to create specific whistleblower protection instruments and policies also on an international level. Setting up international standards would also make life easier for whistleblowing in multinationally active companies. Diverging and even contradicting national rules on whistleblowing, secrecy rules and data protection currently create a maze for their compliance departments as well as for whistleblowers within those companies.

Wherever international bodies set up rules, they should also be empowered and equipped to receive whistleblowing reports about possible breaches of those rules (and this should include public tendering processes) and factually be able to run thorough investigations and to efficiently protect the whistleblowers even against their home countries. Whistleblowing revealing breaches of human rights and international law should qualify as a legitimate reason to request and receive asylum and protection by any state.

Finally, and here I am back to my personal experience, special attention should be devoted to whistleblowers working in multinational and international organizations. Currently they typically have no access to the protection of national legal systems and to national courts, and their freedom of expression is massively limited by the rules of their IGOs. Within these IGOs it's often very hard to find truly independent investigators or even judges, as those typically identify themselves very strongly with the organization which they serve and show a tendency not to endanger its reputation but rather protect secrecy. Those organizations and the wrongdoers working in them often enjoy immunity against national control mechanisms. Even the media and public scrutiny does not work here as intensively as in national contexts. This is due to a lack of democratic processes and political controversies, language barriers, difficulties of the issues and complexity of the rules and also due to the fact that those few journalists who know the concerned institutions sufficiently well, depend on the goodwill of the institutions to provide them with information. All this results in a lack of accountability in international organizations which would make whistleblowing even more necessary but massively hinders it. Finally and perhaps most shocking international courts tend to take a formal approach and limit their control to their member states excluding the international bodies formed by their member states. The European Court of Human Rights for example turned down complaints by several EU-staff whistleblowers<sup>11</sup> and even a Council of Europe staff member<sup>12</sup> with this formal argument, thus factually allowing its member states to escape the control of the court and the application of the human rights guaranteed in the charter by forming an international organization. The argument often used to legitimate this jurisdiction is that in general the international organizations themselves provide sufficient legal protection. But this argument means that justice is no longer applied in the light of the individual case but replaced by a pure fiction that the courts will hold up forever to save themselves from entering into a massive conflict with the court system of the other jurisdictions and the additional workload such a control would bring.

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<sup>11</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90864> and <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-154210> .

<sup>12</sup> See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91461> .

# **10 Principles for good Whistleblowing-Laws**

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London 18.06.2009*



*10 Principles for good Whistleblowing-Laws*

## **1. Legitimisation cultural & legal**

- Human rights
  - Freedoms of expression & conscience
  - Right to petition
- Democratic principles
  - Democracy needs information
  - Rule of Law
- Public interest (early warning function)

***Keep laws simple and easy to understand!***

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## 2. Wide range of application “no loopholes”

- Entire public and private sector
- Any relation to org. not just employees
- Any wrongdoing, dangers or risks
- Formal or informal, written or oral
- Alone or in a group

Exception: purely private issues protected against knowledge of the state

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## 3. Free choice: internally or to competent public authority (not publicly)

- Promote lowest level principle
  - Provide support for best internal practice
  - Do not force whistleblowers, respect choice
  - No gag clauses or contracts
- Sufficient equipped competent authority
  - simple definition of competence + default (1stopShop)
  - guaranteed independence (also from public org.)

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## 4. Right to blow the whistle to the public (some restrictions)

- Perhaps in-between-levels  
(Ombudsmen, MPs, unions)
- “To the public” allowed if:
  - facts are correct & no specific breach of legitimate secret (covering up illegal practices cannot be legitimate) or
  - whistleblower acts in good faith &
    - investigation violated wb-laws or
    - public interest and public right to know are preponderate

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## 5. “Good faith” is sufficient

- Honest and conscious belief that facts are true:  
**WB may be wrong but is still protected !**
- Irrelevant are:
  - motives and/or benefits
  - public interest in the individual case (norm violation and general public risks are sufficient)

But: legal sanctions for non-factual attacks on the dignity of others are possible

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## 6. Free Choice:

### Open confidential, or anonymous

- Promotion of open or at least confidential wb
- Guarantee of confidential channels
- Availability of 2-way-anonymous channels
- Penalisation of breach of confidentiality or anonymity against the will of the wb

But: no limitations of defence of accused persons (wb is informed and might need to choose to come out or not)

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## 7. Right of independent prompt and transparent investigation I

- Every step is formally recorded and justified
- WB is informed and has right to comment (e.g. about reception, start of investigation with foreseen timing, draft final report, out-come, follow-up)
- Prompt standard timings, delays need justification and have limits
- Transparency about possible influences/dependencies

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## 7. Right of independent prompt and transparent investigation II

- Resources proportional to importance, likelihood of risks, facts quality
- If grievance than possible transfer to pursue own right in separate procedures
- Where there is duty to report there is right to ask for full court control of results
- The same fits when wb-rights in investigation have been violated (damages)
- Effective (penal and civil) sanctions against those involved in distorting, hindering or faking investigations or breaching independence

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## 8. No discrimination of covered WBs I

- No legal liability (i.e. penal, civil, labour, administrative)
- Right to refuse service to wrongdoing
- *Discrimination* = negative change of situation compared to realistic expectations (incl. notations, promotions, workload, foreseeable payment increases, prolongation of timed contracts and many more formal and informal reprisals and harassments)
- Clear commitment to this principle and link to other non-discrimination laws
- Guaranteed for: WBs, perceived WBs, supporters, witnesses, investigators

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## 8. No discrimination of covered WBs II

- Duty to care (positive confirmation, protection) of org. and public authority (incl. right for rapid intervention)
- No justification by “loss of confidence”
- Full civil law reparation for victims (choice: damages and/or restitution)
- Change of onus if covered WB + negative change + link possible (other side may still prove that no link)
- WB justifies minor breaches of law necessary to establish the case (e.g. copying documents)
- Sanctions (penal and civil) against discriminators

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## 9. Guaranteed rights for the accused

- Right to be heard (asap without endangering investigation in any case before final report)
- Fair process + data protection rights
- Right to challenge investigation in courts
- Authorities are responsible and fully liable for mistakes (keep legitimate secrets and accuse out of the public knowledge)
- Compensation for damage (even if that was unavoidable and process was ok)

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## 10. Supportive “pro WB policies” I

- Pro WB culture campaigning (values not treason)
- PR training and org. information about new laws
- Support internal WB-policies with best practice
- Independent counselling and advice for (pot.) WB
- Help & Support for WB (moral, legal, med., finance)
- Support WB-research and evaluation of laws
- Spread WB (e.g. procurement, intern. treaties)

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## 10. Supportive “pro WB policies” II

- Public appraisal and recognition of good examples
- Test reward approaches to support WB
- Assure info, support, standards, training and auditing for those dealing with WB and investigations
- Assure transparency of WB-laws in practice WB-laws, annual reporting, statistics, highlighting of positive examples and its auditing, evaluation and adaptation
- Keep other policies coherent (e.g. FOIA, independent courts and prosecution, accountability laws)

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**Thank you for your attention!**

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