

ARTICLE 19

Environmental Defenders

Human Rights, Whistleblower Protections - Laws and Best Practices

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ARTICLE 19

February 2017

Aarhus

- *Article 3.8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.*
- Guide (2nd edition): Paragraph 8 requires Parties to protect persons exercising rights under the Convention. To some extent it reflects the so- called whistle-blower protection principle (referring to the notion that someone is “blowing the whistle” to call the attention of the authorities to particular unlawful activities). In many countries the principle is aimed at protecting employment. To be applied in a wide variety of legal contexts, however, it goes beyond traditional whistle-blower rules. It has been given maximum flexibility and is aimed at preventing retribution of any kind. As in so many other situations that involve openness and transparency and where economic interests are at stake, persons who take the risk of demanding that the rules should be complied with and proper procedures followed need to be protected from various forms of retribution.
- CC Cases
 - *ACCC/C/2009/36 (Spain)*
 - *ACCC/C/2008/27 (United Kingdom)*
 - *ACCC/C/2008/23 (United Kingdom)*
 - *ACCC/C/2009/44 (Belarus)/ACCC/C/2014/102 (Belarus)*

Maastricht Declaration (2014)

5. We recognize close links between the effective implementation of the Convention and its Protocol and the importance of protecting environmental activists and whistle-blowers, freedom of speech and the safe participation of citizens in decision-making affecting their lives. In any case, Governments should recognize the important role played, as well as the risks faced, by such activists and whistle-blowers, and ensure that they enjoy adequate protection. On the other hand, to reduce the need for whistle-blowers, Governments must ensure transparency as well as remove barriers and overcome challenges to accessing justice. Nowadays the organized actions of citizens, including those related to the environment, have more of an impact on Governments than ever. Governments are often well informed about the actions of their citizens, including those related to the environment. Governments must strive to ensure openness and transparency in environmental matters, thus providing citizens with a solid basis for public participation. In order to achieve this, the Convention's and Protocol's Parties should adapt their national legislation as far as possible.

Human Rights Protections



ARTICLE 19

A Dangerous Shade of Green

Threats to Environmental Human Rights Defenders and Journalists in Europe

2014



ARTICLE 19

A Deadly Shade of Green: Threats to Environmental Human Rights Defenders in Latin America

2016

Threats to EHRDs in Europe and Latin America

- Physical Attacks and Threats
- Limits on Association
- Limits on Protest
- Limits on Free Expression and Access to Information
- Surveillance

UN Standards

- UDHR/ICCPR/ICESCR standards apply already to all persons
- UNGA Resolution 53/144 (1999) Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms
- UNGA Resolution 68/181 (2014). Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders
- UNGA Resolution 70/161 (2015). Human rights defenders in the context of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms
 9. Reaffirms the urgent need to respect, protect, facilitate and promote the work of those promoting and defending economic, social and cultural rights, as a vital factor contributing towards the realization of those rights, including as they relate to environmental and land issues as well as development;

UN Human Rights Commission/Council

- **Resolution 2003/71. Human rights and the environment as part of sustainable development**

4. *Reaffirms* that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms and calls upon States to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development;

- **Human Rights Resolution 2005/60. Human rights and the environment as part of sustainable development**

2. *Reaffirms* that peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity are essential for achieving sustainable development and ensuring that sustainable development benefits all, as set forth in the Plan of Implementation of the World Summit on Sustainable Development;

3. *Calls upon* States to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development and reaffirms, in this context, that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms;

- **Resolution 25/21. Human rights and the environment (2014)**

9. *Recognizes* the important role played by individuals, groups and organs of society, including human rights defenders, in the promotion and protection of human rights as they relate to the enjoyment of a safe, clean, healthy and sustainable environment;

UN HRC

Resolution 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights (2016)

Expressing grave concern also at the observations and findings of the Special Rapporteur on the situation of human rights defenders that human rights defenders addressing environmental and land issues and corporate responsibility, those working on governance issues, promoting transparency and accountability, and those exposing discrimination, corruption and violence at the hands of States, business enterprises and other non-State actors, are among those human rights defenders who are most exposed and at risk, and noting with grave concern also the findings of the Working Group on Enforced or Involuntary Disappearance that the practice of enforced disappearance is often used to repress and intimidate human rights defenders and prevent others from claiming and exercising their economic, social and cultural rights,

1. Stresses that the right of everyone, individually and in association with others, to promote and strive for the protection and realization of all human rights and fundamental freedoms, in accordance with the Declaration,¹ without retaliation or fear thereof is an essential element in building and maintaining sustainable, open and democratic societies, and reaffirms the urgent need to respect, protect, promote and facilitate the work of those defending economic, social and cultural rights as a vital factor contributing towards the realization of those rights, including as they relate to environmental and land issues and development;

15. Recognizes the important and legitimate role of individuals, groups and organs of society that are defending human rights in identifying and raising awareness of human rights impacts, the benefits and risks of development projects and business operations, including in relation to workplace health, safety and rights, and natural resource exploitation, environmental, land and development issues, by expressing their views, concerns, support, criticism or dissent regarding government policy or action or business activities, and underlines the need for Governments to take the measures necessary to safeguard space for such public dialogue and its participants;

UN HRC

- Resolution 31/8. Human rights and the environment

4. Calls upon States:

(e) To promote a safe and enabling environment in which individuals, groups and organs of society, including those working on human rights and environmental issues, can operate free from threats, hindrance and insecurity;

7. Recognizes the important role played by individuals, groups and organs of society, including human rights defenders, in the promotion and protection of human rights as they relate to the enjoyment of a safe, clean, healthy and sustainable environment;

UN Special Procedures

- **UN Rapporteur HRD (2011)**

124. States should give full recognition to the important work carried out by defenders working on land and environmental issues in trying to find a balance between economic development and respect of the environment, including the right to use land, natural wealth and resources, and the rights of certain groups, including indigenous peoples and minorities. 125. States should not tolerate the stigmatization of the work of these defenders by public officials or the media, particularly in context of social polarization, as this can foster a climate of intimidation and harassment which might encourage rejection and even violence against defenders.

126. States should combat impunity for attacks and violations against these defenders, particularly by non-State actors and those acting in collusion with them, by ensuring prompt and impartial investigations into allegations and appropriate redress and reparation to victims.

- **UN Rapporteur Toxics (2012) Extractives**

47. The Special Rapporteur underlines the importance of upholding the rights of environmental defenders, including their freedom of opinion and right to peaceful assembly, and of addressing impunity. Environment defenders provide critically important oversight on situations of environmental degradation resulting from unsound management and disposal of hazardous substances, which must not be unreasonably controlled or restrained. He expresses concern at the particular vulnerability of women defenders to gender-based violence, particularly in environments that do not encourage the freedom of expression of women, and reminds States of their obligation to protect against such violence.

- **UN Rapporteur Indigenous (2013) Extractives**

21. It is imperative that States adopt the measures necessary to secure the right of indigenous peoples and individuals to peacefully express opposition to extractive projects, as well as to express themselves on other matters, free from any acts of intimidation or violence, or from any form of reprisals.

- **IE Environment and HR (2014) Mapping**

40. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights.[32] There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns.

- **UN Rapporteur HRD (2016) .UNGA Report on EHRDs (A/71/281).**

- Full report on challenges faced by EHRDs

Other European Initiatives

- COE, Declaration of the Committee of Ministers on action to improve the protection of human rights defenders and promote their activities (2008)
- European Union Guidelines on Human Rights Defenders (2004/2008)
- OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014)
 - Environmental defenders “exposed to heightened risk”

ECLAC

- 9.4 The Parties shall take adequate measures to prevent any attack, threat, coercion or intimidation that any person or group may suffer while exercising the rights guaranteed by the present Agreement and ensure that these acts, should they occur, are investigated, prosecuted and punished in an independent, rapid and effective manner [Peru: , with recourse to judicial and/or non-judicial mechanisms]. Victims will be entitled to protection and damages. [Jamaica: The Parties shall take adequate measures to investigate and prosecute in an independent and effective manner any attack, threat, coercion or intimidation that any person or group may suffer while exercising the rights guaranteed by the present Agreement.] (draft 4th Version, 9/16)

Whistleblower Protection

What is Whistleblowing?

- “Bringing an activity to a sharp conclusion as if by the blast of a whistle”
 - *Oxford English Dictionary*
- “The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.”
 - *International Labour Organisation*
- “individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest”
 - *Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers*

Barriers to WB

- Fear of losing job , moved to lesser job
- Harassment by boss/co-workers
- Lose contracts
- Denied benefit
- Duty of loyalty/confidentiality
- Official Secrets Acts
- Libel/defamation
- Fear of “sneaks”, “spies”, “dobbers”, ” tattle-tales”, troublemaker, “Breaking of friendship, solidarity and peace”



Intl Sources of Whistleblowing

- ICCPR, Article 19
- UN Convention Against Corruption, a33
- Inter-American Convention on Anti-corruption, III.8
- European Conventions on Civil and Criminal Corruption
- African Union Convention on Corruption
- Southern African Development Community
- OECD/ADB Asia-Pacific Anti-corruption Initiative
- OECD guidelines
- Stability Pact for South Eastern Europe

ICCPR/SR

- UN Special Rapporteur on FOE (2015)

“Some matters should be considered presumptively in the public interest, such as criminal offences and human rights or international humanitarian law violations, corruption, public safety and environmental harm and abuse of public office.”

For the purposes of the present report, a whistle-blower is a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.

COE

- Committee of Ministers of the Council of Europe Recommendation CM/Rec(2014)7 on the protection of whistle-blowers
 - 2. Whilst it is for member States to determine what lies in the public interest for the purposes of implementing these principles, member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment.

EU

- Greens, Draft Directive on whistleblowers
 - Protected Disclosure: The environment, public health, public finance has been, is being or is likely to be endangered or negatively affected or damaged;
- European Parliament resolution of 14 February 2017 on the role of whistleblowers in the protection of EU's financial interests (2016/2055(INI))
- Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets)

ECtHR GUJA v. MOLDOVA 2008 (1)

In this respect the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large

In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence

ECHR GUJA v. MOLDOVA 2008 (2)

- Disclosure protected when:
 - disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public
 - Public Interest in Disclosure (85-88)
 - Authentic info (p89)
 - Detriment to office (p90-91)
 - “In Good Faith” (p92-94)
 - Severity of sanction (p95-96)
- See also *Heinsch v Germany* (2011); *Bucur and Toma v. Romania*, (2013)

Comprehensive laws

- Criteria
 - Broad application across sectors
 - Public interest in promoting disclosure
 - Disclosure procedures (Tiers)
 - Easy to disclose inside org
 - Possible to disclose externally
 - Strong protections for disclosures that follow procedures
 - Remedies
 - Oversight

Sectoral Whistleblowing laws

- Encourage by promising protection
 - Anti-Corruption Acts
 - Public Servant Acts
 - Labour Laws
 - Criminal Code
 - Freedom of Information Acts
 - Environmental Protection
 - Other (health, consumer, business, etc.)

UK Public Interest Disclosure Act 1998

- Protections to encourage disclosure of criminal or dangerous activities by govt or corporations
- (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
 - (e) that the environment has been, is being or is likely to be damaged,
or
- Encourages internal disclosure first, eventually to outside
- Prohibits discrimination & job loss
- Employment Tribunal

Other national laws

- Ireland - Irish Protected Disclosures Act, 2014, §5(3)(e)
- Netherlands - House of Whistleblowers (2016), §1(d)(1)
- Hungary - Act 165 of 2013 on complaints and reports of public concern, §17
- Serbia - Act No.128/2014 on protection of whistleblowers, §13
- France - LOI n° 2013-316 du 16 avril 2013 relative à l'indépendance de l'expertise en matière de santé et d'environnement et à la protection des lanceurs d'alerte, now general application with Sapin 2 law (2016)
- US - WB Protection Act (govt employees), 7 environmental acts (clear air, safe drinking, water pollution, toxic wastes) protecting corporate employees
- Slovakia - Act No. 307/2014 Coll., on certain measures related to reporting of anti-social behaviour
- Sweden - Act on special protection against victimization of workers who are sounding the alarm about the serious wrongdoing (2016)
- Norway - Working Environment Act. Currently being reviewed to expand protections.

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Next Steps

Issues going forward

- International Pressures on countries to comply with HR law
- National Measures to protect EHRDs
- IFIs and business commitments
- Legislation promoting and protecting whistleblowing (independently or via COE/EU framework)
- Role of Aarhus?

Budva Draft Declaration

- 5. We are particularly alarmed by the increase in the harassment, silencing and even murdering of environmental activists. To this end, we recall our commitment made through the Maastricht Declaration to actively protect and guarantee the rights of environmental activists and whistle-blowers. We also recall the resolution of the Human Rights Council on protecting human rights defenders, including those addressing environmental issues.
- 6. We call upon Parties to ensure due protection of environmental activists, whistle-blowers and NGOs so that they can exercise their rights under the Aarhus Convention and its Protocol on PRTRs without being threatened in any way.
- 7. We stress that access to information and public participation increase transparency and accountability, lead to better decisions with enhanced ownership and support, and ultimately help reduce conflicts and increase stability.
- 8. We thus welcome the initiatives taken by several Parties to establish bodies that protect the rights of whistle-blowers and we encourage other Governments to take similar steps that ensure adequate protection of the freedom of speech and safe participation of people in decision-making on environmental matters.

ECE/MP.PRTR/WG.1/2016/13 (25 October 2016)