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Topic 1: The issue of adequately protecting whistleblowers and witnesses in order to guarantee the carrying out of justice

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Introduction

Witnesses and whistleblowers are a keen element in the carrying out of justice as they have the ability to expose corruption, fraud and other misleading actions, provide testimony in a jurisdictional setting and ensure criminal groups and or individuals in an enterprise/corporation setting are investigated and prosecuted. However, in order for this cooperation to take place, both witnesses and whistleblowers need to have the confidence to come forward as well as have trust in the judicial system and thus certain measures need to be settled. Their safety is at stake and thus these measures vary from providing them with police escorts all the way to the courtroom, offering a temporary undisclosed safe house residence, to even granting them a new identity. Despite the increasing effort from the nations affected by the issue and the involvement of international organizations such as the United Nations, there does not seem to be a proper settlement which ensures this protection is granted and thus justice is fairly carried out. This is why there is a steady urge for nations to cooperate and agree on a resolution .

Key Terms

Witness - Noun referring to an individual who provides testimony on either an unlawful/innmoral action they have witnessed in third person, a unlawful/immoral incident they have taken part in or is the victim of an unlawful/innmoral event.

Whistleblower - Name otorgated to an individual who reports unlawful or immoral activity form behalf of an individual or organization they are a member of. A whistleblower could be considered a type of witness as they are still providing testimony on either unlawful/unethical actions they have taken part in or they have witnessed. An example of a whistleblower would be an employee from a private sector releasing evidence of someone in a higher position such as a manager, engaging in unlawful activities.¹

Judicial system - A system of courts which ensure that justice is carried out by applying the law in the name of the state.

¹ "Whistleblower Protection." OECD.org - OECD, www.oecd.org/governance/ethics/whistleblower-protection/.

Testimony - *A statement either written or spoken given out by a witness or whistleblower given in a court of law with the purpose of providing existential evidence.*

Law enforcement - *A term used to describe the actions by government officials who ensure the law is being followed by investigating, following, discovering and even punishing.*

Safe house - *A house in a secret location provided by the government to usually witnesses in danger of reprisal from criminal groups.*

Police escorts - *Usually a group of police vehicles surrounding the vehicle transporting an individual testifying in court which can either be a prisoner or witness.*

Non Disclosure - *Confidentiality of information in a legal context.*

Anti retaliation - *The action of preventing an employee or worker from being fired by a superior who wants to take reprisal against them, usually for blowing the whistle.*

Prosecutor - *An individual who conducts a case against the defendant in a criminal court.*

Defendant - *An individual accused in a court of law.*

Background Information

Witness protection first came into place in the United States of America in the 1970's in efforts of dismantling the Mafia style criminal organizations.² Until then, there was a code of silence known as "omertà", obligating all members of the mafia to remain silent and under no circumstance provide the authorities with information. Not doing so would come with the high price of death. This was a challenge to the United States judicial system as persuading witnesses to testify for the state was hopeless, just like the collaboration of key witnesses who lived in fear of the prosecution mandated by the crime bosses. This experience made the United States Department of Justice realize the need for a vigorous witness protection program. Joseph Valachi was the first member of the Italian-American Mafia to break omertà and thus receive witness protection. In fear of getting murdered by Vito Genovese, a powerful Mafia family boss, he proceeded to testify before a United States congressional committee about the

² Beth. "Witness Protection, a Challenge for Small Countries." OCCRP, www.occrp.org/en/projects?option=com_content&task=view&id=139&Itemid=43

inner structure of the Mafia and organized crime. After his actions, rumours were spread about there being a price tag of US\$ 100,000 on his head. Thus he was granted with protection for testimony which was prior to the development of a formal witness protection programme.³ This officially started off the movement which was later followed by countries such as Australia in 1983, China in 1994 and so forth.

Whistleblower protection originated in 1777, 2 centuries ago, prior to the development of a witness protection program.⁴ The first whistleblowers to seek protection were in fact 10 American sailors and marines who reported improper behaviour from behalf of the Continental Navy's most powerful man, commander Commodore Esek Hopkins. On February 19th 1777 the 10 men gathered below the deck of the USS Warren, one of the 13 frigates authorized by the Continental Congress on 13 December 1775, and signed a petition documenting the abuses of their commanders. Aware of the consequences their actions came with, such as being referred to as traitors, and after being subject to aggression and an arrest, they sought help from Continental Congress. Thankfully, they supported them and passed a law to protect these 10 innocent men and the future whistleblowers, which was approved on July 30th 1778.

As proved by the effort and work put into the elaboration of policies from behalf of nations even 2 centuries ago, these individuals whose security is very often threatened, need to be protected. The protection programs witnesses are granted, can range from providing a police escort to the courtroom, voice distortion as well as facial disguise, offering temporary residence in a safe house to even granting them a new identity.

Whistleblowers who work under very different conditions are granted distinctive protection programs merely focusing on the preservation of confidentiality and anti retaliation⁵. Very often, the individuals denounced (mostly bosses, managers and individuals in a higher job position) will use employers to fire the whistleblowers and take some type of adverse action such as firing, lowering wages, denying their overtime, intimidation, harassment, blacklisting... Thus the protection program strives to eliminate these threats towards the people only offering their help to their nation.

Both protection programs should depend on the country's policies and the severity of their security threat. They will be very similar in most countries, however, they can still vary.

³ United Nations Office on Drugs and Crime, www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

⁴ Klein, Christopher. "The United States Began Protecting Whistleblowers in 1777." HISTORY, 26 Sept. 2019, www.history.com/news/whistleblowers-law-founding-fathers.

⁵ The Whistleblower Protection Programs | Whistleblower Protection Program, www.whistleblowers.gov/.

Major Countries and Organizations Involved

Recognising the importance of witnesses and whistleblowers to the judicial system is an issue which many countries have struggled with.

The United States of America was in fact the first country to elaborate a witness protection program as a result of an effort to dismantle the Italo-American mafia and the first whistleblower protection program which served as an example for many countries. They have always been a step ahead of most countries and they nowadays have the Federal Witness Security Programme (WITSEC) which is the world's longest-established programme of its kind and has been operating for over 30 years by the US Marshals Service.⁶ Furthermore, they were the first country to recognize and implement a whistleblower protection policy in 1778.

The Baltics, after suffering from international trafficking trade and Soviet-style communism in the 1900, settled an agreement in the year 2000 in which all three countries (Estonia, Lithuania, Latvia) agreed to take witnesses in criminal cases into each others' countries and protect them outside the borders of the original country.⁷

In the 1990's international courts like the UN war crimes tribunals for Rwanda and the former Yugoslavia agreed to rely on third party countries to protect war crime witnesses, something which is seen as highly successful.

Both groups of countries were quick to analyze their limitations which can either be social, such as war, geographical, such as small land, economical, such as lack of monetary resources to invest in the matter, or political, such as clashing political views, and cooperating internationally in hopes to find a solution to the issue.⁸

In the topic of whistleblowers, Albania adopted a law on 'Whistleblowing and Protection of Whistleblowers' in June 2016 which was the first effort to protect whistleblowers both in the private and public sector.

⁶ "Witness Protection." Wikipedia, the Free Encyclopedia, Wikimedia Foundation, Inc, en.wikipedia.org/wiki/Witness_protection. Accessed 30 July 2020.

⁷ United Nations Office on Drugs and Crime, www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

⁸ <https://www.europarl.europa.eu/cmsdata/175874/20130129ATT59967EN.pdf>

Belgium was the first country where regional protection for whistleblowers was made prior to the national law.

Nowadays, the major stakeholders are the countries which due to different limitations are unable to provide their citizens with witness or whistleblower protection programs. Amongst these countries are war lands such as Israel, which due to their social internal conflict need to seek help from other countries which have better social and geographical conditions.⁹

Nepal and Indonesia where a system has been established, but is not functioning effectively.¹⁰

The most known and widespread organization working towards a better protection of witnesses is the United Nations Office on Drugs and Crime (UNODC) which strives to prevent drug use and control crime. Through targeting crime and striving to put an end to it they are directly eliminating a threat to witnesses.¹¹ However on top of that they have elaborated several articles (24 and 25 of the resolution) which deal with the protection of witnesses through programmes of early identification of vulnerable and intimidated witnesses and assistance and protection to victims and witnesses in accordance with the provisions of the Organized Crime and its Protocols,

Equally the organization working towards the protection of whistleblowers is the United Nations Ethics Office which according to the UN “promotes an ethical organizational culture based on UN’s core values of integrity, professionalism and respect for diversity, and the values outlined in the Code of Ethics for UN Personnel which include independence, loyalty, impartiality, integrity, accountability and respect for human rights.”

Relevant UN Resolutions and Reports

Amongst international resolutions dealing with the matter of witness protection are:

1. The UN Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 and implemented in 2003.

⁹ Beth. "Witness Protection, a Challenge for Small Countries." OCCRP, www.occpr.org/en/projects?option=com_content&task=view&id=139&Itemid=43.

¹⁰ "ASIA: Effective Witness Protection Lacking in Indonesia and Nepal - Indonesia." ReliefWeb, reliefweb.int/report/indonesia/asia-effective-witness-protection-lacking-indonesia-and-nepal.

¹¹ www.europarl.europa.eu/cmsdata/175874/20130129ATT59967EN.pdf.

- a. Most specifically Article 24¹² and 25¹³ of this resolution deals with the protection of witnesses and whistleblowers.
2. (UN Convention against Corruption)
3. Protection Of The Whistleblower Act

Previous Attempts at Resolving This Issue

The need for a protection program for witnesses and whistleblowers has been an urgent issue officially concerning all nations ever since the declaration of the human rights which made reference in articles 3¹⁴, 5¹⁵ and 12¹⁶ to the rights that both whistleblowers and witnesses should be entitled. Despite this first step from behalf of the UN in 1948, which legally recognised this need, there have been prior attempts at solving the issue.

The first official attempt at working on the matter was made by the USA in 1778 This was a very significant step as it served as an example for many countries such as Australia in 1983, China in 1994 which later followed their steps. More recently the EU made itself aware of the issues whistleblowers are faced with and the importance of their participation in the carrying out of justice. In response to this. they developed a Directive on the protection of persons reporting on

¹² “States parties are to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony, establishing procedures for the physical protection of such persons, providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness and entering into agreements or arrangements with other States for the relocation of persons”

¹³ Parties are required to take appropriate measures to encourage persons who participate or have participated in organized criminal groups to cooperate with law enforcement authorities for investigative and evidentiary purposes. Pursuant to paragraph 4 of that article, such persons are to be afforded protection in accordance with the provisions of article 24.

Fromiti. "Organized Crime Module 8 Key Issues: Rights of Victims and Witnesses." United Nations Office on Drugs and Crime, www.unodc.org/e4j/en/organized-crime/module-8/key-issues/rights-of-victims.html.

¹⁴ “Everyone has the right to life, liberty and security of person”

¹⁵ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”

¹⁶ “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”

breaches of Union law (EU Whistleblower Protection Directive)¹⁷ to be put into place by all EU member countries by the 17th December 2021.

Nowadays almost all countries have taken action in the matter and include internal policies as well as international agreements which protect these individuals. A study was made by the UNODC in 2005 which concluded that of the 43 systems from UN member states¹⁸ used in the study “14 jurisdictions had full-fledged witness protection programmes that were able to relocate and change the identity of threatened witnesses; 4 jurisdictions had enacted new legislation providing for the establishment of witness protection programmes but the programmes were not yet operational; 18 jurisdictions had no established programmes but had provided for some form of security measures, such as police measures or procedural in-court protection; and 7 jurisdictions had no witness protection measures at all” (see Figure 1). This study shows the progress being made by all nations to protect these individuals.

FIGURE 1



Possible Solutions

Despite the effort and work put on the cause, protecting witnesses and whistleblowers through a formal protection programs is more difficult than it may appear. In general many nations struggle to sustain the witness and whistleblower protection programs as they come with high financial costs. Small nations especially struggle to relocate individuals and often there is a

¹⁷ "EU Whistleblower Protection Directive in the Different Countries| WhistleB." WhistleB, 29 June 2020, whistleb.com/blog-news/what-is-happening-with-the-eu-whistleblower-protection-directive-in-the-different-countries/

¹⁸ ---. "Organized Crime Module 9 Key Issues: Witness Protection." United Nations Office on Drugs and Crime, www.unodc.org/e4j/en/organized-crime/module-9/key-issues/witness-protection.html

lack of international and regional agreements or treaties with other countries allowing for individuals to be relocated internationally.

More specifically in the case of witnesses, their relatives may be subject to threats and harassment by these criminal groups in an effort to intimidate the protected witness/whistleblower. They may also struggle with relocation as they must leave everything behind and start a new life in many cases with a new identity. Money is often insufficient and they may also be incapable of obtaining a job. Information can sometimes also leak through relatives and friends who are informed of the new identities and locations. And lastly, the desire of going back home to friends and family prevents these individuals from accepting their new reality and accommodating themselves to it.

In the case of whistleblower protection programs, it should not solely be a matter of having legislation protecting them in place, but additionally informing of the importance in changes of social attitudes¹⁹. This implies providing safety to these individuals willing to report these illegal actions, encouraging people to take action, educating these people on the benefits of acting as whistleblowers as well as the disclosure of the information, and, lastly, making sure no reprisal will be held against them.

Therefore the resolutions debated by the delegates should focus around these points:

- Seeking for international cooperation to relocate the witnesses from countries with social, geographical or economic limitations abroad.
- Educating all nations on the importance of witness and whistleblower protection programs and their positive contribution to the judicial system.
- Seek for financial assistance from the UNODC to support those countries who are unable to sustain witness and whistleblower protection programs.
- Ensure all information is kept confidential and families as well as friends are able to stay in touch with the protected individuals without any risk.
- Make sure countries are able to provide their whistleblowers and witnesses with new identities and a new location.
- Ensure all countries have anti retaliation programs which will protect whistleblowers from reprisal.
- Guarantee there are programs supporting those individuals who want to take action as witnesses/whistleblowers.
- Assure witnesses and whistleblowers have trust in the judicial system and are able to securely give testimony.
- Establish a group of individuals who will ensure the protection programs are respected and put into action.

¹⁹ "Whistleblower Protection." OECD.org - OECD, www.oecd.org/governance/ethics/whistleblower-protection/.

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