

## VOICES

# Sentencing Private Manning

August 21, 2013 | by Sandra Coliver | Open Society Justice Initiative | 6 comments

Private Bradley Manning last week apologized for leaking secrets. He said he made a mistake.

He might have made a bigger mistake 25 years ago by being born in the USA.

Had he been born in Denmark, he might have gotten four months for disclosing information a Danish court found highly damaging to national security. That's the penalty Danish Defense Intelligence analyst Frank Grevil received in 2005 for disclosing threat assessments concerning Iraq's possession of weapons of mass destruction.

Or, had he been British, he could have been released after serving seven weeks of a six month sentence, as was David Shayler, the former MI5 member who gave a newspaper 28 security and intelligence files on a variety of topics, including on Libyan links with the IRA, Soviet funding of the Communist party of Great Britain, agents' names and other highly sensitive information.

Or, given his military status, he might have received a sentence of 12 months in jail – the penalty a British judge gave to Navy petty officer Steven Hayden in 1998 for selling significant security and intelligence information to a newspaper concerning a plot by Saddam Hussein to launch anthrax attacks in the UK. That sentence was the heaviest awarded to any of the eight Britons convicted of disclosing sensitive information since the current Official Secrets Act was passed in 1989.

Given the amount and nature of documents Manning disclosed, what penalty would, under international standards, be considered proportionate to the harm caused?

To answer this and related questions, the Open Society Justice Initiative (<http://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative>) together with an academic at the University of Copenhagen (<http://jura.ku.dk/english/staff/phd/?id=386097&vis=medarbejder>) recently undertook a survey of the laws and practices of 20 European countries.

All of the surveyed states prescribe criminal penalties for the disclosure of classified national security information. However, where there is no spying, treason or disclosure directly to a foreign state, the penalties are far less than in the US: up to two years in Denmark and Great Britain; four years in Spain and Sweden; five years in Belgium, Germany, Poland and Slovenia; and seven years in France.

Moreover, prosecutions are rare. In six countries—Albania, Belgium, Norway, Romania, Spain and Turkey—there has not been a single conviction in the past 10 years. In another 11 countries, there have been less than a handful of prosecutions, and even fewer convictions. Russia is the only country surveyed in which significant numbers of prosecutions have resulted in penalties of more than three years, including, and disturbingly, for the disclosure of human rights violations.

A few months ago, a committee of the Parliamentary Assembly of the Council of Europe welcomed (<http://www.opensocietyfoundations.org/press-releases/european-endorsement-tshwane-principles-national-security-and-right-know>) a set of principles, based on international and national law and practices, on national security and the right to information. Called the Tshwane Principles (<http://www.opensocietyfoundations.org/briefing-papers/understanding-tshwane-principles>) after the South African province where they were finalized, they recommend that any laws that make it a crime to publish information should: 1) specify narrow categories of information whose disclosure may be punished, 2) require proof that the disclosure posed a "real and identifiable" risk of causing "significant" harm, and 3) allow the accused to present a public interest defense. Moreover, any criminal penalty, as set forth in law and as applied, should be proportionate to the harm caused.

Significantly, the Principles call on states to establish procedures to enable public servants – current and former public employees and contractors, including members of the security forces – to make “protected disclosures” internally and to independent oversight bodies. Such procedures should protect the confidentiality of the identity of the discloser, including, if necessary, from a soldier’s superior officer, and should be effective – requiring, at the least, that oversight bodies have the necessary resources, powers, independence and impartiality to fully investigate claims and lead to adequate remedial measures.

The US Department of Defense has an inglorious record when it comes to treatment of service members who internally disclose evidence of possible wrongdoing. An internal 2011 DoD report (<http://rt.com/usa/pentagon-whistleblower-reprisal-report-697/>), obtained through litigation, found that most military whistleblowers have faced serious reprisals, including career-stopping mental health evaluations, and that few complaints ever prompted remedial action.

Moreover, the Espionage Act of 1917, the main law under which Manning was prosecuted, has been widely criticized, including by sitting US judges, for its overbreadth and vagueness. The Act makes it a crime, punishable by up to 10 years in prison, for anyone in possession of various sorts of “national defense” documents (interpreted to include all classified documents) to communicate them to someone not entitled to possess them. The prosecution is not required to prove harm to national security, intent to harm, or even reason to believe that a document could be used to injure the United States. Judicial opinions that have sought to interpret the Act so as to be consistent with the First Amendment are not authoritative, and have not been accepted by the Obama Administration.

High criminal penalties might deter a person motivated by financial gain, and accordingly high penalties for the sale of information could well make sense. But experience suggests that high penalties have little impact in deterring actors who believe they are right, let alone are also troubled, feel betrayed by their employer or colleagues, and/or have nowhere to turn. Certainly, the Obama administration’s aggressive, albeit selective, prosecution of leakers has been far from effective: of the 10 post-World War II prosecutions of people who disclosed information publicly, seven have been initiated or maintained by this administration. Yet, significant leaks continue. Indeed, Edward Snowden said that Manning’s courage was one of the considerations he weighed in reaching his own decision to disclose.

The most effective response in a democracy to unauthorized, damaging disclosures is not high criminal penalties but a combination of measures: effective internal disclosure procedures, employment policies that promote loyalty, concentration of access to classified information in the hands of trusted employees, and administrative penalties that are applied consistently regardless of the status or politics of the leaker.

Manning undeniably disclosed information of high public interest. Indeed, some of Manning’s disclosures exposed evidence of possible egregious human rights violations—including a gun-ship video showing U.S. soldiers firing on unarmed civilians. On the other hand, disclosure of State Department cables, the chatter of low and mid-level foreign servants, some of which endangered human rights activists who visited US embassies, gives rise to a very different public interest vs. harm calculus. The fact that the video and many other documents contributed to democratic oversight does not justify disclosure of huge numbers of documents that were of negligible public interest, some of which undoubtedly caused harm to individuals.

Manning was found not guilty of aiding the enemy. He has already served three years in jail, including more than 11 months in solitary confinement under conditions that a UN expert found might have constituted torture. His punishment should be proportionate to the actual harm caused.

The US government, rather than hounding the often idealistic, sometimes unwise persons who gain access to troves of discomfiting information, should instead focus on developing procedures to protect legitimate secrets and facilitate internal whistleblowing.

It should investigate evidence of war crimes and other wrongdoing exposed by Manning and report back to the American people. The Espionage Act should be substantially amended. And the military, which has the authority to parole Manning after he has served one-third of his sentence, should do so at the earliest possible date.

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## 6 Comments

**Waldmeister**

posted on Aug 21, 2013

a little correction:

in Germany he could get up to "life" (life means a minimum of 15 years).

Disclosing a illegal secret (illegal means a secret which can't be covered through legal actions, i.e. a crime or other illegal actions) shall be punished like treason.

**chidi**

posted on Aug 21, 2013

Insightful and informative. No, actually, terrific piece. Thank you Sandy

**Toby Mendel**

posted on Aug 21, 2013

35 years for this is just vindictive. It's more than you would get for multiple premeditated murders in most countries.

**Anna Myers**

posted on Aug 21, 2013

Whistleblowing is above all a democratic accountability mechanism. In this case, as in so many others, the act of whistleblowing and the information disclosed expose specifically and clearly the failure of those in charge to take responsibility for their actions or for their external accountability to those who rely on them. Any response must be proportionate in order to be credible and in this case, it is not.

As Sandra Coliver rightly points out, those in charge must ensure that those who work for them are properly supported, that there are safe and effective routes to raise concerns - and this means that the issues raised are dealt with - and that where such routes fail, there is clear access to independent regulatory bodies. Ultimately, public disclosures are necessary in democracy where government is responsible to the people. It does not take a rocket scientist to understand that in this age of global information sharing, attempting to shut down whistleblowers is counter-productive and dangerous for us, for the institutions we rely on and for the future of our democracies.

**Lori Rosolowsky**

posted on Aug 21, 2013

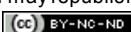
Sandra Coliver clearly articulates not only what makes Manning's sentence so wrong, but steps to make the system work right. What a sad precedent this case sets for promoting transparency in our supposedly democratic country.

**Ashley**

posted on Aug 21, 2013

Excellent article Sandra. Sharing information is the lifeblood of every democracy. Its what we called "a marketplace of ideas" back in the day. But a thirty five year prison term and solitary confinement? You couldn't ask for a better example of "cruel and unusual punishment."

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