

# Un human rights regime assignment

[Sociology](#), [Human Rights](#)



## Introduction

‘ The International Bill of Human Rights is a promissory note to recognize, promote and protect the inherent dignity of individuals. However, justice must sometimes defer to amnesty following gross violations of human rights in a State.’ Critically examine this statement.

The International Bill of Human Rights comprises the Universal Declaration of Human Rights 1950, International Covenant on Civil and Political Rights 1966 (ICCPR) (with its two Optional Protocols) and the International Covenant on Economic, Social and Cultural Rights 1966, all adopted by the United Nations. The ideas inherent in these declarations/protocols are directed at recognising, promoting and protecting the inherent dignity of individuals. However, these ideas may come into conflict with a range of other principles, including amnesty laws enacted by individual states. Amnesty may be defined as a pardon given by a government to a group of people who have not yet been convicted. By its very nature amnesty presupposes the complete obliteration of past offences of individuals.

Currently, in the age of accountability, there is a prohibition on amnesties for serious crimes under international law<sup>[1]</sup>, and many argue that this trend is likely to continue. For example, the Inter-American Court of Human Rights bans any amnesty provision which is capable of eliminating responsibility for a serious crime under the Convention. The ‘ new’ UN position on amnesties also emphasises the denial of amnesty for the perpetrators of serious crimes involving gross human rights violations. However, as Orentlicher argues, it is not clear whether all amnesties should be held unlawful, (1991: 80).

This essay will first provide a criticism of the statement above and then outline weaknesses behind that criticism, arguing that justice must sometimes defer to amnesty following gross violations of the state, despite the wording of the International Bill of Rights. It will then provide concrete arguments in support of the statement and conclude that, despite all the injustices inherent in the idea of granting amnesty for gross violations of human rights, it is sometimes the only available measure in the circumstances and, therefore, is completely justified by necessity.

There are a number of arguments against the idea that justice must defer to amnesty when there is a gross violation of human rights, and most of these arguments, as Orentlicher points out, stem from the legal, moral and political duties of a state to hold the perpetrators of gross human rights violations accountable (1991: 43).

Firstly, it could be argued that although there is no treaty explicitly prohibiting amnesty, the International Bill of Human Rights presupposes such a prohibition. For example, Article 2 (3) of the ICCPR provides for a right to an effective remedy, which may be understood as requiring states to ensure that punishment of human rights offenders is carried out.[2] Moreover, the UN Human Rights Committee states in 1992 that “ amnesties are generally incompatible with the duty of states to investigate [acts of torture]”[3]...to guarantee freedom from such actions” and “ to ensure that they do not occur in the future”.[4] In this respect, any amnesty provision can potentially appear to be in a direct conflict with the wording and spirit of the Covenant, especially since it can potentially deny persons from seeking compensation

through court. This means that a person's right to access to court is also denied. Moreover, the body of jurisprudence of such organs as the UN and Inter-American systems points to the conclusion that amnesties should be seen as incompatible with basic human rights obligations of states, (Robinson, 2003: 486).

However, as Freeman points out, the right to a remedy is not as broad as it is often thought to be (2009: 40), and there is no right available to people to force a prosecution. The right to remedy only places an obligation on the state to conduct an effective investigation which may lead to the capture and punishment of offenders. Also, international law does not state that states must prosecute every human rights violation in every case. The UN has also been seen as supporting amnesty measures which were related to international crimes and which were necessary to end military deadlock, (Naqvi, 2003: 34).

It could also be argued that perhaps the key word in the UN Human Rights Committee's General Comment of 1992 is 'generally' and the inclusion/use of an amnesty provision may sometimes be justified in the circumstances. Moreover, as Robinson (2009: 489) argues, "to impose a duty to prosecute on some states is simply to impose too much burden on them, as some democracies are too fragile and if they start prosecuting, it may lead to their destruction".

It may also be impossible to prosecute all the offenders if the scale of human rights violations is very large in a country. Although to this one may reply that governments may choose to prosecute leaders of gross human rights

violations instead, this may also be undesirable in certain circumstances. Leaders may have close attachments to their community, and their prosecution may lead to further revolts and bloodshed. Alston and Goodman (2012: 1391) argue on similar lines, stating that if one denies the participation of former leaders (who are also the perpetrators of past offences) in a present government, it may effectively “ obstruct social integration and political stability”. By way of example, Alston and Goodman refer to the undesirable consequences of prosecuting major organisations who were involved in the apartheid regime in South Africa, (2012: 1392).

Perhaps the most powerful argument against amnesties involves victims’ rights and tolerance of impunity. Protesters of amnesty measures argue that amnesty infringes states’ obligations to make sure that victims receive means to achieve justice, and seek out the truth in their cases (Mallinder, 2008: 7). By imposing an amnesty measure, the perpetrators’ crimes are effectively denied, causing victims to feel alienated from society, which, in turn, increases the likelihood of vigilantism on their part (Mallinder, 2008: 10).

There are not many who would deny the negative impact that amnesty has on victims and/or their families, and the argument here is that such a negative impact cannot be avoided if one is to achieve common good for the society as a whole.

Another point against the statement that justice must sometimes defer to amnesty following gross violations of human rights is that such a deferral, by its very nature, prevents the achievement of the aims of criminal justice,

such as prosecution, retribution, stigmatisation and deterrence (Freeman, 2009: 20). Aston and Goodman take this view and point out that trials can be very important in the promotion of “ norms and expectations of punishment” in the country, (Alston and Goodman, 2012: 1392). Moreover, as Freeman points out, the deferral of justice to amnesty in spite of the International Bill of Human Rights’ promissory note, undermines public confidence in the rule of law, (Freeman, 2009: 33).

However, even assuming that amnesty is capable of preventing the realisation of some of the criminal justice’s goals, it should not be forgotten that an amnesty measure can take many forms. Freeman states that, more often than not, an amnesty measure would be accompanied by other provisions, such a reparation programme, which may lessen the harm caused by an amnesty, and an amnesty’s potential harm caused is always overestimated, (2009: 25). Another argument is that there are many conditional amnesties in existence, which may encompass some of the aims of the criminal justice process, for example, Freeman enumerates a number of temporal and provisions amnesties, (2009: 93).

Even if one takes into account the need for a trial and all its benefits, it is not altogether clear that a trial or its threat may lead to beneficial results in every case, because as Freeman argues, a threat of a trial may lead to the perpetrators destroying the vital evidence needed in the future for the victims or their relatives to find out the truth about a crime, (2009: 24). In support of this argument Alston and Goodman also state that any attempts at prosecution in a state which undergoes the transition from an

authoritarian past may threaten a delicate peace-conflict balance between different groups, (2012: 1391). Mallinder makes a similar argument when she states that although the trial of leaders may benefit the society by asserting the supremacy of democratic values (as argued by Scharf), there may not be enough evidence to put those leaders on trial in the first place, (2008: 18).

Here, it is interesting to point out an illuminating point made by Mallinder that there could be an instance where the distinction between victims and perpetrators is not clear, for example, in the case of child soldiers who are part of a rebel group in Uganda, and, therefore, the prosecution and punishment may have to take a back seat, (Mallinder, 2009: 34).

Clark also questions the belief that the promotion of individual criminal responsibility is always desirable, (in Lessa and Payne, 2012: 13). He draws attention to the criminal prosecutions in Rwanda and Uganda, and argues that by insisting on the prosecutions, the international organisations overlooked “ the specific context and dynamics of these countries”, for example, the absence of legal procedures and institutions to carry out an effective judicial process, (2012: 14). This means that even though the countries may be the signatories of the International Bill of Human Rights, their specific contexts should be taken into account, and may be used to justify the imposition of conditional amnesties.

One of other widespread arguments against the idea that amnesty should be granted is that doing so only creates a culture of impunity, encouraging future violence, and prevents accountability. This view has a widespread

support from many governments around the world, for example, from the government of Sri Lanka.[5] When academics make this argument they often refer to the offenders who continue violate human rights, and are only stopped when amnesty is granted to them. The clear example of this is Ugandan rebel group ‘ The Lord Resistance Army’s public statement that they will only stop the violence if amnesty is granted to its members. Nevertheless, to these arguments it can be replied that it is not necessarily the case that amnesty will produce further violence, and in fact, there may be situations where one must choose a lesser of two evils and invoke an amnesty provision. Freeman supports this argument.

Therefore, it seems that although the case for the abolition of amnesty is a strong one, it is not without its weaknesses, and despite the promissory note of the International Bill of Human Rights, there may be circumstances where the imposition of an amnesty provision is not a truly unthinkable course of action.

It is clear that there are obvious discrepancies between the theoretical foundations of the International Bill of Human Rights and the practical application of the Bill. There inevitably will be circumstances where it is unwise to follow the literal meaning of the Bill. The reality of an international/domestic political scene is that sometimes compromises must be made in order to safeguard peace in a country and prevent further conflict. In the same vein, Snyder and Vinjamuri maintain that in order to prevent future violations of rights and reinforce the respect for the rule of law it is often necessary to “ strike politically expedient bargains that create



effective coalitions to contain the power of potential perpetrators of abuses,” (Snyder and Vinjamuri, 2003: 17).

Thus, one of the main arguments for the proposition that justice must sometimes defer to amnesty following gross violations of human rights is that such deferral of justice is likely to foster reconciliation and may be necessary to achieve peace in terms of promoting political settlement. Linked to this is an argument that amnesties are needed so that a state can make a break from its past and start from a ‘ clean slate’, (Mallinder, 2008: 13). Governments often use these reasons to justify the imposition of amnesties when it is necessary to end violence. However, this view is becoming more controversial as the states-signatories to the International Bill of Human Rights move to the implementation of more mechanisms of accountability, and this view is not shared by everyone. For example, in 2007 the ICC Prosecutor, Lois Moreno-Ocampo termed the demands of amnesty made by combatants as being nothing less than pure blackmail. Moreover, the offering of amnesty may appear as though a state is showing signs of weakness, which may, in turn, encourage more violations of human rights, (Mallinder, 2008: 12).

However, despite this, Freeman supports the view that amnesties may sometimes be necessary to achieve peace in a state, (2009: 11). He contends that there may not be any other choice for societies which have gone through mass violence and genocide, (2009: 7). Freeman asserts that he is against the idea of impunity for serious crime, but he states that there may be situations where the desire for peace and security should stand

above any impunity which may result from granting amnesty (2009: 6). In particular, he states that if we look at such countries as Burma and Somalia and their particular contexts, one may be forgiven for wishing any kind of amnesty in order to ensure the survival of people by lessening daily violent conflicts, even though this leads to impunity, (2009: 24).

Another argument against the view that amnesties are needed to achieve peace in a country, and to ensure a smooth transition from an authoritarian regime to a democratic one, is provided by Robinson when he draws on an example of Sierra Leone, (Robinson, 2003: 490). In that country, unconditional amnesties were granted to ensure that peace would follow only to discover that the culture of impunity was reinforced and gross violations of human rights continued.

However, in reply to all this, it can be pointed out that, regarding the International Bill of Rights in particular, amnesties can be used, because the International Bill encompasses a wide variety of rights, and unlike the Rome Statute, is not primarily concerned with the protection against gross human rights violations.

Freeman also makes a relatively convincing argument that amnesties are rarely granted without the imposition of other orders or qualifications, such as a reparation programme or an institutional reform measure, (2009: 14). Truth Commissions, which are primarily set up to investigate the causes of death/injury unlawfully perpetrated, often play an important role in offsetting the damage done by amnesty. However, it is questionable whether they are, in fact, as successful as they were initially perceived to be. For example,

again using the Sierra Leone example, the Lome Accord 1999 was designed to provide both an amnesty provision and a Truth Commission investigation, but was unsuccessful in its implementation (Alston and Goodman, 2012: 1452).

Nevertheless, a broad conception of justice usually agrees with the idea that there could be a Truth Commission and a limited amnesty in place to satisfy “ the essential purpose of the right to justice”, (Naqvi, 2003: 34). Dugard seems to be of the same view when he states that even though unconditional amnesties should not be permitted, a Truth Commission should still be capable to grant amnesty after an investigation, provided that amnesty contributes to the achievement of peace and justice, and is more effective than prosecution, (Dugard, 1999: 1020). Arguably, South Africa’s imposition of a conditional amnesty showed that it was possible to combine an amnesty with an accountability process which culminated in the achievement of truth and social healing.

Another argument, which is linked to the argument about the right to remedy discussed above, and which is put forward by Freeman and Pensky (in Lessa and Payne, 2012), is that an amnesty measure will not necessary infringe international law in every instance. This argument rests on the well-known fact that the status of amnesties in international law is unclear, and the practice of its imposition still persists in many countries, including Rwanda, Cambodia, El Salvador and South Africa. This point is supported by Laplante, who argued that the status of an “ outright prohibition on amnesty remains unclear”, (Laplante, 2009: 920). To illustrate the point, Mallinder

discovered in her research that the number of amnesties which includes different kinds of crimes has increased, and this casts doubt on the proposition that we are living in the age of accountability (Mallinder in Lassa and Payne, 2012: 95). Mallinder concludes that this means that there is still a belief that an amnesty measure may be deemed necessary where there is some exceptional situation, (Mallinder in Lassa and Payne, 2012: 96)

Liked to this is the idea that amnesties do not necessarily stand in opposition to the spirit of the International Bill of Human Rights, and, in fact, can fulfil some of its provisions by balancing competing goals, and facilitating long-term peace and security in the nation. One particular example is where a political activist-offender is integrated into a society anew, preventing further disputes.

The final point is that some defendants are unlikely to come within the scope of criminal prosecution as defined by the Rome Statute, and some countries' legal systems may not be sufficiently evolved to prosecute such defendants. In these cases, it may be argued that amnesty could be granted to alleviate the political tension in the country if it exists. Moreover, even the Rome Statute could be said to presuppose the use of amnesties as it gives discretionary powers to prosecutors/judges to take account 'the interests of justice', particularly for those defendants which are unlikely to come within the scope of the International Criminal Court's prosecution.[6]

Thus, it seems that it may not be correct to treat all amnesties as being in the opposition to the principles of justice and truth, and the specific context of a country must be taken into account. Even though amnesties violate the

victim's rights and can potentially create a culture of impunity, it is important to recognise that some amnesties, in some circumstances, may be an effective measure directed at achieving peace and security in a country. This is especially true since it is wrong to think of amnesties as either granting complete impunity or achieving long-term peace. This view fails to take into account the sheer diversity of amnesty measures which a state can employ, and which can be combined with the variety of accountability measures, (Mallinder, 2008: 8). Moreover, as Freeman points out, justice may sometimes defer to amnesty because such practice is virtually unavoidable, although it should be maintained as a practice of the last resort (2009: 4). Moreover, on closer examination, the granting of an amnesty may not be in the direct conflict with the spirit of the International Bill of Human Rights and, therefore, it is fair to say that justice must sometimes defer to amnesty following gross violations of human rights in a state.

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