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978-0-521-89525-5 - Necessary Evils: Amnesties and the Search for Justice

Mark Freeman

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NECESSARY EVILS

This book is about amnesties for grave international crimes that states adopt in moments of transition or social unrest. The subject is naturally controversial, especially in the age of the International Criminal Court. The goal of this book is to reframe and revitalize the global debate on the subject and to offer an original framework for resolving amnesty dilemmas when they arise. Most existing literature and jurisprudence on amnesties deal with only a small subset of state practice and sidestep the ambiguity of amnesty's position under international law. This book addresses the ambiguity head on and argues that amnesties of the broadest scope are sometimes defensible when adopted as a last recourse in contexts of mass violence. Drawing on an extensive amnesty database, the book offers detailed guidance on how to ensure that amnesties extend the minimum leniency possible, while imposing the maximum accountability on the beneficiaries.

Mark Freeman is Director of External Relations with the International Crisis Group. Based in Brussels, he is coauthor of *International Human Rights Law*, the first comprehensive Canadian textbook on the subject, and author of *Truth Commissions and Procedural Fairness* (Cambridge University Press), which was awarded the American Society of International Law's Certificate of Merit in 2007.

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**Whoever destroys a soul, it is considered as if he destroyed an entire world. And
whoever saves a life, it is considered as if he saved an entire world.**

– JERUSALEM TALMUD, SANHEDRIN 4:8 (37a)

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Preface

This book is about amnesties adopted, reluctantly and in contexts of mass violence, for serious crimes under international law. The subject is naturally controversial. My intention in writing the book is merely to contribute to the debate, not to resolve it. The issue belies any neat solution.

More than any other measure, it is amnesty that constitutes the lightning rod – the hot-button issue – for individuals and groups dedicated to the fight against impunity. In that respect, the subject offers an important lens through which to understand the almost-seismic legal-political shift that has taken place in the global fight against impunity since the end of the Cold War – from the establishment of ad hoc international and hybrid criminal tribunals to the creation of the permanent International Criminal Court, the emergence of truth and reconciliation commissions, and the adoption of a formal UN position on amnesties that reverses the institution's long-standing prior practice.

My intention with this book is to be polemical. I believe some of my colleagues in the global fight against impunity have been moving too quickly toward closure of the amnesty debate. As someone who has chosen a professional career in human rights, and has advised on the question of amnesty in more than a dozen states, I have long been troubled by this premature push to close the debate. The fact is that there are many fundamental questions concerning amnesty that remain unresolved and that require debate. Yet the book would have little value if it only raised questions. Therefore, throughout

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the text, the reader will find concrete suggestions about how to reconcile the legal and policy tensions that are endemic to the question of amnesty. The goal is to nurture a debate that will have practical results.

My hope is that the book will find an audience beyond the legal profession. The legal perspective is only one among many, and yet it has dominated amnesty debates thus far. Unless more voices are added to the debate, crucially important and different perspectives will be absent. Georges Clemenceau famously said that war is something too serious to be left to the military. Similarly, amnesty is too serious to be left to the legal profession.

I also wish for this book to find an audience beyond elite policy circles. Persons outside of such circles are almost certainly unaware of the radical normative and institutional changes of recent years that have turned the generally positive image of amnesty into a generally negative one. As a result, there may be a gap between the new rules and the commonsense perspective of the broader global public, including in countries where amnesty may be a necessary last recourse.

There has been much scholarship on amnesties in recent years, although there are relatively few book-length treatments of the subject. My intention is not to repeat what others have already said. However, it is necessary to cover some familiar ground, taking into consideration the broader audience that this book seeks to reach and the fact that not many people read, for example, the numerous legal journals in which the debates on amnesty have been, in equal parts, illuminating and passionate.

The research for this book originated several years ago when I began a project that involved the creation of a significant amnesty database. The database grew over the years and today includes nearly six hundred human rights-related amnesty texts, thanks to the support of many friends and colleagues, most notably Louise Mallinder and Jorge Errandonea. It was always my belief that such a database was necessary to ensure “smart” amnesty outcomes or outcomes based on deep comparative and technical knowledge of all the possible negative and positive amnesty design choices. I also wanted to avoid engaging in the error common to some of the legal literature and jurisprudence on amnesties, which involves making broad conclusions on the topic on the basis of the same small cluster of amnesty laws and cases taken from Latin America, South Africa, and Sierra Leone. Still, I am aware that my own amnesty database is far from complete. There are undoubtedly hundreds more amnesties than have been identified to date.

Although it is important, comparative expertise on amnesties is no guarantee of smart outcomes in and of itself. Expertise in mediation, international law, and military strategy could be just as important in some situations or, indeed, more so. At the same time, expertise on amnesty legislation can help

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avoid foreseeable mistakes and ensure that amnesties are appropriately limited to maximally preserve future justice options. In that respect, I wish to underline that this book is ultimately less about amnesties than about the art of the pursuit of justice. It is about the art of balancing the demands of law with the human and political realities of particular contexts, while always placing a premium on justice in the broadest sense of the term.

The book is divided into two main parts. Drawing from a wide cross section of primary and secondary sources, Part I explains what amnesties are (and are not), why they tend to be viewed as inimical to the fight against impunity, and how international law treats them. It also explores the impact of the International Criminal Court on current debates and the merits of the UN Secretariat's evolving position on what crimes should be barred from future amnesties. Seeking to replace the current ad hoc approach to amnesty negotiation, Part II presents an original methodology for the design of amnesties to help limit the harm they cause to the international rule of law and victims' rights. The discussion includes argument on why amnesties should be adopted only as a last recourse, as well as a detailed presentation on design options for the content of an amnesty. The design options aim to ensure that amnesties pursue a legitimate end, are minimally entrenched in the domestic legal system, confer the minimum amount of leniency on the beneficiaries, impose the maximum conditions on them, and offer the greatest likelihood of being effectively administered.

Also included are an introductory chapter that presents several of the book's underlying themes, arguments, and dilemmas and a concluding chapter that explores different aspects of the contestation of amnesties, following their adoption. The book is complemented by appendices of primary source materials on amnesties, including excerpts from international instruments and selected jurisprudence. There is also a glossary of common abbreviations and legal terms, although the reader will note that I use a number of terms without defining them, such as *human rights crimes*, *international community*, *peace*, *democracy*, and many more. Each of these terms can be dissected and parsed in various ways. I would ask the reader simply to adopt the commonsense or everyday meaning of these terms, except where the text specifies otherwise. *Amnesty* is the only term I will devote significant time to defining.

There was a time when it was considered taboo to say too much about amnesties out of fear that the world's villains would seek to use the information to their own nefarious ends. Happily, that taboo has been overcome. Almost everything to be known about amnesties is now in the public domain where it belongs, and I know of no evidence demonstrating that amnesty outcomes have worsened as a result. Indeed, the opposite may have happened – amnesty scholarship and databases may be serving to refine and improve amnesty

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outcomes. At the same time, there remains much to debate and learn. This book represents my attempt to contribute to that debate by presenting some new questions and ideas on what is at stake and on how to bridge the perceived divide between amnesties and the cause of justice.

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My research for this book began many years ago when I first joined the International Center for Transitional Justice, and I remain appreciative of the early support and many stimulating conversations I had with colleagues while there.

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Finally, I wish to thank Annamie, Malachai, and Jonas for putting up with my many long days and nights typing away at the computer. It is to them and to my parents, David and Claire, that I dedicate this book.

Abbreviations and Legal Terms

ACHR	the American Convention on Human Rights, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978
<i>aut dedere aut judicare</i>	the duty to extradite or prosecute
CAT	the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46, U.N. GAOR, 39th sess., Supp. No. 51, at 197, UN doc. A/39/51 (1985), entered into force June 26, 1987
<i>de jure</i>	in or concerning law
ECHR	the European Convention on Human Rights and Fundamental Freedoms
ECOSOC	the UN Economic and Social Council
<i>force majeure</i>	an extraordinary event or circumstance beyond one's control
Geneva Conventions	the four Geneva Conventions of August 12, 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31; Geneva Convention for the

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	Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287
Genocide Convention	the Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), adopted December 9, 1948, 78 U.N.T.S. 277
ICC	the International Criminal Court
ICCPR	the International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), adopted December 16, 1966, U.N. GAOR, 21st sess., Supp. No. 16, at 52, UN Doc. A/6316 (1967)
ICESCR	the International Covenant on Economic, Social, and Cultural Rights, General Assembly Resolution 2200 A (XXI), adopted December 16, 1966, U.N. GAOR, 21st sess., Supp. No. 16, at 49, UN Doc. A/6316 (1967), 993 U.N.T.S. 3
ICJ	the International Court of Justice
ICJ Statute	the Statute of the ICJ, which is contained within the UN Charter
ICTR	the International Criminal Tribunal for Rwanda
ICTY	the International Criminal Tribunal for Yugoslavia
ILC	the International Law Commission
<i>jus cogens</i>	a peremptory international norm from which no derogation is ever permitted
<i>lex specialis</i>	(or <i>lex specialis derogat legi generali</i>) means the rule of international legal interpretation according to which a specific law governing a subject takes precedence over a general law governing the same subject
<i>locus standi</i>	the right to bring a legal action
<i>mutatis mutandis</i>	with the necessary changes being made
<i>ne bis in idem</i>	the right not to be tried or punished for a crime for which the person already has been convicted or acquitted
OAS	the Organization of American States

<i>obiter</i>	(or <i>obiter dictum</i>) means an aside or a remark by a judge or court that is superfluous to the determination of the case
<i>opinio juris</i>	the belief that an action was carried out because it was obligatory to do so
<i>proprio motu</i>	by one's own initiative
Protocol I to the Geneva Conventions	Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3
Protocol II to the Geneva Conventions	Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609
<i>ratione loci</i>	the territorial scope
<i>ratione materiae</i>	the subject-matter scope
<i>ratione personae</i>	the personal scope
<i>ratione temporis</i>	the temporal scope
Refugee Convention	the Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. 150, entered into force April 22, 1954, as amended by the subsequent Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267
<i>res judicata</i>	a matter that already has been adjudicated
Rome Statute	the Rome Statute of the ICC, July 17, 1998, UN Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998)
Slavery Convention	the Slavery Convention (1926), 60 L.N.T.S. 253, as amended by the subsequent Protocol Amending the Slavery Convention, signed at Geneva on September 25, 1926 (1955), 212 U.N.T.S. 277
UDHR	the Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), UN Doc. A/810 (1948)
UN Charter	the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993
Vienna Convention	the Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969)