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A GENERAL AMNESTY IN SUDAN International Law Analysis (January 2021)

SUMMARY

On 12 November 2020, the chair of Sudan's Sovereign Council, Lt. Gen. Burhan, announced a general amnesty for those who previously carried weapons or participated in military operations in Sudan. The resolution, available in [English](#) and [Arabic](#), is to some extent in line with the Juba Peace Agreement, which stipulated that the transitional government would issue general pardons to the political leaders and members of armed movements at risk of prosecution specifically for their membership of such groups.

The resolution excludes from the amnesty those who have been (i) indicted by the [International Criminal Court](#); (ii) are accused of committing serious international crimes or grave human rights violations that fall within the mandate of the Special Criminal Court for Darfur; and/or (iii) face civil law or *qisas* (a category of crimes under Shari'a law) sentences.¹

However, despite these exclusions, there are outstanding questions about the amnesty resolution's scope of application and its compliance with international law. Accordingly, this briefing paper sets out State obligations under international law with regards to amnesties and pardons. This paper also requests the following points of clarification from the Sudanese transitional government:

- a) **Do the terms “bore arms” and “military operations” in Article 3(1) only include acts carried out in the context of conflicts, or are they more broadly defined?** For example, do those responsible for the events of 3 June 2019 fall within the scope of the amnesty?
- b) **Does the amnesty include the armed forces of the Sudanese government?** If so, how is the resolution consistent with the Juba Peace Agreement provisions, which extend an amnesty only to political leaders and members of the “armed movements”?
- c) **Does the resolution provide an amnesty for serious international crimes or grave human rights violations committed outside Darfur?** For example, would those responsible for alleged international crimes during the conflict in the Blue Nile / South Kordofan fall within the amnesty?
- d) **Does the exception to the amnesty for crimes committed in Darfur apply only to cases that have already been initiated?** For example, would it be possible to initiate new cases against individuals for crimes committed in Darfur?

¹ See, for e.g., Penal Reform International, 'Sharia Law and the Death Penalty,' (2015), available at: <https://cdn.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf>.

IN BRIEF: AMNESTIES UNDER INTERNATIONAL LAW

As the African Commission on Human and Peoples' Rights ("African Commission") has noted, amnesties have "historically been commonly used as part of peace settlements even for armed conflicts manifesting most atrocious acts."² Proponents of amnesties argue that granting perpetrators legal immunity can encourage conflicting parties to embrace peace agreements more rapidly, and that amnesties can be effectively linked to truth and reconciliation processes which achieve accountability through non-judicial means.³

Though amnesties can play a role in peace settlements, amnesties that altogether preclude accountability measures for gross violations of human rights and humanitarian law are incompatible with States' human rights obligations.⁴ This is particularly true of blanket (or unconditional) amnesties—those that "exempt broad categories of serious human rights offenders from prosecutions and/or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis."⁵

Such amnesties are barred under international law.⁶ States are required to effectively investigate and prosecute serious violations of human rights and international humanitarian law, including torture. Blanket amnesty laws are therefore expressly incompatible with international human rights law in that they impede the investigation and punishment of those responsible for gross human rights violations.⁷ In so doing, amnesty laws adversely affect victims' access to the truth of what happened and to reparations. In turn, this hinders victims' full, timely, and effective access to justice.⁸

² African Commission, *Thomas Kwoyelo v. Uganda*, Communication 431/12 (2018), para. 286.

³ See, for e.g., Special Court for Sierra Leone, *Prosecutor v. Kondewa* (Separate Opinion of Justice Robertson) (2004), para. 32. See also REDRESS, 'Not Without Us: Strengthening Victim Participation in Transitional Justice Processes in Uganda,' pages 34 – 35 (July 2020), available at: <https://redress.org/wp-content/uploads/2020/07/Not-Without-Us-Report-for-Web.pdf>; Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States: Amnesties,' pg. 26 (2009), available at: https://www.ohchr.org/documents/publications/amnesties_en.pdf ("carefully crafted amnesties can help in the return and reintegration' of displaced persons and former fighters in the aftermath of armed conflict 'and should be encouraged,' but 'these can never be used to excuse genocide, war crimes, crimes against humanity or gross violations of human rights'"). Note that a 2020 study by Sayara International on perceptions of transitional justice in Sudan found that "a minority of interviewees [in Sudan] opened the door to amnesties for lower level perpetrators under some circumstances, noting the current provisions for amnesty in Sudanese law, the importance of amnesty in Islamic traditions, and the potential utility of such a mechanism for minor, local crimes when offered after community consultation and agreement." Sayara International for USAID, 'National Perception Study of Transitional Justice in Sudan,' (September 2020), available at: <https://sayarainternational.com/wp-content/uploads/2020/12/Savara-for-DT-Sudan-Transitional-Justice-Final-Report.pdf>.

⁴ IACtHR, *Barrios Altos Case v Peru*, Judgement (Merits) (14 March 2001); *La Cantuta v Peru*, Judgement (Merits, Reparations and Costs) (29 November 2006).

⁵ Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009), available at: https://www.ohchr.org/documents/publications/amnesties_en.pdf.

⁶ See, for e.g., Special Court for Sierra Leone, *Prosecutor v. Kallon et al.* (Decision on Challenge to jurisdiction: Lomé Accord Amnesty, Appeals Chamber) (13 March 2004); Special Court for Sierra Leone, *Prosecutor v. Gbao* (Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) (25 May 2004), para. 9. ("there is a crystallising international norm that a government cannot grant amnesty for serious crimes under international law").

⁷ See, e.g., IACtHR, *Gelman v. Uruguay* (Judgement of 24 February 2011, Merits and Reparations) (*Series C No. 221*), para. 226; see also IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, Reparations and Costs, Judgment of 25 October 2012) (*Series C, No. 252*), paras. 297-299; ACommHPR, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,' Principle C(d) (2003), available at: <https://www.achpr.org/legalinstruments/detail?id=38>.

⁸ See, for e.g., IACtHR, *Almonacid Arellano et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs, Judgement of 26 September 2006) (*Series C No. 154*), paras. 110-114. See also IACtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (Preliminary Objections, Merits, Reparations and Costs, Judgement of 24 November 2010) (*Series C No. 219*), paras. 172-173.

SUDAN'S GENERAL AMNESTY

As noted earlier, the [Juba Peace Agreement](#) committed the transitional government to establishing amnesties for political leaders and members of armed forces. In relevant part, the Agreement states that “the government shall commit to issuing general pardons in outgoing sentences, notices against political leaders and members of armed movements *due to their membership of these*” [emphasis added].⁹ In principle, such a limited amnesty could support progress towards important goals including, as discussed above, encouraging parties to the conflict in Sudan to participate in transitional justice processes.

The Juba Peace Agreement also provided “that the pursuit of justice and accountability precludes the possibility of issuing any pardons or immunity for perpetrators of crimes of genocide, crimes against humanity, or war crimes.”¹⁰ In respect of Darfur, the general amnesty announced on 12 November 2020 appears to exclude individuals implicated in genocide, war crimes, or crimes against humanity as well as other serious violations of humanitarian or human rights law. In this regard the amnesty does not pose a barrier to Sudan meeting its international law obligation to effectively investigate and prosecute such cases.

However, the phrasing of the resolution raises questions about whether the exceptions to the amnesty will cover the full range of international crimes and human rights violations committed in Sudan. It is unclear whether the amnesty applies to crimes committed outside of conflicts, such as the 3 June 2019 massacre. It appears that the amnesty also covers all crimes committed outside Darfur, such as alleged war crimes in South Kordofan. And it is unclear whether the exception for crimes in Darfur applies only where a case has already been initiated. If any of these were the case, they would appear to go against the requirements of the Juba Peace Agreement and international law.

The following sections describe in greater detail the areas that are currently unclear in the amnesty resolution, and the requested clarifications from the Sudanese government.

Defining “Bore Arms” and “Military Operations”

Article 3(1) of the amnesty resolution states that “pardons shall be granted to all those who bore arms, or took part in any military or martial operations, or participated in any statements or actions linked to combat operations.”¹¹ The resolution does not provide further guidance as to what is considered a “combat” or “military operation,”¹² nor does it specify who is included in “those who bore arms.”

⁹ Juba Peace Agreement (3 Oct. 2020), National Issues Agreement, Art. 17(1).

¹⁰ *Ibid.* at Eastern Track Agreement, Chapter 3, Sec. 4. *See also* Eastern Track Agreement, Chapter 3, Sec. 5, affirming the “right of victims to unimpeded access to effective mechanisms of justice and equity, especially the right to equity to sufficient, effective and swift reparations for violations of international human rights law and international humanitarian law.”

¹¹ Resolution 489, art. 3(1).

¹² Additionally, among other issues, the amnesty does not specify which conflicts in Sudan are included in the amnesty or the time period covered.

Article 3(2) of the amnesty resolution also provides that the general pardon includes “sentences, issues and open communications/statements against the [armed] forces of the regime.” The extension of an amnesty to government forces goes further than the amnesty contemplated by the Juba Peace Agreement which, as noted above, limits a general pardon to the political leaders and members of rebel groups “due to their membership of these.”¹³

These articles are of particular concern with regards to the events that occurred in the wake of former president Omar al-Bashir’s removal from office, including the massacre of [3 June 2019](#). These events occurred outside of the context of an armed conflict yet were carried out in part by the Sudanese security forces and members of the Rapid Support Forces (RSF), the paramilitary group controlled by the Sudanese government. One reading of the resolution could be that the parties responsible for the crimes committed against pro-democracy protestors are included in the amnesty, as they “bore arms,” arguably in the context of a “military operation.” In particular, under Article 3(2), any government forces involved in such crimes could be covered by the amnesty.

Question for Sudan’s transitional government:

Do the terms “bore arms” and “military operations” in Article 3(1) only include acts carried out in the context of conflicts, or are they more broadly defined? For example, do those responsible for the events of 3 June 2019 fall within the scope of the amnesty?

Does the amnesty include the armed forces of the Sudanese government? If so, how is the resolution consistent with the Juba Peace Agreement provisions, which extend an amnesty only to political leaders and members of the “armed movements”?

Geographic Limitations

The amnesty resolution provides at Article 3(3) that it does not include persons facing “accusation or criminal legal proceedings [for serious international crimes and grave violations of human rights or international humanitarian law] . . . since the year 2002, which fall under the jurisdiction of the Special Court on the Crimes of Darfur.” It also excludes from amnesty those who “have had arrest warrants issued against them by the International Criminal Court.”

The jurisdiction of the Special Court on the Crimes of Darfur will presumably only cover crimes relating to Darfur.¹⁴ The ICC’s current investigation in Sudan is similarly focused only on crimes committed in Darfur. As worded, therefore, the resolution appears to limit any exceptions to the amnesty to crimes which occurred in Darfur since 2002. This would provide an amnesty for all

¹³ Juba Peace Agreement (3 Oct. 2020), National Issues Agreement, Art. 17(1).

¹⁴ At the time of writing, it is not clear over which crimes the Special Court will have jurisdiction, though some press coverage has noted that the Court will “investigate and prosecute those responsible for war crimes and crimes against humanity in Darfur.” Sudan Tribune, ‘Sudan, Armed Groups Agree to Establish Special Court for Darfur Crimes,’ Sudan Tribune (21 January 2020), available at: <https://sudantribune.com/spip.php?article68873>.

other international crimes or human rights violations that were committed throughout the rest of the country, such as atrocities committed in South Kordofan and Blue Nile.

Question for Sudan's transitional government:

Does the resolution provide an amnesty for serious international crimes or grave human rights violations committed outside Darfur? For example, would those responsible for alleged international crimes during the conflict in the Blue Nile / South Kordofan fall within the amnesty?

Application to Future Criminal Proceedings

As other lawyers have noted,¹⁵ it is unclear whether under Article 3(3) only those individuals who are *already* subject to criminal proceedings for international law violations, or private lawsuits seeking compensation, are excluded from the amnesty. Interpreted as such, the resolution would preclude victims from initiating new criminal complaints, even where the factual basis for such claims would rise to the level of crimes against humanity, war crimes, or grave human rights violations.

Question for Sudan's transitional government:

Does the exception to the amnesty for crimes committed in Darfur apply only to cases that have already been initiated? For example, would it be possible to initiate new cases against individuals for crimes committed in Darfur?

¹⁵ See Ali Agab and Olivia Bueno, 'Sudan's Recent Amnesty Resolution Undermines the Prospects for Accountability and Peace,' International Justice Monitor (25 November 2020), available at: <https://www.ijmonitor.org/2020/11/sudans-recent-amnesty-resolution-undermines-the-prospects-for-accountability-and-peace/>. Agab and Bueno argue that international crimes "are only excluded from the amnesty where proceedings were *already instituted* either by a Special Court for Darfur Crimes or where cases are brought by private actors seeking compensation (*gassas*)."