

THE FAILURE OF THE SYRIAN "AMNESTY" DECREES TO ADDRESS THE ISSUE OF DETAINEES AND MISSING PERSONS

I. BACKGROUND

1. Persons arrested and jailed by the authorities in conflict-affected countries have often been victims of enforced disappearance. Amnesty laws may serve many purposes, including releasing detainees, ensuring immunity for those who committed crimes against detainees and the disappeared, and encouraging armed non-state actors to surrender in an effort to regain security control, foster social calm and overcome periods of unrest. Amnesty laws that do not comply with transitional justice measures can undermine efforts to resolve cases of detainees and missing persons. For example, "[i]n Lebanon, following the 1975-90 civil war, the authorities failed to develop mechanisms to address the issue of the missing and disappeared. On the contrary, Lebanon proclaimed an amnesty in 1991 for all politically motivated violence perpetrated during the civil war and consequently failed to address enforced disappearances¹."
2. The concept of "amnesty" refers to the total waiver or reduction of penalties for crimes. According to Syrian law, general amnesties can be granted by the legislature and pardons may be granted by the head of state.² Multiple amnesty decrees issued by the Syrian authorities since 2011³ have not resulted in the release of tens of thousands of detainees who were subjected to enforced disappearance by these authorities.⁴ The *de facto* authorities in some Syrian areas have also issued amnesty decrees, and these too have failed to reveal the fate of many missing and disappeared persons in detention centers⁵.
3. The Syrian amnesty mechanism is incompatible with both the 2012 Syrian Constitution and the fundamental principles of democracy and the rule of law. The President of the Republic, as a representative of the executive authority, issues legislative decrees for a general amnesty, while Article 75 of the 2012 Syrian Constitution stipulates that the People's Assembly has jurisdiction to approve general amnesties⁶. By doing so, the President of the Republic exploits the legislative power conferred upon him under Article 113 of the current constitution to issue legislation. This constitutes a clear breach of the principle of the separation of powers upon which the foundations of democracy and the rule of law are based. In this context, the arbitrariness and domination of the executive authority over the legislative authority in general and the issuance of amnesty decrees in particular must cease.
4. In this paper, the Policy Coordination Group (PCG) aims to shed light on the Syrian authorities' reliance on amnesty decrees in the context of releasing detainees and revealing the fate of missing persons. Also in this paper, the PCG stresses that it opposes the use of such decrees to

¹ Global Report on Missing persons 2021, The International Commission on Missing Persons, 2021, p. 40.

² For more, see Articles 147 to 155 of the Syrian Penal Code No. 148 of 1949.

³ See *infra*.

⁴ The number of missing persons in Syria is estimated at 130,000 persons. See ICMP, Syria-Brussels Conference 6: The Policy Coordination Group facilitated by ICMP presented recommendations on the issue of missing, disappeared, and detained persons, 4 May 2022, available at: <https://www.icmp.int/news/syria-brussels-vi>

⁵ For more on the issue of amnesties in areas controlled by the Syrian Democratic Forces (SDF), see Abdul Aziz al-Khalifa, "قسد" تذر الرماد في عيون أهالي آلاف المعتقلين, "Amnesty for Nowruz." The "SDF" casts ash in the eyes of the families of thousands of detainees, Syria TV website, 21 March 2022, available at:

<https://www.syria.tv> See also the Syrian Interim Government's decision to award amnesty for crimes committed before 21 June 2021, available in Arabic at:

<https://drive.google.com/file/d/1ZMVA65oY7glv1DLIf95mLEKXRdpx4OJZ/view>

⁶ Under Article 108 of this Constitution, the president of the Republic is authorized to grant a special pardon.

evade accountability for those responsible for committing enforced disappearance and other crimes against missing persons. In the view of the PCG, amnesty decrees cannot be used to address the issue of missing persons. Instead, the PCG calls for the release of persons detained for political reasons, for the fate of the missing to be revealed, and for perpetrators of systematic violations to be held accountable.⁷ The many amnesty decrees that were issued by the authorities are evidence of the large-scale systematic practice of arbitrary arrest and enforced disappearance in Syria⁸.

II. AMNESTY AND THE MISSING

5. Opponents of the Syrian regime were subjected to arrest and enforced disappearance following the protests that erupted in 2011, demanding political change. From March 2011 until the time of writing, the Syrian authorities have issued 22 amnesty decrees, including Legislative Decree No. 7 of 2022 granting a general amnesty for "terrorist crimes" committed by Syrians before 30 April 2022⁹.
6. Previous amnesty decrees did not address the issue of missing persons and political detainees, as most were confined to perpetrators of ordinary crimes. All amnesty decrees excluded perpetrators of crimes punishable by death that are investigated by the Military Field Court and stipulated in Articles 154-160 of the Military Penal Code. This excludes crimes provided for in Articles 154 and 157. Two pardons were issued in relation to violations of Article 154 and three covered violations of Article 157. These, however, pertained to the period before 2014. In regard to crimes investigated by the Counter-Terrorism Court, all amnesty decrees have excluded the two crimes provided for in Articles 5/2 and 6/3 of the Counter-Terrorism Act, which are the only articles of the Act that impose the death penalty. Concerning crimes investigated by the Criminal Court or the Field Court, where the perpetrator is an active, engaged, or a secret military agent, or the crime is committed against the interest of the army or military units, the amnesty decrees have excluded the crimes stipulated in Articles 263 to 266 and 268, 271 to 277 and paragraph 3 of Article 305 if they result in the death of a person. They also excluded crimes committed in violation of paragraph 3 of Article 326 of the General Penal Code. Most of these provisions impose the death penalty.¹⁰
7. Hence, the PCG finds that amnesty decrees have excluded a specific set of capital offences

⁷ The PCG considers that such violations are the actual crimes that require accountability, and they must be distinguished from charges of a political nature that were levelled against the majority of detainees and missing persons.

⁸ See *infra* for the official number of people benefiting from those decrees.

⁹ According to the Syrian National report of the universal periodic review mechanism, 20 amnesty laws were issued by the Syrian regime between 2011 and 2020, and 344,684 detainees and convicted persons benefited from them. See Working Group on the Universal Periodic Review, 40th session, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Syrian Arab Republic, 17 November 2021, <https://digitallibrary.un.org/record/3954873?ln=es>, English version: A/HRC/WG.6/40/SYR_1-EN, Page 12. In 2021, Legislative Decree No. 1 granted amnesty that includes full punishment for several misdemeanors committed by those fleeing from military service, and Decree No. 13 granted a general amnesty for perpetrators of misdemeanors, infractions, and felonies. In 2022, Legislative Decree No. 7 granted a general amnesty for "terrorist crimes" committed by Syrians and that did not result in the killing of a person.

¹⁰ For more information about the Syrian exceptional courts, the death penalty and missing persons, see PCG, Towards Addressing the Issue of the Missing, Report to the United Nations on the Universal Periodic Review of the Syrian Arab Republic, Fortieth Session - July 2021, p. 9 et seq, available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=9605&file=ArabicTranslation>

provided for in the General Penal Code, the Military Penal Code and the Counter-Terrorism Act. This may have been done to conceal secret executions that have resulted in cases of missing persons.

8. As with previous decrees, the amnesty stipulated in Decree No. 7 did not cover all charges of a political nature that the Syrian authorities have long invoked to arrest and detain thousands of people, some of whom were sentenced by the exceptional courts to long prison sentences. Several Syrian laws include penalties for exercising the right to freedom of expression and association. These were not covered by Decree No. 7.¹¹ This amnesty decree did not include those prosecuted for crimes of a political nature provided for in other laws, such as crimes related to national security listed in the General Penal Code. These include the crime of attacking the constitution or undermining the status of the State, and acts that aim to strip parts of the state's territory. Decree No. 7 did not cover offences under the Military Penal Code. This shows that many convicts did not benefit from this amnesty. In addition, those detainees who are held arbitrarily without being referred to the judiciary did not benefit from the amnesty decrees. The regime's security services have also disappeared thousands of detainees who were subjected to torture and inhumane conditions of detention, in an attempt to cover up the circumstances of their deaths. The authorities did not hand over the bodies of these victims to their families and failed to prosecute those responsible for these crimes.¹²
9. Many people were subjected to enforced disappearance in areas where reconciliation agreements were signed¹³ and where a "tolerant" approach was adopted by the Syrian authorities.¹⁴ For example, many Syrians disappeared after passing through the military checkpoints established by the regime following the signing of the "Daraa Settlement Agreement" in mid-2018. While the fate of some detainees remains unknown, others were executed and their bodies handed over to their families.¹⁵ Detention campaigns continue to this day in these areas, which were restored by the regime. This is often followed by the detainees being subjected to enforced disappearance.¹⁶
10. The regime's amnesty decrees are shrouded in ambiguity, as they are not accompanied by the publication of official lists of persons benefiting from them.¹⁷ This perpetuates the suffering of

¹¹ See Article 17 of Amnesty Decree 7 for more information on crimes exempted from the decree.

¹² For more on the execution of detainees in detention centers, see Syria: Towards Addressing the Issue of the Missing Persons, op. cit, pp. 5-6. See also The administrative structure of Sednaya prison and its organizational relationship الهيكلية الإدارية لسجن صيدنايا وعلاقته التنظيمية, The Association of the Detainees and Missing of the Sednaya Prison, October 2022, 62 p, available in Arabic at: https://www.admsp.org/wp-content/uploads/2022/10/The-Administrative-Structure-AR-and-Organizational-Ties-of-Sednaya-Prison-30_SEP_2022.pdf

¹³ These are the areas beyond the control of the Syrian authorities, which were retaken after long periods of inhumane siege and repeated bombing.

¹⁴ The National report of the universal periodic review mechanism, op. cit, p. 12.

¹⁵ The Syrian Association for Citizen's Dignity, "The Reconciliation Agreement in Daraa: Insecurity and Continuing Repression and Collective Punishment" اتفاق المصالحة في درعا: انعدام الأمن واستمرار القمع والعقاب الجماعي, 7 October 2020, available at:

<https://syacd.org/reconciliation-agreement-in-daraa-insecurity-continued-repression-and-collective-punishment/>

¹⁶ Muhammad Karkas, Syrian regime forces carry out a massive arrest campaign in the countryside of Daraa, درعا قوات النظام السوري تنفذ حملة اعتقال واسعة في ريف درعا Al-Araby Al-Jadeed, 26 April 2022, available at: <https://www.alaraby.co.uk/politics>

¹⁷ The recent Amnesty Decree No. 7 led to the release of persons who had previously been the subject of death notifications communicated to their families. United Nations, report of the Secretary-General to the General Assembly, A/76/890, 2 August 2022, p 10.

families of the missing, especially female survivors who assume the responsibility to search for missing family members and follow up on relevant legal procedures. In addition to legal, social, and material hardships,¹⁸ women are routinely exposed to numerous violations during the search process. These include sexual exploitation and physical and emotional extortion by brokers and agents of the authorities, as well as repeated trauma and psychological suffering that often follow the issuance of amnesty decrees that do not result in the release of their loved ones. Added to this are the risks and challenges, and even the impossibility of following up with the field military courts and the security services to demand implementation of the amnesty decrees.¹⁹ It is also worth noting the violations of the real estate rights of many detainees and forcibly disappeared persons through the confiscation of their property and deprivation of the rights of their families. In this regard, amnesty decrees are ambiguous in regard to the fate of property that belongs to individuals who benefit from them.²⁰

III. AMNESTY AND PERPETRATORS OF VIOLATIONS

11. Previous amnesty decrees could be used to enshrine impunity for those involved in committing grave violations of human rights such as crimes against humanity and war crimes.²¹ Yet, holding perpetrators of such serious crimes to account is among the basic norms of international law, requiring mandatory punishment. These norms cannot under any circumstances be overturned through amnesty or even through statutes of limitations or other national legal provisions. In fact, international law has attached great importance to holding perpetrators of these crimes accountable, especially through the adoption by the United Nations General Assembly of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.²²

12. Several international instruments, such as the Convention against Torture,²³ that the Syrian

¹⁸ For more on the suffering of women, see *Ibid*, pp. 10-11.

¹⁹ For more on the Military Field Courts and their role in the spread of enforced disappearances and the exacerbation of the phenomenon of missing persons, see *Syria: Towards addressing the issue of the missing*, *op. cit*, pp. 10-11.

²⁰ For more, see Enab Baladi, what is the fate of the property of the detainees who were released by the Syrian regime? ما مصير أملاك المعتقلين الذين أفرج عنهم النظام السوري؟، 10 May 2022, available at: <https://www.enabbaladi.net/archives/571100> See also series of studies on property and housing Problems in Syria, The Day After, available at : <https://tda-sy.org/publications/hlp-research/>

²¹ A report issued by The Day After Foundation stated that "a general amnesty is a tool used by the Syrian regime to forgive criminals, especially those revolve in its orbit, or for the regime's political ends while excluding some of the offenses that the regime has consistently accused its opponents of. Perhaps the most prominent example of the regime's use of the amnesty law as a tool to protect it, the issuance of three amnesty decrees at the beginning of the revolution in 2011, which included many of its agents on the one hand, and many extremists who were released in order to distort the image of the revolution, and later became leaders of ISIS, Al-Nusra, Democratic Union Party (PYD) and others". Anwar Majni, Analysis of the Amnesty Law issued by Legislative Decree No. 13 of 2021، تحليل قانون العفو الصادر بالمرسوم التشريعي رقم 13 لعام 2021، The Day After, 2021, p. 1, available at : <https://tda-sy.org>

²² Article 2 of this Convention states: "If any of the crimes mentioned in article 1 is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission". The full text of this Agreement is available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf

²³ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by United Nations General Assembly Resolution No. 39/46 on 10 December 1984.

State has ratified, uphold accountability for these crimes.²⁴ In this context, Article 27 of the Vienna Convention on the Law of Treaties provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁵ States may not grant amnesty for grave violations of human rights, which include, but are not limited to, torture and enforced disappearance.²⁶ Amnesties for serious human rights violations may also violate the state's obligations under customary law.²⁷

13. Amnesty decrees cover crimes or violations committed up to the effective date of the issuance of these decrees, and in any event do not include continuing or future crimes. Therefore, the amnesty decrees cannot be applied to those involved in committing crimes of enforced disappearance in Syria, which are still ongoing, as the fate of the majority of the victims has not yet been revealed. In the context of the legal actions against former Chilean dictator Augusto Pinochet, the concept of "permanent kidnapping" was developed. Consequently, disappearances were classified as ongoing crimes that render powerless amnesty laws issued throughout the duration of the military regime.²⁸
14. Thus, any amnesty law covering perpetrators of enforced disappearances violates a state's duty to investigate these crimes,²⁹ as well as the rights of the families of the victims to access justice, redress, and information. As for disciplinary sanctions,³⁰ which may have been imposed by the Syrian authorities on some of its agents working in the security sector, the army, and armed militias, these are unacceptable and disproportionate to the seriousness of violations that have affected the missing. All such practices reinforce the culture of impunity that is currently prevalent in Syria.³¹
15. The executive authority, represented by the President of the Republic, issues amnesty decrees,³² which include crimes committed by this same authority. It is common knowledge that the Syrian power organs, and even the head of state himself who issued these amnesty decrees, are accused of committing crimes against humanity and war crimes.³³ Hence, these decrees lack

²⁴ The second paragraph of Article 4 of the Convention against Torture states that "each state party shall make these crimes punishable by appropriate penalties taking into account their dangerous nature".

²⁵ The full text is available on the official University of Minnesota website:

<http://hrlibrary.umn.edu/arabic/viennaLawTreatyCONV.html>

²⁶ Les Instruments de l'Etat de Droit Dans les Sociétés Sortant d'un Conflit (Amnesties), Haut-Commissariat des Nations Unies aux droits de l'homme, New York et Genève, 2009, p. 20. The English version of this publication is available at : https://www.ohchr.org/sites/default/files/Documents/Publications/Amnesties_en.pdf.

²⁷ *ibid*, same page.

²⁸ The Chilean judge Juan Salvador Guzman Tapia developed this concept. For more information, see Global Report on Missing Persons, *op. cit.*, p. 18.

²⁹ Les Instruments de l'Etat de Droit Dans les Sociétés Sortant d'un Conflit (Amnesties), *op. cit.*, p. 20.

³⁰ Disciplinary measures against public sector employees or their subordinates, who have committed offenses, sometimes leading to a job transfer, salary reduction, termination of service, or temporary suspension from work.

³¹ The Amnesty Decree No. 7 stipulates also in its seventh article that the full penalty for kidnapping crimes shall be dropped according to certain conditions. It is worth noting the ambiguity of Syrian legislation concerning punishing crimes committed by state services, such as the crime of enforced disappearance, and there are even decrees dedicated to the immunity of these services from prosecution. See PCG Report, Towards addressing the issue of the missing, *op. cit.*, p. 8 and beyond. As for Syrian Legislative Decree No. 16 criminalizing torture, it has been subject to considerable criticism. See for example, Amnesty International, Syria: New Law to Criminalize Torture Aims to "whitewash" Decades of Human Rights Violations, 1 April 2022, available at: <https://www.amnesty.org/en/latest/news/2022/03/syria-new-anti-torture-law-whitewashes-decades-of-human-rights-violations/>

³² See above.

³³ See for example, Report of the Independent International Commission of Inquiry on the Syrian Arab

legitimacy and are issued by a non-independent or impartial authority that is involved in committing crimes against missing persons and other victims of human rights violations. Consequently, this authority does not have the right to pardon crimes it has been implicated in, and subsequently, invoke these pardon decrees to escape accountability.

VI. CONCLUSION

16. Amnesty could be one of the transitional justice measures that the PCG seeks to implement in the Syrian context, in order to contribute to addressing the issue of missing persons,³⁴ and to achieve national reconciliation, sustainable peace, and an environment conducive to the promotion of human rights and the building of the state of law. The PCG, while reiterating its call on all parties to reveal immediately the fate of missing persons and to release political detainees, calls for the consideration of an amnesty law as part of transitional justice mechanisms within the framework of the forthcoming political settlement, in line with international standards and in order to achieve progress in addressing the issue of missing persons. The PCG also rejects, under any circumstances, the possibility that these amnesty laws would result in the dismissal of penalties for those involved in gross and systematic human rights violations of detainees and missing persons.³⁵

Republic, Human Rights Council, 46/55AHR/C, 11 March 2021, p. 26.

³⁴ For more, see the PCG paper "Proposal of Constitutional Principles for the Missing Persons of Syria", 2022, pp. 7-8, available at: <https://www.icmp.int/wp-content/uploads/2022/01/pcg-007-6-W-doc-constitutional-paper-on-the-issue-of-missing-persons-in-syria-1.pdf>

³⁵ A recent study published by the "The Day After Foundation" concluded that one of the priorities of Syrians is to hold accountable those responsible from the parties to the conflict for committing human rights violations or war crimes. See The Day After, The Constitutional Process from the Syrians' Point of View العملية الدستورية من وجهة نظر السوريين, January 2021, p. 16, available at: <https://syriancc.org>. Many peace agreements have excluded some crimes from any possibility of amnesty, including the crime of enforced disappearance and torture. See for example, the agreement between the Colombian government and the FARC in 2016. See Security Council Resolution, No. S/2017/272, 21 April 2017, p. 260, available at: https://unmc.unmissions.org/sites/default/files/s-2017-272_e.pdf

ANNEX 1: LIST OF AMNESTY DECREES ISSUED SINCE MARCH 2011

No.	Decree Number	Decree Date	Nature of Amnesty
1	Legislative Decree No. 34	7 March 2011	(Comprehensive amnesty)
2	Legislative Decree No. 61	31 May 2011	(Comprehensive amnesty)
3	Legislative Decree No. 72	20 June 2011	
4	Legislative Decree No. 124	05 November 2011	Amnesty for military crimes
5	Legislative Decree No. 10	15 January 2012	(Comprehensive amnesty)
6	Legislative Decree No. 30	02 May 2012	Amnesty for military crimes
7	Legislative Decree No. 70	23 October 2012	(Comprehensive amnesty)
8	Legislative Decree No. 23	16 April 2013	(Comprehensive amnesty)
9	Legislative Decree No. 70	29 October 2013	Amnesty for military crimes
10	Legislative Decree No. 22	09 June 2014	(Comprehensive amnesty)
11	Legislative Decree No. 32	25 July 2015	Amnesty for military crimes
12	Legislative Decree No. 8	17 February 2016	Amnesty for military crimes
13	Legislative Decree No. 15	28 July 2016	Amnesty for military crimes
14	Legislative Decree No. 11	04 February 2017	Extension of the previous amnesty for military crimes
15	Legislative Decree No. 18	09 October 2018	Amnesty for military crimes
16	Legislative Decree No. 20	14 September 2019	(Comprehensive amnesty)
17	Legislative Decree No. 06	22 March 2020	General amnesty for the containment and management of the COVID-19 pandemic
18	Legislative Decree No. 01	12 March 2021	Amnesty for military crimes
19	Legislative Decree No. 13	02 May 2021	(Comprehensive amnesty)
20	Legislative Decree No. 03	25 January 2022	Amnesty for military crimes
21	Legislative Decree No. 07	30 April 2022	General amnesty for “crimes of terrorism”
22	Legislative Decree No. 24	21 December 2022	General Amnesty for military crimes