

MENA Rights Group is a Geneva-based legal advocacy NGO defending and promoting fundamental rights and freedoms in the Middle East and North Africa (MENA) region. Adopting a holistic approach, we work at both the individual and structural level. We represent victims of human rights violations before international law mechanisms. In order to ensure the non-repetition of these violations, we identify patterns and root causes of violations on the ground and bring key issues to the attention of relevant stakeholders to call for legal and policy reform.

About the Enforced Disappearances in Africa Project

The Enforced Disappearances in Africa Project is a joint project by the African Centre for Justice and Peace Studies (Sudan), Lawyers for Justice in Libya (Libya), MENA Rights Group (Algeria), REDRESS (UK) and Zimbabwe Lawyers for Human Rights (Zimbabwe). It supports human rights lawyers and victims' groups to bring cases challenging enforced disappearances. It empowers victims to speak about their own experiences, set up victims' networks and advocate for justice on their own behalf. It raises awareness about the problem with the African Union, relevant UN bodies and specific governments. It seeks to work with the African Commission on Human and Peoples' Rights to draft and adopt comprehensive guidelines on enforced disappearances in Africa.

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Table of Contents

1	Introduction	4
2	Algeria’s international obligations and cooperation with human rights mechanisms	5
2.1	Ratification of international human rights treaties	5
2.2	Cooperation with UN Human Rights Committee and UN Special Procedures.....	6
2.3	Algeria’s national human rights institution	8
3	The right to truth	10
3.1	Criminalisation of truth-seeking efforts.....	10
3.2	Freedom of expression, peaceful assembly, and association.....	13
4	The state’s duty to investigate	18
4.1	Search for disappeared persons	18
4.2	Mass graves and the return of remains	19
4.3	Duty to prosecute.....	21
5	The state’s duty to provide reparations	24
6	The state’s duty to provide guarantees of non-repetition	26
6.1	Criminalisation of enforced disappearances in Algeria.....	27
6.2	Legal safeguards	28
6.3	Judicial reform	31
6.4	Security sector reform.....	34

1 Introduction

In 1992, Algeria was plunged into a civil war known as the “dark decade.” The conflict left around 200,000 people dead and thousands of others injured.¹ It was marked by gross human rights violations committed by all parties involved in the hostilities. In this context, the country experienced a widespread and systematic practice of enforced disappearances.²

Two decades since the end of the Algerian civil war, the whereabouts of thousands of forcibly disappeared persons are still unknown. Due to the adoption of several blanket amnesty laws, perpetrators of enforced disappearances were not held to account, and victims and their families were left with no recourse to seek justice or uncover the truth regarding the fate and whereabouts of their loved ones.

In light of the unaddressed legacy of enforced disappearances in Algeria, this policy paper tackles the legislative, policy and practice gaps in the prevention and protection from enforced disappearances in the country. While shedding light on these shortcomings, the aim of the paper is to propose to the Algerian authorities concrete recommendations that may be pursued in an effort to deal with the past, provide redress to victims, remedy the harm caused by these atrocities, and guarantee their non-repetition.

The paper first identifies areas of necessary improvement in Algeria’s commitments to its international human rights obligations and the effectiveness and independence of its national human rights institution. It then assesses the various challenges preventing the realisation of the victims’ right to truth, such as the criminalisation of truth-seeking efforts and the implementation of added restrictions on fundamental freedoms. The paper then addresses the state’s duty to investigate, provide reparation and guarantees of non-repetition, and provides recommendations that may enable the realisation of victims’ rights and the fulfilment of Algeria’s obligations, as established under international law.

¹ Wendy Kristianasen, “Truth & Justice after a Brutal Civil War: Algeria: The Women Speak”, *Review of African Political Economy*, 33(108), pp. 346-351.

² Sofian Philip Naceur, “The Legacy of the Algerian Civil War: Forced Disappearances and the Cost of Amnesty”, *Mada Masr*, 25 July 2017.
<https://madamasr.com/en/2017/07/25/feature/politics/the-legacy-of-the-algerian-civil-war-forced-disappearances-and-the-cost-of-amnesty> (accessed 26 July 2020).

2 Algeria's international obligations and cooperation with human rights mechanisms

2.1 Ratification of international human rights treaties

Though Algeria is party to the majority of international human rights treaties, it has not yet ratified the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED), signed in 2007, nor has it ratified the Rome Statute of the International Criminal Court (ICC).

Ratifying the ICPPED and the Rome Statute of the ICC would provide Algeria with tools to address its past legacy of enforced disappearances and commit to the eradication of such practices through an adherence to international human rights norms and obligations. Under article 4 and 6 of the ICPPED, for example, state parties shall criminalise enforced disappearances in their national legislation and hold perpetrators criminally responsible.

Echoing article 5 of the ICPPED, article 7 of the Rome Statute, moreover, provides that enforced disappearances may amount to a crime against humanity if the disappearances are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Since Algeria has not yet ratified either of the aforementioned instruments, the obligations outlined in the ICPPED remain non-binding and the violations in the Rome Statute not prosecutable.

Recommendations:

- Ratify the International Convention for the Protection of all Persons from Enforced Disappearances and recognise the competence of the Committee on Enforced Disappearance to receive individual complaints as per article 30 and 31 of the ICPPED;
- Ratify the Rome Statute of the International Criminal Court.

2.2 Cooperation with UN Human Rights Committee and UN Special Procedures

Although Algeria has ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), recognising the competence of the Human Rights Committee (HR Committee) to receive and consider individual communications, it has not cooperated effectively with this body regarding the practice of enforced disappearances.³ In all the Views adopted by the HR Committee regarding Algeria, the government was found responsible for several violations of its obligations under the ICCPR.⁴

The Algerian authorities, moreover, have not yet implemented the recommendations outlined in these individual decisions, including carrying out effective investigations into the cases of disappearances; providing families with information about the results of these investigations; prosecuting those responsible for the disappearances; and providing adequate compensation to victims and their families.⁵ As a result of this lack of cooperation, in March 2018, the HR Committee decided to suspend the “follow-up dialogue with the finding of unsatisfactory implementation” of 22 of its decisions.⁶

Following Algeria’s fourth periodic review in 2018, the HR Committee, in its Concluding Observations, voiced concern over the lack of effective investigations into cases of disappearances and the unwillingness of the authorities to provide an effective remedy to victims and their families.⁷ The Committee further recommended that Algeria organise a country visit for the UN Working Group on Enforced or Involuntary Disappearances (WGEID); that it ratifies the ICPPED; and that it guarantees victims’ access to truth. Yet, none of these recommendations have been implemented to date.

³ Sir Nigel Rodley, former member of the Human Rights Committee, has affirmed that the human rights violations that took place throughout the country’s civil war, including the practice of enforced disappearances, amount to “crimes against humanity.” See: Human Rights Committee, *Summary records of the review of the third periodic report of Algeria by the Human Rights Committee*, 31 October 2007, UN Doc. CCPR/C/SR.2495, para. 5.

⁴ See the jurisprudence of the Human Rights Committee:
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=DZA&Lang=EN (accessed 10 February 2021).

⁵ Human Rights Committee, *Concluding Observations on the fourth periodic report of Algeria*, 17 August 2018, UN Doc. CCPR/C/DZA/CO/4, para. 7.

⁶ Human Rights Committee, *Follow-up to Views under the Optional Protocol to the Covenant*, 29 May 2018, UN Doc. CCPR/C/122/R.2, p. 5.

⁷ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 29.

Furthermore, Algeria has yet to effectively cooperate with the UN Special Procedures, including the WGEID. Despite sending an official invitation to the WGEID in 2014, the authorities have not yet allowed the Group to conduct a visit.⁸ According to the latest report of the WGEID, of the more than 3,280 cases submitted to the Working Group, the Algerian government has only clarified nine of those cases.⁹

Moreover, instead of responding individually, the authorities submitted a “memorandum” to respond to all cases of disappearances filed before the WGEID, claiming that a case-by-case approach with the UN mechanisms did “not reflect the internal socio-political and security context in which the alleged facts took place.”¹⁰ This document was further used by the authorities to challenge the admissibility of communications brought forward before the HR Committee. On that note, the Committee concluded “that despite repeated requests, the State party continues to refer systematically to a general document (the “aide-memoire”) without responding to the claims made by authors concerning events related to the period 1993-1998 and, in some instances, outside that period.”¹¹

Because enforced disappearances constitute a serious violation of international human rights law, which, if committed in a widespread or systematic manner, may amount to a crime against humanity, Algeria must respond to these violations in a manner that takes into account the gravity of the crime and its harmful impact on victims and their families. To do so, Algeria must honour its international human rights obligation by strengthening its cooperation with UN human rights mechanisms.

Recommendations:

- Reply favourably and without delay to the pending request of the WGEID to visit Algeria.

⁸ Country visits of Special Procedures of the Human Rights Council since 1998, https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewCountryVisits.aspx (accessed 10 February 2021).

⁹ Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, 7 August 2020, UN Doc. A/HRC/45/13, p.28.

¹⁰ This argument presented before the WGEID has been mentioned in several Views of the Human Rights Committee, in the section “State party’s observations” adopted by the Human Rights Committee, including in Communication No. 1884/2009, *Aouali et al. v. Algeria*, para. 4.1.

¹¹ Concluding observations on the fourth periodic report of Algeria, *op. cit.*, para. 7.

- Cooperate with the HR Committee in good faith under the individual communications procedure by ceasing to refer to the memorandum and by responding individually to the claims made by the authors of these communications;
- Take all necessary action to put in place appropriate procedures that give full effect to the HR Committee's Views on individual cases of enforced disappearance by implementing all recommendations contained therein.

2.3 Algeria's national human rights institution

National human rights institutions can play a crucial role in the establishment of justice mechanisms in post-conflict settings. According to the Principles relating to the Status of National Institutions for the Protection and Promotion of Human Rights (Paris Principles), national human rights institutions are responsible for promoting and ensuring “the harmonization of national legislation, regulations and practices with the international human rights instruments to which the state is a party, and their effective implementation.”¹² They are additionally responsible for “drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government.”¹³

Algeria's National Consultative Commission for the Promotion and Protection of Human Rights (CNCPPDH) was established in 2001 by presidential decree No. 01-71. The commission was tasked with investigating cases of enforced disappearances, and, in 2005, it concluded that more than 6,100 people had been disappeared in Algeria between 1992 and 1998.¹⁴ However, the establishment of this commission through an executive order undermined its structural independence. As enshrined in the Paris Principles, a national human rights

¹² UN General Assembly, *Principles relating to the Status of National Institutions*, 20 December 1993, UN Doc. A/RES/48/134, <https://www.un.org/ruleoflaw/files/PRINCI~5.PDF> (accessed 12 January 2021).

¹³ *Ibidem*.

¹⁴ Amnesty International, “A Legacy of Impunity, A Threat to Algeria's Future”, 2009, <https://www.amnesty.org/en/documents/MDE28/001/2009/en/> (accessed 22 November 2020), p. 28.

institution should be “independent of the Government and not be subject to financial control which might affect its independence.”¹⁵

In March 2017, the CNCPPDH was replaced by the National Council for Human Rights (CNDH), under Law No. 16-13. Following its review by the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) in May 2018, the CNDH was granted B status, indicating partial compliance with the Paris Principles, including due to its lack of independence from the executive branch.¹⁶

The SCA expressed concern over the limited actions taken by the CNDH to address human rights violations in the country. It additionally noted that the CNDH has not properly fulfilled its protection mandate which requires that it “not only monitor, investigate and report on the human rights situation in the country, [but] also undertake rigorous and systematic follow-up activities to promote and advocate for the implementation of its recommendation and findings and the protection of those whose rights were found to be violated.”¹⁷ The SCA also found that the CNDH did not demonstrate that it was taking adequate steps to address serious human rights violations, including torture, enforced disappearances and the expulsion of migrants.¹⁸

Recommendations:

- Strengthen the role of Algeria’s national human rights institution by:
 - Promoting the structural, financial and functional independence of the CNDH;
 - Strengthening the CNDH’s role in addressing cases of enforced disappearances by increasing their technical capacity and specifically mandating them to investigate such cases;
 - Ensuring full compliance with the requirements of the Paris Principles.

¹⁵ UN General Assembly, *Principles relating to the Status of National Institutions*, 20 December 1993, UN Doc. A/RES/48/134, <https://www.un.org/ruleoflaw/files/PRINCI~5.PDF> (accessed 12 January 2021).

¹⁶ Global Alliance of National Human Rights Institutions (GANHRI), *Report and Recommendations of the Session of the Sub-Committee on Accreditation*, 14-18 May 2018, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20May%202018-Eng.pdf> (accessed 8 August 2020), p. 16.

¹⁷ *Ibidem*.

¹⁸ *Ibidem*.

3 The right to truth

3.1 Criminalisation of truth-seeking efforts

In the aftermath of mass violations of human rights and humanitarian law, victims and their families are entitled to their right to truth.¹⁹ This right has been established by international customary law,²⁰ the case law of regional courts,²¹ international soft law principles²² and the individual decisions adopted by the HR Committee.

The right to the truth implies that Algeria has an obligation to give the competent investigative authorities full access to available information, allowing the tracing of disappeared persons. Paragraph 2 of article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance (hereinafter “UN Declaration”) states that the “competent authority [to investigate] shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.”²³ In its General Comment No. 10 on the right to the truth in relation to enforced disappearance, the WGEID explained that the competent authorities should also have the power to fully access the archives of the state. After the investigations have been completed, the archives of the said authority should be preserved and made fully accessible to the public.²⁴

Article 13 of the UN Declaration additionally maintains that “[w]henever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an

¹⁹ See: The Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva, art. 26.

²⁰ See: Rule 117 in Customary International Humanitarian Law, Volume I, Rules, ICRC, Cambridge University Press, 2005, p. 421.

²¹ See: Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser.C) No. 4, para. 181.

²² UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, UN Doc.

A/RES/60/147, <https://www.refworld.org/docid/4721cb942.html> (accessed 15 September 2020).

²³ UN General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992, <https://undocs.org/en/A/RES/47/133> (accessed 21 January 2021), art. 13.

²⁴ Working Group on Enforced or Involuntary Disappearances, *General Comment on the right to the truth in relation to enforced disappearance*, 26 January 2011, UN Doc. A/HRC/16/48, para. 39.

investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.”

The HR Committee has found that the “right to know” serves to prevent or end the psychological torture of the families of the disappeared.²⁵ As additionally stated in the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, “[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death and disappearance, the victims’ fate.”²⁶

In Algeria, however, victims and their families have been denied their right to truth and continue to face legal hurdles preventing the realisation of this right. Article 46 of Ordinance No. 06-01, which outlines the scope and obligations of the Charter for Peace and National Reconciliation, constitutes a major impediment preventing families and individuals from seeking the truth regarding the fate and whereabouts of their loved ones. This provision criminalises any attempt to uncover or examine the events that took place throughout the civil war, including the serious breaches of international law. Indeed, article 46 maintains that:

Anyone who, by speech, writing or any other act, uses or exploits the wounds of the National Tragedy to harm institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honourably served it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 DA.²⁷

Not only is the right to truth not protected in Algeria, but in fact, merely seeking the truth may be prosecutable. The HR Committee has recommended that Algeria repeal the article “as it impedes the freedom of expression and infringes the right of all to have access, both domestically and at the international level, to an effective remedy against human rights violations.” The Committee added that

²⁵ See: UN Human Rights Committee, *R. A. V. N. et al.* (Argentina), communication Nos. 343, 344 and 345/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/343/1988. See also: *Concluding observations of the Human Rights Committee: Algeria*, 18 August 1998, UN Doc. CCPR/C/79/Add.95, para. 10.

²⁶ UN Economic and Social Council, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the Independent Expert to Update the Set of Principle to Combat impunity, Diane Orentlicher*, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1.

²⁷ Algeria, Ordinance No. 06-01, 27 February 2006 (in French), <http://www.interieur.gov.dz/index.php/fr/dossiers/168-la-charte-pour-la-paix-et-la-reconciliation-nationale.html> (accessed 16 November 2020).

Algeria “should also ensure that no prosecutions are undertaken, or threats of prosecution made on the basis of article 46 of Ordinance No. 06-01.”

Recommendations:

- Repeal article 46 of Ordinance No 06-01;
- Establish a national truth-seeking commission tasked with the investigation of war crimes and serious violations of human rights, including enforced disappearances;
- Ensure the financial, functional and structural independence and impartiality of the said commission by providing it with the authority and mandate to:
 - Investigate the magnitude of enforced disappearances, the general characteristics and patterns of violations accompanying this state practice, and the alleged perpetrators and groups of people targeted;
 - Conduct thorough and effective investigations on each case of enforced disappearance;
 - Provide the families with detailed information about the results of the investigation;
 - Subpoena individuals responsible for violations;
 - Subpoena evidence that may lead to the identification of alleged perpetrators or gravesites;
 - Allocate sufficient resources and define the operating period of the commission in consultation with civil society organisations and victims’ associations;
 - Create spaces for victims and their relatives to provide their perspectives on the harm suffered as a result of the disappearance of their loved ones;
 - Present recommendations to the executive branch on the measures to be taken to redress the suffering and injustices experienced by victims and their relatives;
 - Make public the findings and recommendations of the commission;
 - Adopt a gender dimension throughout its work by:
 - Investigating the particular harms faced by women as a result of enforced disappearances;
 - Establishing “female only” truth-seeking sessions when investigating crimes or violations that may otherwise have negative consequences on female victims if discussed in public;

- Providing private truth-seeking sessions that allow victims to disclose their testimony in a private and confidential manner;
- Ensuring that women victims and relatives have access to their rights in just as equal terms as men.

3.2 Freedom of expression, peaceful assembly, and association

Since the end of the civil war, the exercise of fundamental freedoms in Algeria – namely freedom of expression and opinion, peaceful assembly, and association – has been further restricted undermining the ability of families of the disappeared to pursue their right to truth.

Article 2 of Algeria’s 2012 Information Code maintains that the activities of the press must be conducted within the constraints of respect for “national unity and sovereignty, the demands of state security and national defence, [and] the country’s economic interests,” among others.²⁸ As mentioned earlier, article 46 of the Charter for Peace and National Reconciliation prescribes a penalty of imprisonment and a fine for any person who attacks the institutions of the State party, impugns the honour of its officials or tarnishes its international reputation. Although convictions under this article remain extremely rare, this provision has a detrimental impact on freedom of expression as it creates a chilling effect and a climate of self-censorship according to the findings of the HR Committee.²⁹

Algerian legislation contains other provisions that have a detrimental impact on the families of victims’ right to freedom of expression and thus restricts their right to truth:

Article 96 criminalises the distribution, sale or exhibition of leaflets or bulletins of “such a nature as to harm the national interest,” and article 100 criminalises and punishes, through a sentence of minimum two years in prison, “any direct provocation to an unarmed gathering either by speeches uttered publicly, either by written or printed material displayed or distributed.”³⁰

²⁸ Algeria’s Information Code, https://menarights.org/sites/default/files/2016-11/ALG_LoiPresse_AR_0.pdf (accessed 25 January 2021), art 2.

²⁹ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 13.

³⁰ Algeria’s Penal Code, https://menarights.org/sites/default/files/2019-10/ALG_PenalCode_0.pdf (accessed 8 January 2021), arts. 96, 100.

Furthermore, under article 144 of the Penal Code, which was revised in 2020 through Law No. 20-06,³¹ families of the disappeared criticising the authorities may be arrested and prosecuted. Most notably, article 144 criminalises defamation and imposes a punishment of imprisonment from six months to three years, or a fine of 100,000 DA to 500,000 DA, or both, for whoever “with the intention of damaging their honour, delicacy or the respect due to their authority,” holds in contempt a magistrate, commander or law enforcement officer, “either by words, gestures, threats, sending or handing over of any object, either in writing or drawing not made public.”³²

Penalties for insulting civil servants or undermining “public security or order” have also been made more severe through Algeria’s new Penal Code which introduced article 196 *bis*. The latter imposes a punishment of “one to three years and a fine of DA 100,000 to DA 300,000, [for] anyone who wilfully disseminates or propagates, by any means, to the public false or slanderous information or news likely to undermine public security or order.”³³

These aforementioned provisions make it more difficult for journalists, human rights defenders and activists, as well as victims’ families, and the general public, to speak or report about the serious human rights violations committed during the civil war.

Article 52 of the Constitution guarantees freedom of assembly and peaceful demonstration under the conditions established by law. However, Law No. 91-19 amending and supplementing Law No. 89-28 on public meetings and demonstrations severely restricts the right to freedom of peaceful assembly. It requires for the organisation of any demonstration, (a) prior authorisation by and at the discretion of the executive on the basis of vague criteria, such as national principles, the public order or public decency; (b) an excessively long advance notice of eight days; and (c) criminal sanctions for any public assembly not meeting these conditions. Articles 97 and 98 of the Penal Code further punish

³¹ See: Algeria’s Official Gazette No. 25, https://www.mfdgi.gov.dz/images/pdf/textes_reglementaires/F2020025.pdf and MENA Rights Group, *Algeria: Penal Code amendments restrict freedoms of expression and association*, 2 July 2020, <https://menarights.org/en/articles/algeria-penal-code-amendments-restrict-freedoms-expression-and-association> (accessed 20 November 2020).

³² Algeria’s Penal Code, https://menarights.org/sites/default/files/2019-10/ALG_PenalCode_0.pdf (accessed 8 January 2021), art. 144.

³³ *Ibidem*.

organising or participating in an unauthorised demonstration, known as “unarmed gathering”, in a public place with up to one year in prison. The penalty is up to three years in prison if “the unarmed person continued to be part of an armed gathering that dissipated only when force was used.”

Finally, since 2001, a government decree placed a blanket ban on demonstrations in Algiers.

This legal framework has been used to prevent associations of victims from organising peaceful protests. Indeed, families of the disappeared have been regularly prevented from holding sit-ins or demonstrations calling for the truth on the whereabouts of their relatives. On 29 September 2016, several associations of families of the disappeared, including *le Collectif des familles de disparu(e)s d’Algérie (CFDA)*, *la Coordination nationale des familles de disparu(e)s (CNFD)*, and *SOS Disparus*, gathered before the Algerian Parliament in an organised peaceful assembly demanding their right to truth and justice.³⁴ The families of the disappeared, however, were beaten violently by police officers in Algiers, many of them in civilian clothing, who struck demonstrators with batons, dragged them along the ground, and in some cases strangled them.³⁵ More than 27 demonstrators, many of them direct relatives of the disappeared, were arrested that day.³⁶

Additionally, in 2012, the government enacted Law No. 12-06 that requires all associations including those already registered - to re-file registration applications and obtain a registration receipt from the Ministry of Interior before they can operate legally. On that basis, numerous human rights organisations in Algeria, including associations of families of the disappeared, have been unable to properly operate. Indeed, they were never provided with receipts though they properly refiled their registration forms years ago.

In 2018, the HR Committee noted with concern that the Law No. 12-06 contained provisions that are restrictive and subject an association’s stated objective to vague, imprecise and general criteria, such as the “public interest” and “respect

³⁴ UN Office of the High Commissioner for Human Rights, Joint Letter by Special Procedures Mandate-Holders, Reference AL DZA 3/2016, 1 November 2016.

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22811> (accessed 27 January 2021).

³⁵ *Ibidem*.

³⁶ *Ibidem*.

for national values and principles”. The UN experts further stated that “under that legislation, (a) the founding of an association is subject to an authorization procedure; (b) cooperation with foreign organizations and the receipt of funds from abroad are subject to prior clearance by the authorities; and (c) associations may be dissolved by simple administrative decision for reasons of “interference with the domestic affairs of the country or affront to national sovereignty’.”³⁷

Article 95 *bis* of the Penal Code, as amended in 2020, subjects individuals to five to seven years of imprisonment, in addition to a fine that ranges from 500,000 to 700,000 DA, if they receive:

funds, a gift or an advantage, by any means, from a State, an institution or any other public or private body or from any legal or natural person, inside or outside the country, to carry out or incite to carry out acts likely to undermine the security of the State, the stability and normal functioning of its institutions, national unity, territorial integrity, the fundamental interests of Algeria or public security and order.³⁸

The provision states that the “penalty shall be doubled when the funds are received within the framework of an association, group, organisation or agreement, regardless of its form or name.”³⁹

The criminalisation of foreign funding, particularly when the recipient is an association, as provided for in article 95 *bis* runs counter to Human Rights Council Resolution No. 22/6 calling on states to ensure “that no legislative provision criminalises or discredits activities for the defence of human rights on the grounds of the geographical origin of their source of funding.”

In its 2018 Concluding Observations on Algeria, the HR Committee had already expressed concern that “cooperation with foreign organisations

³⁷ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 47.

³⁸ See: Algeria’s Official Gazette No. 25, https://www.mfdgi.gov.dz/images/pdf/textes_reglementaires/F2020025.pdf (accessed 20 November 2020) and MENA Rights Group, “Algeria: Penal Code amendments restrict freedoms of expression and association”, 2 July 2020, <https://menarights.org/en/articles/algeria-penal-code-amendments-restrict-freedoms-expression-and-association> (accessed 20 November 2020).

³⁹ *Ibidem.*

and the receipt of funds from abroad are subject to prior clearance by the authorities.”⁴⁰

The above legal framework impedes associations of families of victims of disappearances from conducting their legitimate activities protected under article 22 of the ICCPR.

Recommendations:

- Protect the right to the freedom of expression by:
 - Revising domestic legislation to ensure that provisions governing freedom of expression are in line with international standards;
 - Revising or repealing article 2 of the Information Code;
 - Decriminalising defamation by repealing or amending article 144 of the Penal Code;
 - Repealing or amending articles 96, 100 and 196 bis of the Penal Code.
- Protect the right to freedom of peaceful assembly by:
 - Revising domestic legislation to ensure that provisions governing freedom of peaceful assembly are in line with international standards;
 - Repealing or amending Law No. 89-28 and Law No. 91-19;
 - Repealing or amending article 97 and 98 of the Penal Code;
 - Revoking the 2001 blanket ban on demonstrations in Algiers.
- Protect the right to freedom of association by:
 - Revising domestic legislation to ensure that provisions governing the freedom of association are in line with international standards;
 - Repealing or amending Law No. 12-06;
 - Guarantee the establishment of associations upon simple notification, without any prior requirements for registration;
 - Establish effective appeal mechanisms for associations who have been denied registration;
 - Lifting the excessive restrictions on access to foreign funding for associations and repealing or amending article 95 *bis* of the Penal Code.

⁴⁰ Concluding Observations on the fourth periodic report of Algeria, *op. cit*, para. 47.

4 The state's duty to investigate

4.1 Search for disappeared persons

The United Nations Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter “Basic Principles”), maintain that:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.⁴¹

After the civil war, a number of investigative mechanisms were set up in order to uncover the impact of practices of enforced disappearances; however, their findings were never made public. In September 2003, a commission on disappearances, commonly referred to as the “*ad hoc* mechanism”, was established for a duration of 18 months, to serve as an intermediary between the authorities and the families of the disappeared. It was mandated to collect information about cases of disappearances, facilitate communication between families and the authorities, and elaborate proposals to address cases of disappearances.⁴² However, the commission had insufficient investigative powers and its leadership publicly excluded the criminal prosecution of alleged perpetrators.⁴³ Though the commission transmitted a confidential report to the President, the report has never been published.⁴⁴

Recommendations:

- Disclose the findings of the of the 2003 “ad-hoc commission” that were presented to the Office of the Presidency;
- Adopt a comprehensive state policy to continue searching for the disappeared until their fate is determined; in doing so, ensure the search for the disappeared

⁴¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

⁴² Amnesty International, “A Legacy of Impunity: A Threat to Algeria’s Future”, 2009, <https://www.amnesty.org/download/Documents/48000/mde280012009eng.pdf> (accessed 25 January 2021), p. 28.

⁴³ *Ibidem.*

⁴⁴ *Ibidem.*

falls in line with the Committee of Enforced Disappearances' Guiding Principles on the Search for Disappeared Persons.

4.2 Mass graves and the return of remains

There are several mass graves in Algeria, which have been discovered since 1998.⁴⁵ Yet, so far, insufficient measures have been taken by the authorities to protect the mass graves and to ensure the return of the remains to victims' families. Even though several media outlets reported the discovery of mass graves in different cities across the country, official institutions have remained silent, or have actively attempted to conceal evidence of the existence or discovery of these mass graves.⁴⁶ After a mass grave was uncovered near the city of Relizane in 2004, several individuals, including members of the gendarmerie, were seen attempting to destroy the evidence found at the scene. Furthermore, when the destruction of evidence was reported to the authorities, the individual who reported the destruction was arrested and sentenced to one year in prison for defamation, before being released by appealing before the Supreme Court.⁴⁷

The Algerian authorities have failed to disclose their procedures for preserving evidence and identifying the human remains found at these sites. Several international human rights organisations and UN bodies such as the WGEID have requested clarifications on these mass graves. However, the Algerian government has yet to make any comment on the issue.

According to the International Committee of the Red Cross, recovering remains involves three phases, including "1. locating the remains, 2. mapping the remains and the entire site and documenting all relevant information, and 3. retrieving the remains properly, labelling them and securing them for transport."⁴⁸ Forensically identifying human remains involves matching the remains to a disappeared person, through a legal determination based on a scientific matching of

⁴⁵ Amnesty International, "Algeria: Newly discovered mass grave must be fully investigated", 29 July 2004, <https://www.amnesty.org/en/documents/mde28/010/2004/en/> (accessed 2 February 2021).

⁴⁶ Amnesty International, "A Legacy of Impunity: A Threat to Algeria's Future", 2009, <https://www.amnesty.org/download/Documents/48000/mde280012009eng.pdf> (accessed 25 January 2021), p. 23.

⁴⁷ Human Rights Watch, "Time for Reckoning: Enforced Disappearances in Algeria", Volume 15, No. 2(E), February 2003, <https://www.hrw.org/reports/2003/algeria0203/index.htm#TopOfPage> (accessed 19 November 2020).

⁴⁸ International Committee of the Red Cross, "Forensic Identification of Human Remains", December 2013, <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4154.pdf> (accessed 25 January 2021).

information.⁴⁹ As stated by the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, bodies of deceased persons “shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred.”⁵⁰

Preliminary background research is needed in order to locate and assess all relevant information on the whereabouts and fate of disappeared persons. To enhance the process of identifying human remains, the relevant investigative team must therefore have the authority and power to interview and corroborate the statements of witnesses, family members, and suspects accused of conducting the disappearance, among others. In order to properly conduct their work, investigators must also have access to state records, including police and military reports and archives, fingerprint records, satellite photographs and other legal reports.⁵¹

Recommendations:

- Disclose the findings of the of the 2003 “ad-hoc commission” that were presented to the Office of the Presidency;
- Protect areas suspected of being mass grave sites and outline appropriate procedures to protect the remains in those graves;
- Establish an official database of victims of enforced disappearance, including a centralised DNA database, data management system, a registry of missing persons, and a proper communication strategy between the authorities and relevant stakeholders
- Establish and develop processes for the safe reporting of mass graves in the country;

⁴⁹ *Ibidem.*

⁵⁰ UN Economic and Social Council, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*, UN Doc. Resolution 1989/65, 24 May 1989, <https://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf> (accessed 22 January 2021).

⁵¹ *Ibidem.*

- Guarantee the protection of these graves and establish a process for the proper identification and return of remains;⁵²
- Accept the involvement of qualified international and local nongovernmental organisations and institutions that may provide their resources, expertise and technical means to support exhumation and identification processes;
- Establish official communication procedures with victims' families with regards to the investigations of enforced disappearances, including the discovery of mass graves and all exhumation and identification efforts.

4.3 Duty to prosecute

As maintained by the UN Basic Principles, victims are entitled to effective remedies, which encompass the right to “equal and effective access to justice.”⁵³ Victims of Algeria’s “dark decade”, and their families, continue to face great obstacles that prevent them from accessing local justice mechanisms. We recall that according to the UN Basic Principles, the term “victims” includes “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.”⁵⁴

Many of the obstacles faced by the victims, moreover, stem from the amnesty laws that have effectively prevented any prosecution of perpetrators of enforced disappearances. In 1999, Law No. 99-08 on Civil Harmony sought to bring an end to the war by granting an amnesty to all members of the armed groups who agree to surrender their weapons within six months of the law’s enactment. A year later, presidential decree No. 2000-03 provided additional amnesties to members of the *Islamic Salvation Army* and the *Islamic League for Preaching and Combat*, exempting members of the two non-state armed groups from prosecution and criminal accountability.⁵⁵ On 29 September 2005, the authorities organised a referendum on the Charter for Peace and National Reconciliation.⁵⁶ The e provided

⁵² See: International Commission on Missing Persons, *Bournemouth Protocol on Mass Grave Protection and Investigation*, 27 January 2021, https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection.?fr=sMjc3OTIOMjAyNzZM (accessed 28 January 2021).

⁵³ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

⁵⁴ *Ibidem.*

⁵⁵ Mohammed M. Hafez, “Armed Islamist Movements and Political Violence in Algeria”, 54 Middle East Journal, 2000. pp. 572-584.

⁵⁶ Human Rights Watch, “Impunity in the Name of Reconciliation: Algerian President’s Peace Plan faces National Vote September 29”, 2 September 2005,

amnesties to all state security forces and members of armed groups for acts of violence committed during the civil war,⁵⁷ “excluding collective massacres, rape and bomb attacks on public places”.⁵⁸

The Charter prevents victims and their families from seeking or pursuing justice for the harm caused by the practice of enforced disappearances. This is most apparent through Ordinance No. 06-01, which outlines the Charter’s scope and obligations. The Ordinance, which was adopted without a parliamentary debate in 2006, contains three sections, the first of which states that victims of enforced disappearances shall be considered victims of “the national tragedy,” after an investigation concludes that they have in fact been disappeared.⁵⁹ The second section outlines the procedure for establishing death certificates for disappeared persons, and the last section details the financial compensation to be paid by the Algerian state for the victims of the national tragedy.⁶⁰

Regarding the accountability of perpetrators of acts of enforced disappearance, article 45 of the ordinance states that:

No prosecution may be initiated, individually or collectively, against elements of the defense and security forces of the Republic, all components included, for actions carried out for the protection of persons and property, the safeguard of the Nation and the preservation of the institutions of the People's Democratic Republic of Algeria. Any denunciation or complaint must be declared inadmissible by the competent judicial authority.⁶¹

The above provision severely restricts the ability to access local justice mechanisms since the very act of seeking truth and justice is criminalised and subject to legal sanctions. This stands in violation of victims’ right to a remedy as outlined by the UN Basic Principles.

<https://www.hrw.org/legacy/backgrounder/mena/algeria0905/3.html> (accessed 5 September 2020).

⁵⁷ Ghaiza Hidouci, “‘Charter for Peace and National Reconciliation’ in Algeria: Threatening Contradictions,” *Arab Reform Initiative*, 15 July 2006, <https://www.arab-reform.net/publication/charter-for-peace-and-national-reconciliation-in-algeria-threatening-contradictions/> (accessed 29 July 2020).

⁵⁸ *Décret présidentiel n° 05-278 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale*, 14 August 2005, https://www.usip.org/files/file/resources/collections/commissions/Algeria-Charter_Decree05-278.pdf (accessed 18 February 2021).

⁵⁹ Algeria, Ordinance No. 06-01, 27 February 2006 (in French), <http://www.interieur.gov.dz/index.php/fr/dossiers/168-la-charte-pour-la-paix-et-la-reconciliation-nationale.html> (accessed 16 November 2020), art. 27.

⁶⁰ *Ibidem.*, art. 37.

⁶¹ *Ibidem.*, art. 45.

The provisions listed within the Charter additionally prevent the opening of any inquiry seeking to reveal the fate of a disappeared person. Presidential decree No. 05-278, convening the electorate for the referendum on the Charter for Peace and National Reconciliation, asserted that “[t]he sovereign Algerian people reject all allegations that attribute to the state the responsibility for a deliberate phenomenon of disappearances.”⁶² It maintains that the practice of enforced disappearances is the consequence of terrorism, while simultaneously assuming state responsibility “for the fate of all persons who disappeared in the context of the national tragedy.”⁶³

The HR Committee has repeatedly urged the Algerian government to take all possible steps to ensure that article 45 “does not undermine the right to an effective remedy,” and to amend the article “to clearly stipulate that it does not apply to serious violations of human rights, such as torture, murder, enforced disappearances or abduction.”⁶⁴ Since blanket amnesties for gross violations of human rights and humanitarian law violate international human rights standards,⁶⁵ the Committee also recommended that Algeria guarantee that all allegations of serious human rights violations committed by state forces or non-state armed groups be investigated, prosecuted, and punished.⁶⁶

Recommendations:

- Revise or repeal article 45 of Ordinance No. 06-01 to allow prosecutions of perpetrators of serious human rights violations committed during the civil war;
- Identify and prosecute perpetrators of enforced disappearances at the highest level, in fair trials that provide the accused with their due process guarantees;
- Cooperate with other states, heads of states and legislatures, to identify, search, prevent, investigate and prosecute instances of enforced disappearance.

⁶² *Décret présidentiel n° 05-278 portant convocation du corps électoral pour le référendum du jeudi 29 septembre 2005 relatif à la réconciliation nationale*, 14 August 2005, https://www.usip.org/files/file/resources/collections/commissions/Algeria-Charter_Decree05-278.pdf (accessed 19 November 2020).

⁶³ *Ibidem*.

⁶⁴ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, paras 12-14.

⁶⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

⁶⁶ *Ibidem*.

5 The state's duty to provide reparations

According to the UN Basic Principles, states' obligation to "respect, ensure respect for and implement international human rights law and humanitarian law" includes the duty to "provide effective remedies to victims, including reparation."⁶⁷ Reparation should be proportional to the gravity of the violations and the harm suffered. Full and effective reparation, moreover, must include restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition (see section 6).⁶⁸

Restitution must be understood as any action aimed at restoring victims "to the original situation that existed before the gross violations of international human rights law or serious violations of international humanitarian law took place." Such measures are challenging to implement with regard to victims of enforced disappearance due to the continuous nature of the crime.

Under the Charter on Peace and National Reconciliation, relatives of the disappeared were entitled to some compensation for the harm suffered. Monetary compensation was offered in more than 7,000 cases of enforced disappearance acknowledged by the state.⁶⁹ However, victims and their families have not been offered full and effective reparations. Under article 37 of Ordinance No. 06-01, compensation may only be allocated to families of victims after a death certificate is obtained.⁷⁰ As such, closing a forcibly disappeared person's file remains a requirement in order to obtain monetary compensation. Understood from this perspective, victims' right to monetary compensation is mutually exclusive of their right to access relevant information concerning their disappeared relatives. While most families accepted the compensation they were entitled to, others refused and continue to protest in demand for the truth.

⁶⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

⁶⁸ *Ibidem.*

⁶⁹ Eric Goldstein, "Dispatches: Algeria's 'Disappeared'", *Human Rights Watch*, 16 October 2014, <https://www.hrw.org/news/2014/10/16/dispatches-algerias-disappeared> (accessed 10 August 2020).

⁷⁰ Heba Naguib, "Only Truth Could Heal This Pain: Algerian Women Speak of Their Search for the Disappeared", *The International Center for Transitional Justice*, 8 March 2016, <https://www.ictj.org/news/algeria-women-disappeared-truth> (accessed 29 July 2020).

In the case of “*Mihoubi v. Algeria*,” the HR Committee condemned the requirement of seeking a death certificate in order to receive compensation.⁷¹ According to members of the Committee, such requirement constitutes “cruel and inhuman treatment in violation of article 7” of the ICCPR.⁷² From this standpoint, compensation on its own cannot be considered a complete reparation, within the meaning of the UN Basic Principles, and must be delivered alongside other forms of reparations. As stated by the WGEID, victims and their families have the right to “obtain redress and integral reparation, including as to complete rehabilitation as possible.”⁷³

Rehabilitation involves “medical and psychological care as well as legal and social services.” We regret that none of the victims of the “dark decade” benefited from any long-term and comprehensive rehabilitation program. The families of victims of enforced disappearances could have benefited from rehabilitation measures designed to alleviate the psychological distress caused by the failure to return the bodies of the victims, the lack of burial and the denial of their right to know the exact circumstances of the enforced disappearance. We believe that these services must be offered to all of those who are still unable to start a mourning process due to the fact that the fate and whereabouts of their loved ones have yet to be clarified.

Finally, as outlined by the Basic Principles, *satisfaction* may consist of any number of measures, such as publicly acknowledging responsibility for the atrocities committed, making a public apology, continuing the search for the disappeared until their fate is known, creating commemorations and tributes, or making an official declaration “restoring the dignity, the reputation and the rights of the victims.”⁷⁴ Such measures have never occurred in relation to the violations committed during the “dark decade”.

The Basic Principles provide that satisfaction should include effective measures aimed at the cessation of continuing violations. Satisfaction also includes verification of the facts, full and public disclosure of the truth, judicial and

⁷¹ *Rabiha Mihoubi v. Algeria*, Communication No. 1874/2009, U.N. Doc. CCPR/C/109/D/1874/2009, 7 January 2014, para. 7.11.

⁷² *Ibid.*, para. 11.

⁷³ Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/30/38/Add.5, 9 July 2015, para. 58.

⁷⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

administrative sanctions against those responsible for the violations, and commemoration and tributes to the victims. We believe that the provisions of the Charter for Peace and National Reconciliation are incompatible with the measures that must be taken in terms of satisfaction. Indeed, certain provisions of the Charter, most notably articles 45 and 46, hinder a collective and objective discussion on the practice of enforced disappearances committed by all the parties involved in the civil war.

Recommendations:

- Adopt a holistic approach to reparations which include measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition;
- Acknowledge, at the highest level, the systematic practice of enforced disappearances by state agents during the civil war;
- Make a full apology, at the executive level, for the role of the state in the practice of enforced disappearances during the war;
- Create memorials dedicated to the victims of the civil war, including those who disappeared;
- Establish a reparations program providing adequate, timely and appropriate reparations to the families of the disappeared without requiring the victims to close the files or ending investigations into the disappearances before obtaining reparations;
- Set up an official reparations commission tasked with determining the amount of payments that should be paid as compensation for the various categories of human rights violations throughout the civil war;
- Allocate sufficient resources to ensure that victims and their relatives have access to rehabilitation services, including free access to psychosocial care.

6 The state's duty to provide guarantees of non-repetition

Guarantees of non-repetition serve to ensure that the atrocities experienced by victims will no longer recur. They can include any number of measures, including ensuring civilian control of military and security forces; promoting the observance of human rights standards and ethical norms in state institutions like the security sector, the military and law enforcement; strengthening the

independence of the judiciary; and reviewing and reforming laws that have contributed to a pattern of violations of human rights law and humanitarian law.⁷⁵

6.1 Criminalisation of enforced disappearances in Algeria

Algeria has thus far not taken any measures seeking to define enforced disappearances or criminalise its practice under its criminal laws. According to article 4 of the UN Declaration, states should “make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.”⁷⁶ This obligation is also enshrined in article 7 of the ICPPED, which Algeria signed.

Though enforced disappearances are neither defined nor criminalised under Algeria’s Penal Code, Algerian law does criminalise certain elements that can lead to enforced disappearances, such as illegal arrest, kidnapping and arbitrary detention, even if the provisions do not fully satisfy the obligations outlined in the ICPPED or the UN Declaration.⁷⁷

Under article 107 of the Penal Code, the arbitrary deprivation of liberty, ordered or committed by a state official, is criminalised and punished with five to ten years imprisonment. Article 291 of the Penal Code criminalises, except in cases where the law permits, the seizure, kidnapping, arrest, detention or sequestration of any person, when the act is committed without an order from constituted authorities, and punishes such acts with 10 to 20 years in prison.⁷⁸ The penalty is increased to life imprisonment if the abduction lasts for more than one month, if it is committed by an individual wearing a uniform or insignia, under a false name or false order from the public authority, or if the abducted, arrested, detained or confined person has been subjected to torture or death threats, or was abducted with the aid of a motorised means of transport.⁷⁹

⁷⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *op. cit.*

⁷⁶ UN General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearance*, 18 December 1992, UN Doc. A/RES/47/133, <https://undocs.org/en/A/RES/47/133> (accessed 21 January 2021), art. 4.

⁷⁷ Human Rights Watch, “Time for Reckoning: Enforced Disappearances in Algeria,” Volume 15, No. 2(E), February 2003, <https://www.hrw.org/reports/2003/algeria0203/index.htm#TopOfPage> (accessed 19 November 2020).

⁷⁸ Algeria’s Penal Code, https://menarights.org/sites/default/files/2019-10/ALG_PenalCode_0.pdf (accessed 8 January 2021), art. 291.

⁷⁹ *Ibidem.*, arts. 291, 292, 293.

In order to effectively address the legacy of enforced disappearances, the authorities must criminalise enforced disappearance by defining the practice in the Penal Code, in conformity with the accepted definition of enforced disappearance enshrined in the UN Declaration. In the event that Algeria becomes a party to the ICPPED, the definition contained in article 2 of the Convention should be incorporated into the country's Penal Code.

Criminalising enforced disappearances in line with international standards would allow the authorities to uphold, promote and protect the rights of victims, victims' families, and the Algerian population as a whole.

Recommendations:

- Ensure that the crime of enforced disappearance is incorporated into domestic law as an autonomous offence;
- Ensure that the offence carries appropriate penalties that take into account its extreme seriousness, while avoiding the imposition of the death penalty;
- Ensure that enforced disappearance is recognised as a crime against humanity in the Penal Code in case it is practised in a widespread or systematic manner;
- Establish specific mitigating and aggravating circumstances when criminalising enforced disappearances;
- Ensure that the criminalisation of enforced disappearance is not subject to any statute of limitations due to the continuous nature of the crime;
- Ensure that domestic laws specifically provide for the criminal responsibility of superiors;
- Ensure that cases of enforced disappearance are expressly excluded from military jurisdiction and can only be investigated and tried by the competent civil authorities.

6.2 Legal safeguards

In order to prevent the recurrence of atrocities, and particularly of enforced disappearances, the onus is on the Algerian state to implement legal safeguards that may serve to guarantee the non-repetition of these practices. These safeguards are particularly important during police custody. They serve, moreover, to ensure that any individual who is deprived of their liberty has access to their rights and is never placed in situations that may lead to their

disappearance or to the violation of other rights, such as the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 45 of the 2020 Constitution states that “detention pending a criminal investigation shall be subject to judicial control and shall not exceed 48 hours”. The same provision states that any extension shall only be effectuated as an exceptional measure in accordance with the conditions specified by law.

Article 51 *bis* of the Code of Criminal Procedure allows for the initial police custody period of 48 hours to be extended up to five times in the case of crimes qualified as terrorist acts. On that point, the HR Committee recommended that the Algerian authorities “limit the period of initial police custody to a maximum of 48 hours, including in cases of suspected terrorism, and allow access to counsel as from the time the person is detained.”⁸⁰

Regarding the right to challenge the lawfulness of one’s arrest or detention (right to *habeas corpus*) and the need to have all forms of detention or imprisonment ordered by, or subject to, the effective control of a judicial authority, we are concerned that police custody is supervised by the prosecutor under Algerian law. International standards require that anyone arrested or detained person is brought promptly before a judge or other officer authorised by law to exercise judicial power.⁸¹ In its jurisprudence, the HR Committee has established that prosecutors do not generally qualify as judicial officers for this purpose. They have repeatedly been considered not to have the necessary institutional objectivity and impartiality to act as judicial officers in determining the legality of detention.⁸²

In 2015, the Code of Criminal Procedure was amended by legislative decree No. 15-02. Although some of the provisions contained in the decree comply with international standards, we are concerned that the decree failed to include key deprivation of liberty safeguards.⁸³

⁸⁰ *Idem*, para. 17.

⁸¹ UN Human Rights Council, Resolution 21/4, 2012, para. 18(a).

⁸² UN Human Rights Committee, *Kulomin v Hungary*, UN Doc. CCPR/C/50/D/521/1992 (1996), para. 11.3, *Reshetnikov v Russian Federation*, UN Doc. CCPR/C/95/D/1278/2004 (2009) para. 8.2, *Zheludkova v Ukraine*, UN Doc. CCPR/C/75/D/726/1996 (2002), para. 8.3.

⁸³ See Ordinance No. 15-02 of 23 July 2015, amending and modifying Ordinance No. 66-155 of 8 June 1966 establishing the Code of Criminal Procedure.

Article 52 of the amended Code of Criminal Procedure stipulates that “individuals may be held in custody only in premises intended for that purpose, known to the public prosecutor’s office and consistent with the principle of human dignity.”

We are concerned that the premises used to hold individuals in custody are placed under the supervision of the civil or military public prosecutors. This shortcoming was noted by the HR Committee, who recommended that the authorities ensure judges’ effective monitoring of all places of detention.⁸⁴

Regarding the right to the assistance of a lawyer, article 51 *bis* 1 of the amended Code of Criminal Procedure, states that the person being held in custody may be visited by their lawyer only when the custody is extended by the prosecutor. When the investigation concerns terrorism, the person in custody may be visited by their lawyer after the expiration of half of the maximum period of times, i.e., after six days. We believe that a person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.⁸⁵

The same article states that the lawyer can only visit the accused person for a period of 30 minutes, under the supervision of a judicial police officer. Moreover, in numerous instances, detained individuals in Algeria are not able to enjoy their right to confidentiality when speaking with a lawyer after being arrested.⁸⁶

In its 2018 Concluding Observations, the HR Committee expressed concern about the fact “that prisoners may only meet with their counsel in the presence of a criminal investigation police officer.”⁸⁷ This shortcoming goes against the UN Basic Principles on the Role of Lawyers, according to which all those “arrested, detained or imprisoned [...] shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, censorship and in full confidentiality.”⁸⁸

⁸⁴ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 18.

⁸⁵ Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19 (2010) para. 6.

⁸⁶ Amnesty International, “Algeria: Submission to the United Nations Human Rights Committee”, 2018, <https://www.amnesty.org/download/Documents/MDE2884552018ENGLISH.pdf> (accessed 10 September 2020).

⁸⁷ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 35.

⁸⁸ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, 1990, <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> (accessed 14 September 2020).

Lastly, considering the intrinsic link between enforced disappearance and torture, it is concerning that the definition of torture under Algeria's Penal Code is not aligned with the definition provided by the UN Convention against Torture (UNCAT), to which Algeria is a party. Indeed, article 263 *bis* of the Penal Code states that, "[t]orture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any purpose whatsoever."⁸⁹

Recommendations:

- Limit the period of initial police custody to a maximum of 48 hours, including in cases of terrorism;
- Allow access to counsel as from the time the person is detained; remove the restrictions contained in article 51 bis 1 of the Code of Criminal Procedures pertaining to the right to legal counsel;
- Ensure that there is effective monitoring — by judges — of all places of detention;
- Create procedures which enable individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful;
- Ensure that:
 - Registers of detainees be readily available to family members and lawyers, and that detainees have access to a lawyer and their family;
 - State security officers identify themselves and the agencies they work for at the time of arrest;
 - No one is held in secret or incommunicado detention.
- Ensure that anyone who was detained arbitrarily is released without conditions, and that a thorough and independent investigation is launched with regards to the arbitrary detention;
- Revise article 263 of the Penal Code to align the definition of torture with the UN Convention against Torture.

6.3 Judicial reform

Rebuilding trust in state institutions and providing victims with guarantees of non-repetition is not possible without an independent judiciary which can

⁸⁹ Algeria's Penal Code, https://menarights.org/sites/default/files/2019-10/ALG_PenalCode_0.pdf (accessed 14 September 2020).

protect, promote and guarantee the rule of law. As things stand, the judiciary lacks independence in Algeria.

In its 2018 Concluding Observations, the HR Committee expressed concern over the lack of independence of the judiciary, particularly given the undue interference of the executive. Issues of concern mentioned by the Committee include the role played by the Ministry of Justice in reassigning judges working in the prosecution service and the ability of the executive and the Ministry of Justice to dismiss and compel judges and public prosecutors to retire or be subject to disciplinary measures.⁹⁰ Under such circumstances, the Algerian judiciary cannot maintain its structural and functional independence and must instead be reformed in a manner that allows it to promote and protect the rule of law within the country.

The 2020 Constitution introduced amendments on the judiciary's independence. Article 172 is supposed to enshrine the irremovability of judges, stating that “[a] judge may not be transferred or removed or dismissed or disciplined except in the cases and with the guarantees provided for by the law, based on a reasoned decision from the High Judicial Council.” This provision, however, still falls short of the standards contained in the UN Principles on the independence of the Judiciary, which stipulates that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties. Security of tenure is the cornerstone of the independence of judges as it provides them with full protection when exercising their duties.

In addition, article 180 provides that the High Judicial Council guarantees the independence of the judiciary. While this is a positive development, it is undermined by the fact that the President of the Republic is still the president of the High Judicial Council. His membership increases the likelihood of political influence over this body.

In this regard, the former UN Special Rapporteur on the independence of judges and lawyers has advised that bodies in charge of protecting judicial independence and promoting judicial accountability should “preferably be composed entirely of

⁹⁰ Concluding Observations on the fourth periodic report of Algeria, *op. cit.*, para. 39.

judges, retired or sitting;” and while “some representation of the legal profession or academia” is an option, “no political representation should be permitted.”⁹¹

Finally, the 2020 Constitution provides the creation of a Constitutional Court, replacing the Constitutional Council, with the mandate to supervise the application of the Constitution. Under article 193, 40 members of the lower chamber or 25 members of the upper chamber of the Algerian Parliament can ask for the review the constitutionality of proposed laws. We believe that this is a positive development, if the constitutionality of laws that infringe rights and freedoms can effectively be challenged. However, article 188 of the Constitution providing that the President of the Constitutional Court is nominated by the President of the Republic, limits the independence of the Court.⁹²

Recommendations:

- Guarantee the tenure and independence of judges and protect the workings of the judiciary from any outside interference by ensuring that judges are appointed through an independent process that is based on objective, transparent criteria for assessing candidates’ suitability in terms of the required skills, competence and reputation;
- Revise article 172 of the Constitution so that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
- Strengthen the independence and the powers of the High Council of the Judiciary, particularly with regard to assessing judges’ qualifications, disciplinary measures, dismissals and compulsory retirements;
- Ensure that the President of the Republic is removed from the membership of the High Council of the Judiciary;
- Ensure that the president of the Constitutional Court be elected by a majority of their peers rather than appointed by the President of the Republic.

⁹¹ UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on Accountability*, 28 April 2014, UN Doc. A/HRC/26/32, para. 126. *See also*: UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 24 March 2009, UN Doc. A/HRC/11/41, para. 28.

⁹² Amnesty International, “Algérie : Projet de constitution algérienne : Préoccupations relatives aux droits humains”, 25 June 2020, <https://www.amnesty.org/fr/documents/mde28/2601/2020/fr/> (accessed 3 February 2021).

6.4 Security sector reform

As previously mentioned, one way of rebuilding trust in the state's institutions and ensuring the non-repetition of atrocities – particularly in the context of a civil armed conflict involving state-affiliated actors – is through reforming the security and military forces and ensuring civilian control over them.

In Algeria, the military and state security services lack civilian oversight. In 2016, the former president Abdelaziz Bouteflika sought to limit the powers of the country's security apparatus by dismantling the Department of Intelligence and Security (DRS), establishing instead the Security Services Department (CSS). After sweeping changes and the removal of military personnel from their positions, the CSS, in contrast to its predecessor, was mandated to report to the presidency; and so were the other agencies within the intelligence and security apparatus in the country.⁹³ However, control of the country's security services was reverted back to Ministry of National Defence in 2019, itself headed by the country's commander-in-chief and new president, Abdelmadjid Tebboune.

Given that the military, including the DRS, was responsible for numerous cases of enforced disappearances committed during the civil war, it is paramount that Algeria takes steps to ensure the effective civilian control of military and security forces in order to rebuild trust in the military and other security institutions.

Recommendations:

- Create an independent commission on state security reform and vetting, with the mandate to:
 - Provide recommendations on the implementation of state-wide vetting processes of the Algerian security services and military forces;
 - Identify state institutions and individuals responsible for committing mass atrocities throughout the war;
 - Strengthen oversight and accountability mechanisms for abuses committed by members of the military and other security services.

⁹³ Al Jazeera, "The purge of powerful Algerian generals: Civil-military reform or presidential power grab?", 12 February 2017. <https://studies.aljazeera.net/en/reports/2017/02/170212111608848.html> (accessed 14 September 2020).