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Transition to Where? The Long Journey of Algeria

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¹ H. Roberts, *The Battlefield. Algeria, 1988-2002. Studies in a Broken Polity*, London, Verso, 2003, pp. 177-179 and 203-206; L. Addi, *Algeria's Army, Algeria's Agony*, in «Foreign Affairs», vol. 77, no. 1, July/August 1998, pp. 44-53; International Crisis Group, *The Algerian Crisis: Not Over Yet*, 20 October 2000, pp. 12 ff. The documents by the International Crisis Group are online at <http://www.crisisweb.org>.

² H. Roberts, *Moral Economy or Moral Polity? The Political Anthropology of Algerian Riots*, Working Paper 17, Development Research Centre, London School of Economics, 2002. In 1990 an amnesty was offered concerning offences against the state starting in 1980 (Law no. 90-19).

³ W. Quandt, *Between Ballots & Bullets. Algeria's Transition from Authoritarianism*, Washington, D.C., Brookings Institution Press, 1998, pp. 39-41; Y. Bouandel, *Political Parties and the Transition from Authoritarianism: The Case of Algeria*, in «Journal of Modern African Studies», vol. 41, no. 1, 2003, pp. 1-22.

⁴ L. Addi, Z. Lockman, J. Hiltermann, *Algeria's Democracy between the Islamists and the Elite*, in «Middle East Report», no. 175, March-April 1992, pp. 36-38; M.S. Tahi, *The Arduous Democratisation Process in Algeria*, in «The Journal of Modern African Studies», vol. 30, no. 3, September 1992, pp. 397-419. See Amnesty International, *Truth and Justice Obscured by the Shadow of Impunity* [hereinafter *Truth and Justice*], November 2000. All the documents by Amnesty International are online at www.amnesty.org.

⁵ International Crisis Group, *La Concorde civile: une initiative de paix manquée* [hereinafter *La Concorde civile*], 9 juillet 2001, pp. 15-16.

⁶ H. Roberts considers the conflict the outcome of competition for power in the executive sphere. H. Roberts, *Moral Economy or Moral*

1. Algeria from the October 1988 Riots to Bouteflika III

Since independence in 1962, the Party of the National Liberation Front (*Parti du Front de Libération Nationale*, PFLN) and the Presidency have formally been the two main actors in Algerian political life, but the Algerian army has always been the principal power behind the scenes¹.

In October 1988 a nationwide youth revolt was very harshly repressed by the army². The process of formal democratisation started afterwards, with the adoption of a new Constitution and local elections won by the Islamic Salvation Front (*Front Islamique du Salut*, FIS)³.

The internal conflict was sparked by the cancellation of the second round of parliamentary elections in 1992, which the FIS was poised to win. A state of emergency was declared, the FIS was banned and military rule was established⁴. Senior army officials continued to rule particularly during the non-constitutional period (1992-1996) before formally relinquishing power to civilian institutions⁵. Political violence broke out, a bloody conflict ensued with massive human rights violations⁶. The Algerian regime tried to solve the crisis by counter-insurgency⁷, economic reform and later on building political institutions. Formally held elections became a regular feature of Algerian political life, with presidential ones starting in 1995 and parliamentary ones in 1997⁸. Since 1992 the armed rebellion was carried out by several distinct groups, which never united under a common leadership and never acted with a single aim⁹. The counter-insurgency policy of the regime became harsher from 1994, with the concomitant creation of state-armed militias¹⁰. This policy has implied the militarisation of part of the society (stimulating new violence and exposing part of the population to risks of reprisals), a

Polity?, cit., pp. 250-259 and 353-354.

⁷ The 1990s also saw a conflict in Algerian politics between the so-called «radicators» and «conciliators», with the former prevailing. Dialogue at times was opened with the armed groups, in particular by the Presidency, and in 1995 an amnesty offered to them (Rahma Law no. 95-12). All Algerian normative acts are at <http://www.joradp.dz/HFR/Index.htm>.

⁸ The FIS has not been allowed to compete since the ban.

⁹ The Islamic Salvation Army (*Armée Islamique du Salut*, AIS), linked to the FIS, aimed at bringing the state to the negotiating table in order to have the party re-legalised. The Armed Islamic Group (*Groupe Islamique Armé*, GIA) aimed at a forced re-Islamisation of society. See International Crisis Group, *Islamism, Violence and Reform in Algeria: Turning the Page*, no. 29, 30 July 2004, pp. 10 ff; Q. Wiktorowicz, *Centrifugal Tendencies in the Algerian Civil War*, in «Arab Studies Quarterly», vol. 23, no. 3, Summer 2001, pp. 65-82.

¹⁰ Executive Decree no. 97-04.

¹¹ International Crisis Group, *La Concorde civile*, cit., pp. 2 and 11-12.

¹² The AIS, after declaring a ceasefire secretly brokered by the army in 1997, announced the cessation of hostilities in 1999. Other armed groups kept fighting.

¹³ H. Roberts, *Algeria: The Subterranean Logics of a Non-election*, Real Instituto Elcano. ARI 68/2009, 22 April 2009, at http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/mediterranean+arab+world/ari68-2009 (accessed 8 March 2011).

¹⁴ Since the measures adopted so far are a combination of exemptions of prosecution, amnesties and pardons, they will be referred collectively in this article as «clemency measures».

¹⁵ See H. Roberts, *Algeria's National «Protesta»*, 10 January 2011, at http://mideast.foreignpolicy.com/posts/2011/01/09/algeria_s_national_protesta (accessed 21 January

massive repression and an alleged strategy of failing to protect civilians from armed groups¹¹. The worst massacres of civilians took place between the end of 1996 and early 1998, but by then the force of the armed groups was already decreasing¹². The level of political violence has since considerably abated, with most of the attacks presently attributed to the former Salafist Group for Preaching and Combat (*Groupe Salafiste pour la Prédication et le Combat*, GSPC), which in 2006 has re-branded itself al-Qa'ida in the Islamic Maghreb (AQIM).

Bouteflika won the presidential election in 1999 with the military support. Since then he has been re-elected in 2004 and 2009¹³. His relationship with the army has been uneven, at times showing in the background the power struggle between the civilian and the military. Bouteflika has been the apparent driving force between the two waves of clemency measures in 1999-2000 and 2005-2006 officially aimed at ending the conflict and restoring national harmony¹⁴.

Protests and riots have shaken Algeria in the past decade; following the turmoil in the Middle East at the beginning of 2011, and with new disturbances triggered by the increase of food prices, the state of emergency has been repealed¹⁵.

2. Living and Disappearing in Algeria during «la décennie noir»

Given the total absence of independent research in Algeria, it has overall been difficult to attribute responsibility for human rights violations¹⁶.

In addition to armed confrontations with security forces, armed Islamist groups started to kill civilians on a large scale in 1993¹⁷. Among the civilians targeted were relatives of members of security forces, political and intellectual figures and ordinary people. In other cases, it appeared that families or villages were targeted because they were considered to oppose or withdraw support from the armed groups¹⁸. Although it did not exclude civilians from its targets, the AIS started condemning certain GIA tactics frequently aimed at targeting civilians in a widespread manner¹⁹. The period between August 1997 and early 1998 was the worst one of the conflict, with an unprecedented wave of large-scale rural massacres characterised by the security

2011). The state of emergency, originally established by Presidential Decree no. 92-44, has been abrogated by Ordinance no. 11-01.

¹⁶ The press could work only with great difficulty since the *coup* because of censorship, self-censorship and a high death toll paid by journalists.

¹⁷ Human Rights Watch, *Annual Report*, 1994. All reports of Human Rights Watch are accessible at www.hrw.org.

¹⁸ Amnesty International, *Algeria. Civilian Population Caught in a Spiral of Violence*, November 1997; Amnesty International, *Algeria. Steps towards Change or Empty Promises?* [hereinafter *Steps towards Change*], 2003.

¹⁹ Human Rights Watch, *Annual Report*, 1995 and Human Rights Watch, *Annual Report*, 1996.

²⁰ Human Rights Watch, *Annual Report*, 1998; *Under Western Eyes. Violence and the Struggle for Political Accountability in Algeria*, Interview with Hugh Roberts, in «Middle East Report», vol. 206 (28,1), Spring 1998, pp. 39-42.

²¹ Human Rights Watch, *Algeria. Time for Reckoning: Enforced Disappearances in Algeria* [hereinafter *Time for Reckoning*], February 2003.

²² Human Rights Watch, *Annual Report*, 1993.

²³ Human Rights Watch, *Annual Report*, 1995. It should be noted that since 1993 Algeria has had a *de facto* moratorium on death penalty.

²⁴ Human Rights Watch, *Annual Report*, 1996.

²⁵ «Disappearance» in this article refers to enforced and involuntary disappearance.

²⁶ Human Rights Watch, *Annual Report*, 1997; Human Rights Watch, *Annual Report*, 1999 and Human Rights Watch, *Annual Report*, 2000.

²⁷ Human Rights Watch, *Annual Report*, 1998.

²⁸ Human Rights Watch, *Annual Report*, 2002.

²⁹ Presidential Decree no. 92-77 of 22 February 1992.

forces' failure to protect civilians. The GIA was blamed for most of the massacres and asserted responsibility for some of them²⁰. The members of armed groups were reported to have committed abductions of people on a large scale and thousands of women were allegedly raped during the period of the armed struggle²¹.

With regard to state counter-insurgency, the allegations of torture were widespread since the first year of emergency rule in Algeria²². In the following years the pattern of torture has been confirmed, facilitated by the practice of incommunicado detention in unacknowledged detention sites throughout the conflict. Since 1994 there have been frequent reports of extra-judicial executions happening in an atmosphere of impunity²³. These killings have mostly concerned people suspected of being members of armed groups and sometimes people of neighbourhoods accused of maintaining sympathy to Islamists²⁴.

Disappearances²⁵ of people suspected of being connected with armed groups, or being sympathisers of the FIS or of people without any manifest reason, took place mostly between 1993 and 1998.

The record concerning the measures adopted by the authorities *during* the conflict to call those responsible for human rights violations to account, their attempts to clarify the fate and the whereabouts of the disappeared persons and to give reparation to the victims has been extremely poor.

As far as criminal justice is concerned, it may be argued that members of security forces and of state-armed militias enjoyed an almost total impunity²⁶. With regard to members of armed group, frequently criminal trials did not cast light on specific events since they focused on broad charges such as membership in armed groups²⁷. The alleged concurrent policy of extra-judicial executions reduced the number of those brought to justice. These factors were compounded by the fear among victims and their relatives to testify²⁸.

The Algerian authorities set up national institutions for the promotion and protection of human rights since 1992, but their independence and effectiveness have been repeatedly questioned. The National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*, ONDH)²⁹ was replaced in 2001 by the National Consultative Commission

for Promoting and Protecting Human Rights (*Commission Nationale Consultative pour la Promotion et la Protection des Droits de l'Homme*, CNCPPDH)³⁰. Algerian human rights non-governmental organisations had been operating during the conflict, even if their freedom was restricted in many respects and their members were not spared by the long wave of violence³¹. Since 1998 a grassroots movement acting on behalf of the families of the disappeared has continued to provide evidence on those cases and has brought this issue to national attention³².

The international human rights monitoring system has considered the situation of Algeria³³ during the 1990s, expressing concern for the serious human rights violations taking place, requesting their investigations and, not uniformly, prosecutions of serious human rights violations³⁴.

There are no final figures of the number of victims. Only from 1999 the Algerian authorities started providing figures that can be considered realistic and that came closer to those originally proposed by NGOs. It has been maintained that the civil conflict of the «black decade» cost the lives of between 100,000 and 200,000 people³⁵. The number of disappeared by the security forces is deemed to be at least 6,500 people, while those of people abducted by armed groups has been put at around 10,000. The numbers of those tortured, raped and ill-treated is unknown³⁶.

The bulk of the suffering of the conflict has been borne by the civilian population, in terms both of the magnitude and the savagery of the acts committed; an especially high price has been paid by women. As a final remark, it should be noted that the Algerian conflict only grabbed the international headlines in the case of the widespread massacres or when foreigners or high-profile Algerians were killed.

3. Duty to Prosecute and Victims' Rights under International Law Regarding Gross Human Rights Violations³⁷

3.1. Duty to Prosecute

In recent years there has been a trend under international law

³⁰ Human Rights Watch, *Algeria. Time for Reckoning*, cit.

³¹ Human rights NGOs had been quite active in Algeria as well as organisations abroad.

³² Amnesty International, *Algeria. Steps Towards Change*, cit.

³³ The relevant treaties are: ICCPR (International Covenant on Civil and Political Rights, 999 UNTS 171), CAT (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS, vol. 1465, p. 85), and the African Charter on Human and Peoples' Rights. The first two entered into force for Algeria on 12 December 1989 and 11 October 1989, respectively; the third one was ratified by Algeria on 1 March 1987. Algeria acceded to the Optional Protocol to the ICCPR (999 UNTS 171) on 12 September 1989.

³⁴ As for the treaty-based bodies, see the Concluding Observations of the Committee against Torture [hereinafter CAT Committee] in 1996 (A/52/44, para. 80.e) and those of the Human Rights Committee [hereinafter HRC] in 1998 (CCPR/C/79/v Add.95, para. 6). As for the Charter-based bodies, the Working Group on Enforced or Involuntary Disappearances asked Algeria to take effective measures to prevent, terminate and punish all these acts (E/CN.4/1996/38, 15 January 1996, paras. 65-69). No resolution during the Algerian conflict was adopted by the African Commission on Human and Peoples' Rights.

³⁵ There is no definitive figure on the number of dead.

³⁶ See the periodic *Country Reports on Human Rights Practices* of the United States Department of State (at <http://www.state.gov/g/drl/rls/hrrpt/>), those of Amnesty International and Human Rights Watch.

³⁷ This article will not consider the issues from the angle of international humanitarian law.

³⁸ A. Cassese, *International Criminal Law*, New York, Oxford University Press, 2003, pp. 327–347; T. Meron, *Is International Law Moving towards Criminalisation?*, in «European Journal of International Law», vol. 9, 1998, pp. 18–31; L.J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, in «Virginia Journal of International Law», vol. 49, no. 4, 2009, pp. 915–984.

³⁹ K. Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, in «Michigan State University - DCL Journal of International Law», Fall 1999, pp. 595–649.

⁴⁰ Since the end of the 1980s the then United Nations Sub-Commission on Prevention and Discrimination and Protection of Minorities embarked on studies aimed at combating impunity and strengthening victims' rights to reparation (for the latter point, see *infra* note 55). The process was completed in 2005 with the adoption of the Updated Set of Principles to Combat Impunity (E/CN.4/2005/102/Add.1).

The 1993 Vienna Declaration and Programme of Action resulting from the World Conference on Human Rights asked states to prosecute grave violations of human rights and abrogate legislation leading to impunity (A/CONF.157/23, para. 60). The UN Secretary General has stated that UN-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity and gross violations of human rights (S/2004/616, para. 10).

⁴¹ On customary rules see A. Cassese, *International Law*, New York, Oxford University Press, 2001, pp. 119–126.

⁴² D.F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime* [hereinafter *Settling Accounts*], in «the Yale Law Journal», vol. 100, 1990–1991, pp. 2582–2585; N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, New York, Oxford University Press, 1995, pp. 40–56.

towards an increasing recognition of individual criminal responsibility for gross human rights violations and it seems that the international legal process now favours the establishment of mechanisms of accountability to deal with past atrocities³⁸. It is also within the framework created by these developments that decisions of granting impunity to perpetrators of human rights violations representing an «international concern» are to be considered³⁹. It bears mention that the United Nations has been increasingly supporting the view that there is a duty to prosecute gross human rights violations⁴⁰. Although the focus in this paper will be on treaty law, a brief presentation on the status of customary law on this issue will be offered first⁴¹.

Customary Law

Broadly speaking, two different views emerge from an examination of the existing literature on the duty to investigate, prosecute and punish those responsible for gross human rights violations. As for the first view, it has been argued that the duty to punish gross violations of human rights is a customary rule or that such a rule is probably emerging, establishing that at least wholesale impunity for the most serious crimes was not allowed⁴². A partial programme of prosecution of those most responsible for designing and ordering these crimes would be in accordance with international customary law⁴³ as long as such efforts are made in good faith and the process of selection is based on reasonable and fair criteria⁴⁴. Valid justifications for states which decide not to prosecute could be the customary doctrines of state of necessity or *force majeure*. It might be said that these cases occur for example when the military still detain large autonomous power during a transitional period⁴⁵. Other authors have maintained that, although international customary law today clearly recognises the principle of individual criminal responsibility for certain offences, there is no customary rule that obliges states to prosecute human rights violators. With regard to internal atrocities there has been a widespread state practice of granting amnesties or acquiescing in impunity and the international reaction has been, at best, ambiguous⁴⁶. Somehow half-way between the two above positions, it has also been argued that even if the duty in question is not backed by a

43 N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, in «Law and Contemporary Problems», vol. 59, no. 4, 1996, p. 134.

44 N. Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, in «California Law Review», vol. 78, 1990, p. 509.

45 D.F. Orentlicher, *Settling Accounts*, cit., pp. 2606-2612.

46 M.P. Scharf, *Accountability for International Crimes and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, in «Law and Contemporary Problems», vol. 59, Autumn 1996, pp. 41-61; M.P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, in «Texas International Law Journal», vol. 31, 1996, pp. 1-42.

47 According to this view, blanket amnesties would not be acceptable. See C.P. Trumbull, *Giving Amnesties a Second Chance*, in «Berkeley Journal of International Law», vol. 25, no. 2, 2007, pp. 283-345.

48 R. Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, in «Journal of International Criminal Justice», vol. 1, 2003, p. 347. This issue is dealt with in Section 5.2.

49 L. Reydam, *Universal Jurisdiction. International and Municipal Legal Perspectives*, New York, Oxford University Press, 2003.

50 General Comment no. 20, 1992, para. 15 and General Comment no. 31[80], CCPR/C/21/Rev.1/Add.13, 2004, paras. 8, 18. For a critical view, see M.P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, in «Washington and Lee Law Review», vol. 63, 2006, pp. 357-358.

51 General Comment no. 2, CAT/C/GC/2, 2008, para. 5.

52 Article 1.1.

53 Office of the United Nations High Commissioner for Human Rights

customary rule, it seems that states are increasingly accepting that in dealing with past atrocities some form of accountability should be taken into account, for example in the form of looking for the truth of what happened⁴⁷. Growing support is also emerging for an obligation concerning reparation for victims of human rights violations⁴⁸. Finally, decisions of countries regarding the granting of impunity in different forms do not bar foreign courts from prosecuting perpetrators of such violations⁴⁹.

Human Rights Treaty Law

The ICCPR does not explicitly require states to prosecute or punish, but General Comments, Concluding Observations and Final Views on the communications submitted to the Human Rights Committee have clarified that state parties generally have to investigate serious violations of physical integrity and to bring those who have committed these acts to justice⁵⁰.

The CAT requires state parties to make the offence of torture punishable and its monitoring Committee has clearly stated the duty to investigate and prosecute⁵¹. The CAT applies *ratione personae* only to public officials or persons acting in an official capacity⁵².

As to the African Charter on Human and Peoples' Rights, no specific resolution on this issue has been passed so far, but some of its decisions seem to indicate that investigation and criminal prosecution would be necessary for states to fulfil their obligations⁵³.

3.2. Victims' Rights

Customary Law

Studies have been carried out since the late 1980s, in particular by several Special Rapporteurs appointed by the then Commission on Human Rights, trying to define the content of victims' rights⁵⁴. In cases of states emerging from conflict or authoritarian rule in the recent past, victims' rights, although not uniformly and not comprehensively, have been taken into account⁵⁵. After having being first recognised with regard to the fate and whereabouts of the missing persons under international humanitarian law, the right to the truth has

[hereinafter OHCHR], *Amnesties*, 2009, at <http://www.ohchr.org/Documents/Publications/Amnesties.en.pdf> (accessed 25 February 2011), p. 23.

⁵⁴ In 1985 the General Assembly listed access to justice, restitution, compensation and assistance as victims' rights (UN Doc. A/RES/40/34, paras. 4-17). The process of defining and strengthening victims' rights through the formulation of draft principles was started by the then United Nations Sub-Commission on Prevention and Discrimination and Protection of Minorities at the end of the 1980s and it was completed when in 2005 the General Assembly adopted by consensus a resolution on reparation principles (UN Doc. A/RES/60/147). The principles list restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as forms of reparation.

⁵⁵ On victims' rights within the criminal process, see R. Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, in «Human Rights Quarterly», vol. 26, 2004, pp. 605-685. On possible options concerning reparations, see N. Roht-Arriaza, *Reparations Decisions and Dilemmas*, in «Hastings International and Comparative Law Review», no. 27, Winter 2004, pp. 157-219.

⁵⁶ OHCHR, *Study on the Right to the Truth*, E/CN.4/2006/91, paras. 8-32 and 38-40.

⁵⁷ HRC, General Comment no. 31[80], cit., para. 16.

⁵⁸ See OHCHR, *supra* note 56, paras. 26-27.

⁵⁹ CAT/C/GC/2, 2008, para. 15.

⁶⁰ ACHPR/Res.4(XI)92.

⁶¹ UN Doc. A/RES/60/147.

⁶² See the report of the Independent Expert D. Orentlicher (E/CN.4/2004/88, in particular paras. 4-5).

⁶³ UN Secretary General, S/2004/616, cit., paras. 25-26.

gained increasing importance in the human rights sphere in recent times, with its material scope expanding⁵⁶. The issue of compensation and, possibly to a lesser degree, that of satisfaction in the form of preserving a collective memory of the events seem to have been considered most frequently.

Human Rights Treaty Law

The HRC has stated that reparation may involve restitution, rehabilitation and measures of satisfaction that include public apologies, public memorials, guarantees of non-repetition, changes in laws and practices, and bringing to justice those responsible for such violations⁵⁷. The right to the truth has also been recognised by the HRC⁵⁸.

The CAT provides for redress for the victims, including as full rehabilitation as possible, and compensation for dependants in case of death of the victim (Article 14). The CAT Committee restated the issue of redress in its most recent General Comment clarifying the scope of states' obligations and responsibility⁵⁹.

At the regional level, the African Charter on Human and Peoples' Rights provides for the right to judicial remedy (Article 7) and the general right to an effective remedy has been recognised by the Commission⁶⁰.

In sum, there seems to be a growing recognition that victims' rights go beyond pure material compensation. Victims would enjoy a wide array of rights, namely right to justice (access to a prompt and effective remedy), to know (with a complementary duty of states to preserve memory) and to reparation, the latter including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition⁶¹.

The options of accountability and reparations considered so far have been recommended as mutually reinforcing components of a complex strategy to address past gross human rights violations, without there being a «one-size-fits-all» response to serious human rights violations⁶². The UN Secretary General asserted that the challenges of post-conflict environments require a holistic approach that balances several goals, including accountability, truth, reparation, the preservation of peace and the building of democracy and rule of law⁶³.

4. The Place of Human Rights in the Algerian Transition

The measures adopted in this area will be grouped in the categories of justice, truth and reparation⁶⁴.

Justice

The Algerian transition has been definitely characterised more by clemency measures than by court justice. Little can be said about prosecutions related to gross human rights violations (unlawful killings, disappearances, tortures, rapes) committed during the internal conflict: almost no case is known as far as members of the security forces are concerned, whereas the decisions in the trials involving members of the armed groups have been too generic to be linked to specific episodes and, more generally, the trials have not been considered in compliance with international fair trial standards. The main initiatives under this rubric are the two waves of amnesty measures of 1999-2000 and 2005-2006⁶⁵.

On 5 July 1999 a pardon was granted to prisoners convicted under the law on «terrorism», excluding those who committed certain crimes (murder, explosions in public places and rape)⁶⁶. The Civil Harmony Law entered into force on 13 July 1999 and expired on 13 January 2000, reportedly receiving broad popular support in a referendum⁶⁷. The law provided for clemency measures for members of armed groups that surrendered within six months. Those who had not committed certain crimes (murder, rape, causing permanent disability and placing bombs in public places) did not face prosecution; those who had committed such crimes would receive reduced sentences, not including death penalty or life imprisonment. Serious doubts have been expressed in relation to the kind of investigations carried out to ascertain what crimes have been committed by the beneficiaries of the law⁶⁸.

On 10 January 2000 an amnesty was granted to the members of the AIS and the Islamic League for Da'wa and Jihad (*Ligue Islamique pour Da'wa et Djihad*, LIDD)⁶⁹. It has been reported that 5,500 members of armed groups surrendered between July 1999 and January 2000⁷⁰.

The Charter on Peace and National Reconciliation, which is a political framework document, was approved by referendum in September 2005 and implemented by Ordinance no. 06-01⁷¹.

⁶⁴ This reflects the structure followed in the previous Section, where truth and reparation figured under victim's rights.

⁶⁵ Other clemency measures adopted before the first set, in particular the Rahma Law of 1995, will not be considered here due to their scarce effect.

⁶⁶ Presidential Decree no. 99-133 of 3 July 1999. See Amnesty International, *Truth and Justice*, cit.

⁶⁷ Law no. 99-08 of 13 July 1999. Three Executive decrees (nos. 99-142, 99-143 and 99-144) concerning the law were adopted on 20 July 1999.

⁶⁸ Amnesty International, *Truth and Justice*, cit.

⁶⁹ Presidential Decree no. 2000-03. The amnesty has been considered part of the secret agreement between the AIS and the army in 1997; the two groups dissolved under the terms of the decree. See International Crisis Group, *La Concorde civile*, cit., p. 4.

⁷⁰ Amnesty International, *A Legacy of Impunity. A Threat to Algeria's Future* [hereinafter *Legacy*], 2009, p. 12.

⁷¹ The Charter is an Annex to Presidential Decree no. 05-278 of 14 August 2005; Ordinance no. 06-01 of 27 February 2006 was adopted by the government while the Parliament was in recess.

The Ordinance provides for clemency measures for members of armed groups who surrendered since 13 January 2000 (date of the end of the application of the Civil Concord Law) and were not implicated in collective massacres, rape or use of explosives in public places (Article 10); according to the Algerian authorities, over 7,000 people benefited from these measures⁷². The Ordinance also provided for blanket immunity for security forces and state-armed militias, at the same time making it a crime to criticise acts of the security forces during the conflict⁷³.

Truth

For reasons of space, we consider the dimension of truth only in relation to the issue of disappearances, which represent a continuing violation. The question of disappearances had been a taboo subject until 1998, when it entered the public debate thanks to the families of disappeared, local and international human rights NGOs and very occasionally the international community⁷⁴. Since then several authorities have taken measures to register complaints about cases of disappearances. The usual reasons of the disappearances provided by the authorities have been evading arrest, leaving the country, abduction by armed groups, killed during armed confrontations or surrendered to the authorities under the clemency measures. An *ad hoc* commission on disappearances established in 2003 gathered information for 18 months, but with a very weak mandate and no investigative powers⁷⁵. The Commission provided the number of 6,146 people disappeared as a result of security forces' action, but its report has not been rendered public up to now⁷⁶.

Another facet of the issue has been the uncovering of many mass graves after the subsiding of the conflict, with the authorities failing to adhere to international standards related to exhumation and identification of human remains⁷⁷.

Reparation

Restitution. The only known formal measure concerns the reintegration for individuals dismissed on grounds related to the «national tragedy»⁷⁸. Freeing persons irregularly detained can also be considered as a restitution measure, but no detail is available on this issue.

⁷² Amnesty International, *Legacy*, cit.

⁷³ Articles 44-46. State-armed militias are not specifically named, but Article 44 seems to refer to them.

⁷⁴ Before such major breakthrough, the relatives of the disappeared had often been accused of being accomplices of members of armed groups. It was striking that while the authorities kept denying the problem, the ONDH admitted being receiving a considerable number of complaints from relatives of disappeared persons.

⁷⁵ Presidential Decree no. 03-299.

⁷⁶ See Human Rights Watch, *Truth and Justice on Hold: The New State Commission on «Disappearances»* [hereinafter *Truth and Justice on Hold*], 2003. The president of the body has repeatedly blamed the acts committed by members of the security forces on a situation of «chaos» which gripped the country, always maintaining that the phenomenon consisted of acts of individuals.

⁷⁷ Human Rights Watch, *Truth and Justice on Hold*, cit.; Amnesty International. *Steps towards Change*, cit.; Amnesty International, *Legacy*, cit.

⁷⁸ Presidential Decree no. 06-124 of 27 March 2006, Articles 12-13.

Financial compensation. The first measure adopted was an executive decree in February 1997 concerning victims of «terrorism» or of «accidents» happened in the fight against «terrorism»⁷⁹, subsequently repealed by another executive decree passed in February 1999 basically reproducing the same provisions and establishing that no one involved in acts of terrorism can benefit from such measures⁸⁰.

Ordinance no. 06-01 includes the disappeared among the victims of the «national tragedy» and financial compensation to their relatives is made conditional upon the production of a death certificate (*déclaration de décès par jugement*), to be issued following proper investigations⁸¹. Presidential decrees implementing the Ordinance provided for financial compensation for victims of the «national tragedy» (but with some exclusions among the victims and not making compensation proportional to the harm suffered) and compensation for relatives of members of armed groups (having to obtain a death certificate and to prove lack of financial resources)⁸².

Guarantees of non-repetition. After the worst years of the conflict, Algerian authorities have introduced legislative changes, some of which aimed at increasing the rights of detainees⁸³. Algeria has also criminalised torture through an amendment to the Penal Code⁸⁴. The structure of the judiciary has not been fundamentally revised⁸⁵.

Rehabilitation and Satisfaction. As for the remaining types of reparation, no significant measures of rehabilitation⁸⁶ or of satisfaction, such as a formal apology to the victims or efforts aimed at preserving a collective memory of the events, seem to have been adopted.

5. Algerian Measures under International Law and Their Contribution towards Peace

In this Section we will first consider the compliance of Algeria's clemency measures under international law, mainly referring to the results of the work of the United Nations Treaty- and Charter-based bodies⁸⁷. Then we will see if these measures have had any impact on the levels of political violence and human rights violations.

⁷⁹ Executive Decree no. 97-49 of 12 February 1997.

⁸⁰ Executive Decree no. 99-47 of 13 February 1999.

⁸¹ Ordinance no. 06-01, Articles 29-39.

⁸² Presidential Decree no. 06-93 of 28 February 2006 and Presidential Decree no. 06-94 of 28 February 2006, respectively.

⁸³ Law no. 01-08 and Law no. 01-09 of 26 June 2001. For a critical analysis of the legislative changes, see Amnesty International, *Steps towards Change*, cit.

⁸⁴ See Amnesty International, *Legacy*, cit.

⁸⁵ *Ibidem*.

⁸⁶ In the case of women victims of rape, for whom rehabilitation measures would definitely be required, it seems that not even financial compensation has been provided. See Amnesty International, *Legacy*, cit.

⁸⁷ The results of the international human rights monitoring system up to the adoption of the first set of clemency measures and immediately thereafter are presented in Section 2.

5.1. Compliance of Algerian Measures with International Law Regarding the Duty to Prosecute Cases of Gross Human Rights Violations

It seems that almost no member of the security forces nor of state-armed militias have been prosecuted to date and there is no available information as to whether proper investigations have taken place. At the same time, when there has been recourse to the criminal justice system with regard to members of the armed groups, the fairness of the trials has been repeatedly questioned. Almost all of the actors of the conflict presently enjoy *de jure* impunity; the second wave of clemency measures has granted *de jure* impunity to members of security forces and state-armed militias as well. Measures such as pardons or their equivalent may not be considered as violation of international standards when they concerned lesser offences and also if they were backed by referenda. However, the clemency measures benefiting members of armed groups excluded punishment for some serious crimes, and the list of excludable crimes falls short of international standards, with the requirement for 2006 being considerably less stringent than that of 2000⁸⁸. As to the security forces, the clemency measures cover all crimes potentially committed by them. The broad application of the clemency measures is generally deemed not to be in compliance with international law according to monitoring mechanisms⁸⁹.

5.2. Compliance of Algerian Measures with International Law in Relation to Victims' Rights

Truth

The right to the truth with regard to human rights violations committed, in particular, with respect to the issue of disappearances, has not been fulfilled. The fate and the whereabouts of the victims have never been clarified, let alone the events that led to the disappearances⁹⁰.

Reparation

Restitution. This component of reparation has been fulfilled only in a limited way, for example freeing persons held in incommunicado detention, but even in relation to this point it

⁸⁸ Human Rights Watch, *Impunity in the Name of Reconciliation. Algerian President's Peace Plan Faces National Vote September 29* [hereinafter *Impunity*], 2 September 2005. No case information on the vetting process related to the excludable crimes has been obtainable nor had it been available at the time of the first clemency measures in 1999-2000.

⁸⁹ Algeria's measures have been examined by both United Nations treaty-based bodies and charter-based bodies. As for the former, the measures have been deemed in violation of its treaty obligations by both the HRC (CCPR/C/DZA/CO/3, para. 7) and the CAT Committee (CAT/C/DZA/CO/3, paras. 11-12). Charter-based bodies have also dealt with the human rights situation in Algeria and its transitional measures. As to the UN Human Rights Council, the Working Group on the Universal Periodic Review reviewed Algeria on 14 April 2008; only Canada out of 46 delegations expressed concern with regard to the 2005-2006 amnesty measures (A/HRC/8/29, 23 May 2008, para. 45). The Working Group on Enforced and Involuntary Disappearances expressed concern related to the amnesty measures (A/HRC/4/41, paras. 55-57, 68, 70). The Special Rapporteur on violence against women, its causes and consequences, remarked that those responsible for rape seem to enjoy *de facto* impunity and should be brought to justice (A/HRC/7/6/Add.2, 13 February 2008, paras. 79-93, 98, 104.b). It should be noted that Algeria has not extended invitations to several Special Procedures for quite some years.

With regard to regional mechanisms, the African Commission on Human and Peoples' Rights has not expressed any view on Algeria's clemency measures.

⁹⁰ See HRC (CCPR/C/DZA/CO/3, para. 12).

is difficult to assess the compliance because data have been scarce and the phenomenon is not over. A decree part of the package of the 2005-2006 measures sets procedures for the reintegration (or compensation) for individuals dismissed on grounds related to the «national tragedy»⁹¹. Restitution remains obviously disregarded in the case of the disappeared.

Financial compensation. This appears to be the component of the right to reparation mostly addressed by the authorities, although requiring relatives of the disappeared to produce certificates of death without a proper investigation reportedly having been carried out and sometimes excluding categories of victims⁹². It should be noted that now financial compensation is offered to the victims of all actors, whereas in the past only relatives of victims of armed groups were beneficiaries. The category of victim seems to be narrow, mainly referring to the dead, whereas direct victims of other human rights violations (such as torture, incommunicado detention, unfair trial) have not been properly taken into account.

Rehabilitation. On the basis of the attainable information it seems that it has not generally been recognised in the Algerian transitional policies.

Satisfaction. This element of the right to reparation, in its components of acknowledgement and apology, has not been realised; moreover, the constant harassment of the associations of the families of the disappeared contributes to hampering the establishment of the truth and the formation of a collective pluralistic memory.

Guarantees of non-repetition. Basic requirements attempting to avoid the recurrence of past violations such as an effective civilian control of security forces, strengthening the independence of the judiciary and the establishment of mechanisms for monitoring and preventing conflicts from turning into violence are far from being met⁹³. Algerian law still retains a broad definition of terrorism allowing for the criminalisation of rights guaranteed under international human rights law⁹⁴. The progressive disbandment of State-armed militias started in 2004 belongs to this component of reparation. Legislative reforms such as that related to the criminalisation of torture in 2004 can also be considered as guarantees of non-repetition, although as to the latter serious doubts exist in relation to its implementation⁹⁵.

⁹¹ Presidential Decree no. 06-124 of 27 March 2006.

⁹² The rule concerning the death certificate has been criticised by both the HRC (CCPR/C/DZA/CO/3, para. 13) and the CAT Committee (CAT/C/DZA/CO/3, para. 13).

⁹³ See UN Doc. A/RES/60/147, para. 23. A regular assessment of the justice system is contained in the US Department annual *Country Report on Human Rights Practices*.

⁹⁴ In Legislative Decree no. 92-03 and later incorporated into the Penal Code (Article 87 bis). See CAT Committee (CAT/C/DZA/CO/3, para. 4); Amnesty International, *Unrestrained Powers: Torture by Algeria's Military Security* [hereinafter *Unrestrained Powers*], 2006.

⁹⁵ The CAT Committee has expressed its concerns on secret detention centres and the lack of judicial supervision (CAT/C/DZA/CO/3, para. 6). More generally on the issue, see Amnesty International, *Unrestrained Powers*, cit.

Considering that almost all the measures adopted reflect a compensation-centred approach, the unevenness of some of them and sometimes the questionability of some requirements (such as the request of the death certificates in cases of disappearances), show that the right to reparation has been fulfilled only minimally.

5.3. Did the Clemency Measures Bring Peace (or Less Violence) to Algeria?

Among the reasons usually adduced for clemency measures in transitional times, when accountability may prove difficult, is the quest for peace and the desire to stop human rights violations. As far as the Algerian measures are concerned, the answer about the results cannot be straightforward⁹⁶.

The level of political violence and human rights violations started to decrease at the end of the 1990s, that is, before the introduction of the first set of measures⁹⁷. The fact that the army got the upper hand militarily in the second half of the 1990s, the ceasefire declared by some armed groups in 1997, the ensuing reduction of armed confrontation and the consequent fewer opportunities of human rights violations by the actors in the conflict should all be factored in when assessing the reduction of the level of political violence. More specifically, the drop in the cases of «long-term» enforced disappearances allegedly committed by security forces and state-armed militias from the late 1990s cannot be attributed to the clemency measures since no clemency measure has been adopted for them until 2006, by which time they had become very rare. The transitions have been from a full-blown conflict to a low-intensity conflict, since hundreds of people still are killed every year, and from widespread human rights violations to residual patterns of them. The two components of the Algerian strategy, that is, military response and clemency measures without any negotiated peace agreement, must be seen together without forgetting that the first clemency measures were launched *after* the military victory of the army. The figures of victims post-2006 clemency measures show an erratic pattern, but not a steady decrease. For example, the year 2009 saw the largest number of casualties since 2005⁹⁸.

⁹⁶ It bears mention that it is not always easy to assess the impact of the individual factors on the level of political violence. For example, the 1997 ceasefire allegedly was declared with a secret promise of future clemency measures (then adopted in 2000), which *promise* might therefore be considered somehow related to the impact of the ceasefire.

⁹⁷ We will not consider in this analysis the Law no. 95-12, since it does not seem to have produced any noticeable effect; see *supra* note 7.

⁹⁸ The US Department of State reports that 804 people were allegedly killed in 2009 compared with 488 in 2005 (some 400 people according to Amnesty International). It should be noted that almost all the figures come from Algerian official sources and media, usually without any independent verification.

6. Conclusion

Choices in transitional periods are always delicate and there is no ready-made recipe to solve the frequent tension between the need for truth, the quest for justice and the desire for peace⁹⁹. Arguments based on legal duties have not always influenced decision-makers in shaping policies of states regarding accountability. Many factors should be taken into account, among them the nature of the system that produced the violations, the legacy of the past, the social and economic situation, the balance of power at the time of transition and the international context. Coping with the past after a period of massive human rights violations may take a plurality of forms (among them, criminal prosecutions, reparation, lustrations, truth-telling), but it can be said that all strategies have to address two fundamental questions: accountability and knowledge/acknowledgement.

As to accountability, Algeria has chosen, at least for the time being, to shelve criminal justice and to provide little reparative justice. The choice of clemency measures as a solution to the legacy of the past seems to be a regular feature of Algerian recent history¹⁰⁰. The way of dealing with the former issue has undoubtedly influenced the approach to the latter one. The institutional choice has been to close the chapter of the internal conflict, born of a bitter power struggle and costing the lives of over 100,000 people, through presenting it as a sort of «parenthesis» within the country history to be overcome to reach peace and national reconciliation. This has become the official narrative. The role of society at large, and victims in particular, in contributing to the construction of this narrative has been limited. Although the population was called upon to approve or reject the institutional proposals in 1999 and 2005, little real dialogue seems to have taken place. Moreover, the process has taken place in a context with strict boundaries for exercising rights of expression, association and assembly, essential components for a meaningful participation in public affairs¹⁰¹. The lack of real debate, of criminal investigation and of any mechanism such as a participatory and public truth commission, has left the Algerian scenario devoid of accountability, acknowledgement, knowledge, and only with the official narrative maintaining that events that caused deep

⁹⁹ The literature on transitional justice has been constantly increasing in the last two decades. See for example, N.J. Kritz, *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, Washington, United States Institute of Peace Press, vol. 1, 1995; R.G. Teitel, *Transitional Justice*, New York, Oxford University Press, 2000; A. Rigby, *Justice and Reconciliation. After the Violence*, Boulder, Lynne Rienner, 2001; P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, Routledge, 2002; M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston, Beacon Press, 1999; N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth v. Justice*, New York, Cambridge University Press, 2006; T.A. Borer (ed.), *Telling the Truths: Truth-Telling and Peace Building in Post-Conflict Societies*, New York, University of Notre Dame Press, 2006; E. Hughes, W.A. Schabas and R. Thakur (eds.), *Atrocities and International Accountability. Beyond Transitional Justice*, Tokyo, United Nations University Press, 2007.

¹⁰⁰ The Evian agreement with France in 1962; the 1990 amnesty law; the 1995 clemency law; the 1999-2000 clemency measures; Presidential Decree no. 02-157 concerning the violence in Kabylia in 2001; the 2005-2006 clemency measures.

¹⁰¹ Amnesty International, *Legacy*, cit. On the issue in general, see Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. National Consultations on Transitional Justice*, 2009, pp. 3-5, at http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf (accessed 28 February 2011).

disagreement should be remembered through a uniform and unquestioned agreement¹⁰². The lid put on other narratives than the dominant one seems to be a recipe for future tension. The Algerian choice of a «top-down» approach to the transition must be inserted into a broader «top-down» process started with the institution building programme in the mid-1990s (Constitution; presidential, parliamentary and local elections) and marked by an absence of real popular debate.

And this brings us to the final point of these reflections, that is, the wider political and institutional context, which in the very end will determine if the adopted and yet-to-be-adopted guarantees of non-repetition of gross human rights violations, like the reform of the justice system, are to be effective¹⁰³. It has been remarked that the central issue of Algerian politics has for a long time been the imbalance of the distribution of power among the legislative, executive and judiciary branches, with the executive being the dominant one, and within it with the military side wielding more power than the civilian one. Only the empowering of the legislative branch, in order to keep the executive in check (and within it the military within proper boundaries) will address the fundamental deficit of representation of the society by the institutions. This, in turn, would prove the essential precondition to carry out a fairer distribution of resources. The type of the protests in the last decade, with riots being a frequent feature of the political landscape, has showed a tendency of bypassing political parties and institutions deemed unable to provide solutions¹⁰⁴.

As a last remark, it is worth mentioning the paucity of comments on the Algerian transition on the part of the international community. And if the international community seems to have left the human rights question completely in Algerian hands, it will probably be there that it will take a more definite shape, if allowed by a more conducive institutional and political landscape. As the recent history of other countries shows, a characteristic feature of these issues is of periodically resurfacing, sometimes in response to unexpected events, despite pragmatist approaches trying to consider them over.

¹⁰² On the construction of official narratives, see B.F. Havel, *Public Law and the Construction of Collective Memory*, in M.C. Bassiouni (ed.), *Post-Conflict Justice*, Ardsley (NY), Transnational Publishers, 2002, pp. 383-397; M.J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, in «University of Pennsylvania Law Review», vol. 144, 1995-1996, pp. 463-704.

¹⁰³ Human rights institutions in transitional times are meant to mediate between a conflict-riven past and a better future; they are shaped by the type of transition and the «deal» ending the conflict or authoritarianism. The «deal» is ideally supposed to be a «meta-bargain», that is, an agreement (or at least a discussion) on the conflict on what the conflict was about («meta-conflict»). On these points, see C. Bell, *Peace Agreements and Human Rights*, New York, Oxford University Press, 2000.

¹⁰⁴ On the balance of power in Algeria and possible future political scenarios, see H. Roberts, *Demilitarizing Algeria*, in «Carnegie Endowment», no. 86, May 2007; W.B. Quandt, *Democratization in the Arab World? Algeria's Uneasy Peace*, in «Journal of Democracy», no. 13.4, 2002, pp. 15-23. On the riots in the last decade, the surge of protests at the beginning of 2011, their unstructured character and the lack of political representation, see H. Roberts, *Algeria's National «Protest»*, cit.; J. Brown, *Algeria's Midwinter Uproar*, 20 January 2011, at <http://www.merip.org/mero/mero012011.html> (accessed 1 March 2011).