

IHL Resource  
Desk for Mali

## Legal Brief

# THE LEGAL FRAMEWORK APPLICABLE TO INTERCOMMUNITY VIOLENCE IN MALI

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# ACRONYMS AND ABBREVIATIONS

**AP:** Additional Protocol to the Geneva Conventions of 1949

**FAMa:** Malian Armed Forces

**IAC:** International Armed Conflict

**ICC:** International Criminal Court

**ICCPR:** International Covenant on Civil and Political Rights

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

**ICRC:** International Committee of the Red Cross

**ICTY:** International Criminal Tribunal for the former Yugoslavia

**IHL:** International Humanitarian Law

**IHRL:** International Human Rights Law

**MINUSMA:** United Nations Multidimensional Integrated Stabilization Mission in Mali

**NIAC:** Non-international Armed Conflict

**UN:** United Nations

**UNJHRO:** United Nations Joint Human Rights Office

**WHO:** World Health Organization

# EXECUTIVE SUMMARY

Violence across community lines has accelerated in recent years, intensifying the scale and complexity of humanitarian challenges in Mali and in the Sahel region. This violence has not only left scores dead but also caused massive internal displacement of people in the central and northern parts of Mali. The dynamics of intercommunity violence in Mali, often planned and coordinated, and carried out with automatic weapons, as noted in various United Nations' reports, are not necessarily related to the ongoing armed conflict.

This study sheds light on various legal questions related to intercommunity violence that has been evolving steadily over the recent years in Mali. In addition to constituting violations of Human Rights and / or the Malian law, the intercommunity violence is also covered and prohibited by International Humanitarian Law (IHL). The analysis in this note therefore examines the dynamics of intercommunity violence committed in Mali over the recent years to clarify the legal framework applicable to this violence. Better understanding the key legal questions pertaining to this violence is central to developing appropriate justice responses.

In fact, intercommunity violence could be prosecuted by the Malian, foreign courts or the International Criminal Court (ICC) as international crimes (crimes against humanity, war crimes or crime of genocide) provided that they meet the legal requirements of these crimes. It is primarily the Malian government that has the obligation to investigate and prosecute the perpetrators of this violence. Thus, the analysis highlights the essential role of the newly established Specialized Judicial Unit against Terrorism and Transnational Organized Crime in ensuring that those responsible for intercommunity violence in Mali are appropriately held to account. This study further underlines the importance of complementarity between national jurisdictions and the ICC, which also has jurisdiction over crimes referred to by the Rome Statute committed on the territory of Mali or by Malian citizens since 2012.

This study has significant practical consequences, for the humanitarian community for their advocacy work, and those who seek to assist effective prosecution of this violence, but particularly for the Malian government that must take appropriate measures to ensure that perpetrators of this violence are brought to justice, in full compliance with national and international legal standards. While this study provides useful insight into the legal response to this violence, it also makes recommendations to the government to put in place appropriate measures for the protection of civilian populations in order to curb the cycle of recurrent intercommunity violence in Mali.

## ABSTRACT

Intercommunity violence has become recurrent in Mali in recent years. Violent events and deaths linked to this violence have increased in 2019, particularly in the centre of the country. In addition to constituting violations of Human Rights and/or Malian law, this inter-community violence could also be covered and prohibited by International Humanitarian Law (IHL). This brief clarifies the law applicable to inter-community violence in Mali. The question of which legal framework is applicable to such violence is particularly relevant in the context of possible legal proceedings. Indeed, inter-community violence could be prosecuted by Malian, foreign or international courts as international crimes (crimes against humanity, war crimes or genocide) provided that they meet the corresponding legal definitions.

# INTRODUCTION

Mali has been facing armed conflict since 2012, leading to an unprecedented complex multidimensional security crisis. Millions of people in Mali and the Sahel region continue to suffer the consequences of this conflict, with recurrent violations of International Humanitarian Law (IHL) and Human Rights, particularly in the centre and north of the country.<sup>1</sup> In recent years, and particularly in 2019, this humanitarian crisis has been aggravated by intercommunity violence leading to an appalling level of brutality and a growing number of civilian victims often exposed because of their belonging to a particular ethnic group.<sup>2</sup> This often widespread violence, particularly in northern and central Mali, has often led to massive internal displacement of people in the country and in the Sahel region.

The increase of intercommunity violence in Mali in 2019, often planned and coordinated, and sometimes carried out with automatic weapons,<sup>3</sup> has heightened the need for clarification of the legal framework applicable to this violence, not only to support the government in ensuring that perpetrators are brought to justice, but also to support the humanitarian community in its advocacy work.

The aim of this research is to clarify the law applicable to intercommunity violence, which is not necessarily covered by IHL even if it took place in a country affected by one or more armed conflicts, such as in Mali.

This study therefore aims to provide answers to various legal questions relating to intercommunity violence and especially concerning the applicability of IHL to such violence in Mali. It will also make it possible to identify shortcomings and adapt existing national legal norms on intercommunity violence in the Malian national legislation.

# METHODOLOGY

This study is heavily based on information included in various reports by national and international organisations, as well as other secondary sources, on intercommunity violence committed by different actors in Mali. The complexity and fluidity of intercommunity violence in the context of Mali, particularly in the centre of the country, makes it impossible to have complete and reliable information on the *modus operandi* of the perpetrators of this violence.<sup>4</sup> Therefore, this study does not claim to be exhaustive in its analysis of inter-community violence, particularly the level of organisation of the actors involved in the centre of Mali, nor all the legal challenges linked to the investigation and prosecution of the actors involved in these acts.

This analysis of the legal issues related to intercommunity violence - which has become recurrent in Mali in recent years - will enable us to identify the prospects for justice before the competent courts in order to put an end to impunity, and above all to bring justice to the many victims of this violence.

The Diakonia IHL Resource Centre hopes that this study can contribute to clarify the international law applicable to intercommunity violence in Mali in order to guide judicial actors and raise awareness among the Malian State regarding its obligations as well as among organisations involved in human rights advocacy across the country.

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<sup>1</sup> See, for example, Report of the UN Secretary-General on the situation in Mali, published on 26 March 2019. See also Report of the UN Secretary General on the situation in Mali, published on 20 March 2020.

<sup>2</sup> See Report of the Independent Expert on the situation of Human Rights in Mali, published on 21 January 2019, paras. 39-46 available at <https://reliefweb.int/sites/reliefweb.int/files/resources/G1901203.pdf> (accessed on 15 April 2020).

<sup>3</sup> See, for example, Report of the Independent Expert on the situation of Human Rights in Mali, para 30. See also Human Rights Watch report, "How much more blood must still be spilled? Atrocities committed against civilians in central Mali, 2019" published in February 2020, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/mali0220fr\\_web\\_0.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/mali0220fr_web_0.pdf) (accessed on 20 April 2020).

<sup>4</sup> Various reports on intercommunity violence in Mali, particularly in the centre of the country, highlight the complexity of the *modus operandi* of the actors of such violence. For example, the reports of the Independent Expert on the situation of Human Rights in Mali show that some intercommunity violence is often planned, coordinated and carried out with automatic weapons. The involvement of so-called self-defence armed groups, with a strong community component, or extremist armed groups has also amplified the scale of such violence. See situation of Human Rights, Report of the Independent Expert on the situation of Human Rights, 15 January 2020, para. 42. See also situation in Mali, Report of the Secretary, 31 May 2019, para. 30.

# I. DEFINITION OF COMMUNITY VIOLENCE

According to the World Health Organization (WHO), there are three categories of violence. Self-inflicted violence, interpersonal violence and collective violence. According to the WHO, interpersonal (between people) violence includes family violence and community violence. WHO uses the term “community violence” to refer to “violence between people who are not related and may not know each other”.<sup>5</sup> It distinguishes this type of violence from collective violence, which is committed by “larger groups of people or by states”.<sup>6</sup>

In this report we use the term “community violence” to refer to acts of violence committed by individuals or groups of individuals (including armed forces, state or non-state). Therefore, our definition encompasses the definitions of “community violence” and “collective violence” used by the WHO. Some acts that the WHO would describe as “collective violence” would fall within the scope of this report.

Community violence as we understand it is committed by members of one group or “community” against members of another community (or perceived as such by the perpetrators). The term “community” as used in this report covers any group of individuals smaller than the Nation State and larger than the household (family), defined along religious, racial, ethnic, geographical or other lines.

Community violence can be expressed through a multitude of violent acts that affect an individual’s physical or psychological integrity – for example, murder, torture, mutilation, ill-treatment, rape and other forms of sexual or gender-based violence. It may also include violent acts directed against property, particularly (but not only) if it is necessary for survival or if it is of great importance to the cultural heritage of that community.

The community nature of a particular act of violence is not always obvious to identify.<sup>7</sup> In fact, this has a limited impact on the legal classification of the violent act: the acts listed above may constitute crimes under national and international law without having to prove the *dolus specialis* behind the attack against a specific ethnic group. Proof of such intent is, however, necessary in order to classify the act as a crime of genocide.

This note examines how intercommunity violence can be legally classified and the forms of responsibility it generates. In legal terms, intercommunity violence is covered by the national law applicable in the State where it takes place, but also by international law since it is contrary to the values shared by the international community as a whole.

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<sup>5</sup> WHO, “World Report on Violence and Health”, 2002, p. 6 available at [https://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_fr.pdf](https://www.who.int/violence_injury_prevention/violence/world_report/en/full_fr.pdf) (accessed on 15 April 2020).

<sup>6</sup> *Idem*, p. 7

<sup>7</sup> Except when the attackers themselves admit it, for example by asking the community to which their victims belong before attacking them.

## II. APPLICABLE LEGAL FRAMEWORK

### A. National law

The Constitution of Mali enshrines fundamental human rights.<sup>8</sup> It provides for instance that a human being “is sacred and inviolable” and that every individual “has the right to life, liberty, security and integrity of their person” (Article 1). It further provides that all Malians “were born and remain free and equal in rights and duties” and that “all discrimination based on social origin, colour, language, race, sex, religion and political opinion is prohibited” (Article 2). According to the Constitution, “no one shall be subjected to torture, inhuman, cruel, degrading or humiliating treatment or abuse” (Article 3). The Constitution must be respected by “all citizens, all persons living on Malian territory” (Article 26).

More specifically, the Malian Criminal Code defines the crimes and offences that can give rise to criminal or civil liability.<sup>9</sup> Community violence can thus constitute different ordinary crimes under the Criminal Code (see section III. B. 1.). Malian law also includes rules derived from international law.<sup>10</sup> International treaties ensure a number of rights to Malians and prohibit the commission of acts of violence against them, including those of a community nature.

### B. International Human Rights Law

#### 1. Instruments applicable to Mali

Human Rights are a branch of International Law that offers protection to individuals through rights conferred upon them and obligations imposed on States. Human Rights belong to every individual as a “member of the human family”<sup>11</sup> and apply at all times, including in times of armed conflict. The content of the rights applicable to a given population depends in particular on the texts ratified by the State under which jurisdiction the individual is. These texts may be international or regional.

Among the Human Rights treaties that Mali has ratified, we can cite the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide and, the Convention on the Rights of the Child. At the regional level, Mali has ratified the African Charter on Human and Peoples’ Rights (“African Charter”). The Malian State is obligated to respect the rights contained in these instruments with regard to any person on its territory, but also to protect these rights against any infringement by third parties (persons or entities).

It is possible that a person in the territory of Mali may fall under the “jurisdiction” of another State: for example, when the individual is detained by foreign forces operating in Mali or simply under the “control” of the forces of that State in some way (for example, during a search or screening operation). In this case, the treaties that that State has ratified also apply (for example, the European Convention on Human Rights if it is a signatory State member of the Council of Europe).

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<sup>8</sup> The Constitution of Mali, adopted by referendum on 12 January 1992 and promulgated by decree N°92-073 P-CTSP on 25 February 1992.

<sup>9</sup> Republic of Mali, Criminal Code, Law N°01-079 of the 20 August 2001.

<sup>10</sup> The Constitution of Mali also provides for the primacy of international treaties - particularly those relating to Human Rights - over Malian laws (Article 116).

<sup>11</sup> The Universal Declaration of Human Rights, Preamble.

## 2. Relevant provisions

When an individual is a victim of community violence, several of their Human Rights can be invoked, depending on the nature of the violence suffered.

First of all, everyone has the right to life - this right is enshrined in the ICCPR (Article 6) and the African Charter (Article 4) and is customary in nature. This fundamental right is the “supreme right”: no derogation is permitted, including in times of armed conflict or another public emergency.<sup>12</sup> The right to life is not absolute in the sense that what is prohibited are “arbitrary” deprivations of life. However, the cases in which it is lawful to deprive someone of their life are very limited - they include, for example, cases of self-defence - and must in any case be established by law and combined by institutional safeguards.<sup>13</sup>

Human Rights instruments also provide for the right to physical and moral integrity, and the right to respect for human dignity (Articles 4, 5 African Charter; Article 7 ICCPR). The African Commission on Human and Peoples’ Rights (African Commission) has considered that the right to human dignity is a “fundamental right that all human beings should enjoy without discrimination of any kind”.<sup>14</sup> Like the right to life, these rights are non-derogable, i.e. applicable even in situations of public emergency.<sup>15</sup> They imply in particular that no one may be subjected to torture or cruel, inhuman or degrading treatment or punishment.

According to the African Commission, these forms of treatment include “not only acts that cause serious physical or psychological suffering, but also those that humiliate the person or force them to act against their will or conscience”.<sup>16</sup> Torture is considered to be an aggravated form of inhuman treatment resulting in severe suffering.<sup>17</sup> Sexual violence is one of the forms of violence that can constitute torture, cruel, inhuman or degrading treatment. Rape is widely considered to be an act of torture,<sup>18</sup> and other forms of sexual violence have been recognised as cruel, inhuman or degrading treatment.

Human Rights also ensure the right to security (Article 9 ICCPR, Article 6 African Charter). This right concerns protection against bodily and psychological harm, or bodily and mental integrity.<sup>19</sup> It should be noted that the Malian state has the obligation to respect and ensure these rights without any distinction (Article 2(1) ICCPR, Articles 2 and 3 African Charter), but also the obligation to provide a resort to victims of violations and their relatives (Article 2(3) ICCPR, Article 1 African Charter<sup>20</sup>).

Other relevant Human Rights include the right to property (Article 14 African Charter) and housing (Article 11 ICESCR). These rights could indeed be invoked in cases where community violence consists of acts committed against people’s property (theft, looting, destruction, etc.).

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<sup>12</sup> Human Rights Committee, General Comment No. 36 - Article 6: Right to life, 3 September 2019, para. 2; African Commission on Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), November 2015, para. 5.

<sup>13</sup> Human Rights Committee, General Comment No. 36 - Article 6: Right to life, 3 September 2019, para. 10.

<sup>14</sup> African Commission on Human and Peoples’ Rights, Purohit and Moore v. Gambia, Communication N° 241/2001, 33rd session, 15-29 May 2003, para. 57.

<sup>15</sup> The African Charter does not include an opt-out clause.

<sup>16</sup> African Commission on Human and Peoples’ Rights, International Pen et al (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria, Communications N° 137/1994, 139/1994, 154/1996 and 161/1997, 24th session, 22-31 October 1998, para. 79.

<sup>17</sup> According to the European Court of Human Rights, it consists of “deliberate inhuman treatment causing very serious and cruel suffering”, European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, A N° 25, para. 167.

<sup>18</sup> See, for example, Inter-American Commission on Human Rights, *Martín de Mejía v. Peru*, Case N° 10.970, report 5/96, 1st March 1996, Inter-American Yearbook, 1996-I, pp. 1174-1178; European Court of Human Rights, *Aydin v. Turkey*, 25 September 1997, paras. 82-86; ICTR, *The Prosecutor v. Akayesu*, Trial Chamber, Case N° ICTR-96-4-T, 1998, para. 597; ICTY, *The Prosecutor v. Delalic, Mucic, Delic and Lando, ‘Celebici Camp’*, Trial Chamber, Case N° IT-96-21-T, 1998, para. 495.

<sup>19</sup> Human Rights Committee, General Comment No. 35 - Article 9 (*Liberty and Security of the person*), 16 December 2014, para. 3.

<sup>20</sup> African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication N° 245/2002, 39th session, 11-15 May 2006, para. 171.

### 3. Actors

#### 3.1 State violence

Community violence may be committed by state agents (such as members of the armed forces) on the basis of their own community affiliation.<sup>21</sup> In other cases, violations are committed by state agents on the fringe of community violence. Even if such acts are not committed on the orders of a superior but by agents acting on their own initiative, state responsibility may still be engaged.<sup>22</sup>

States are obligated to take all necessary measures to prevent violations of human rights by their agents - this is part of their obligation to “respect” those rights.<sup>23</sup> These measures include the adoption of regulations and training of state agents, as well as the obligation to investigate allegations of violations. Thus, the mere failure to conduct an investigation when the State knew (or should have known) of violations may in itself constitute a human rights’ violation.<sup>24</sup>

#### 3.2 Violence committed by a non-state actor

Intercommunity violence is generally committed by armed groups, militias, so-called “self-defence” groups or any private individual, rather than by state agents. Even in this case, it is covered by Human Rights Law.

Although Human Rights are primarily addressed to States, it is increasingly recognised that non-state actors are also directly bound by these rules.<sup>25</sup> For example, the UN has already documented Human Rights abuses committed by groups of individuals acting on a community basis.<sup>26</sup> Indeed, it should be noted that the African Charter imposes obligations not only on states but also directly on individuals (and not only on individual state agents) - a unique feature in a Human Rights instrument. It requires everyone to consider their fellow human beings without discrimination of any kind (Article 28).<sup>27</sup>

Even when violence is committed by non-state actors, it can give rise to Human Rights violations by the state. Indeed, States are not only obligated to respect Human Rights themselves, but also to protect them, i.e. to prevent them from being violated as a result of the actions of third parties, such as armed groups or private individuals.<sup>28</sup> Thus, the African Commission has held that a state that fails to protect the rights set out in the African Charter commits a violation “even if the state or its agents are not the immediate cause of the violation”.<sup>29</sup>

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<sup>21</sup> See, for example, UNJHRO, *Report of the special fact-finding mission on the intercommunity violence of 16 and 17 December 2018 in the territory of Yumbi, March 2019*, para. 69; UNJHRO, *Public Report on the Conflicts in the Territory of Djugu, Ituri Province - December 2017 to September 2019*, January 2020, para. 56.

<sup>22</sup> According to the UN International Law Commission, when an agent acts in excess of authority or contrary to instructions but still in an official capacity, the State may be held responsible. See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Resolution adopted by the General Assembly at its fifty-sixth session, A/RES/56/83, 2002, article 7.

<sup>23</sup> See, for example, Human Rights Committee, *General Comment No. 35 - Article 9 (Liberty and security of the person)*, 16 December 2014, para. 9; Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, 3 September 2019, para. 19.

<sup>24</sup> See, for example, European Court of Human Rights, *M.C. v. Bulgaria*, Application N° 39272/98, 4 December 2003, paras. 169-187; African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, November 2015, para. 7; Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, 3 September 2019, para. 27 (for modalities and procedures of investigation, see paras. 27-28).

<sup>25</sup> See, for example, United Nations Secretary-General, *Report of the Secretary-General’s Panel of Experts on Sri Lanka*, 31 March 2011, para. 188; *Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya*, A/HRC/17/44, 1 June 2011, para. 72; *Report of the International Commission of Inquiry on the Situation of Human Rights in the Syrian Arab Republic*, A/HRC/19/69, para. 106.

<sup>26</sup> See, for example, UNJHRO, *Public Report on Conflicts in Djugu Territory, Ituri Province - December 2017 to September 2019*, January 2020, paras. 72-77.

<sup>27</sup> However, only States can be held responsible for violations of the Charter according to the implementation mechanisms.

<sup>28</sup> See, for example, African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: the right to life (Article 4)*, November 2015, para. 41; Human Rights Committee, *General Comment No. 20 - Article 7: Prohibition of torture and cruel, inhuman or degrading treatment or punishment*, 1992, para. 2.

<sup>29</sup> African Commission on Human and Peoples’ Rights, *National Commission on Human Rights and Freedoms v. Chad*, Communication N° 74/1992, 18th session, 2-11 October 1995, para. 20.

In this regard, it has, for example, considered that Chad has committed a violation of the Charter by failing to take the necessary measures to ensure the security of its nationals against acts of violence committed by non-state actors.<sup>30</sup>

According to the Human Rights Committee, the State itself commits a violation if it “condones such acts or fails to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts committed by natural persons or legal entities”.<sup>31</sup> The duty to take preventive measures applies where the authorities “knew or ought to have known that there was an immediate threat and failed to take the action that might have been expected”.<sup>32</sup>

The UN has recently found that the Congolese State could be held responsible for community violence perpetrated on its territory in 2018, as the authorities had been informed of the high risk of violence and yet failed to take preventive measures.<sup>33</sup> However, in relation to the right to life, the Human Rights Committee has clarified that what is expected of States is to take “reasonable” measures in the event of “reasonably fore-seeable” events emanating from individuals or private entities.<sup>34</sup> It has further clarified that the right to life requires States to take special protection measures in favour of persons exposed “to a particular risk because of specific threats or pre-existing patterns of violence”,<sup>35</sup> as may be the case with community violence.

The State may also be held responsible when it fails to investigate violations committed by private actors or to redress the resulting damage.<sup>36</sup> Under the right to an effective remedy, States must ensure that any victim or their relatives have accessible and effective remedies to enforce their rights.<sup>37</sup> This right also implies a duty to provide appropriate reparation (Article 2(3) ICCPR) - this may take the form of restitution, rehabilitation, satisfaction (public apology, official testimony), guarantees of non-repetition or modification of the laws and practices in question as well as bringing the perpetrators to justice.<sup>38</sup>

Community violence violates the Human Rights of its victims. The fact that they are committed by non-state actors (armed groups, militias, so-called “self-defence” groups, private individuals, etc.) does not absolve the State of its responsibilities under International Human Rights Law (IHRL). Failure to prevent or punish such acts may, in itself, constitute a violation by the State. In criminal law, such violations may give rise to individual criminal liability for crimes against humanity or genocide, as described below.

Human Rights are not the only branch of international law relevant to intercommunity violence. When such violence is committed in the context of an armed conflict, it is also governed by International Humanitarian Law (IHL).

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<sup>30</sup> African Commission on Human and Peoples’ Rights, *National Commission on Human Rights and Freedoms v. Chad*, Communication N° 74/1992, 18th session, 2-11 October 1995, para. 22. See also African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication N° 245/2002, 39th session, 11-15 May 2006, para. 142; African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, November 2015, para. 9.

<sup>31</sup> Human Rights Committee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 8.

<sup>32</sup> African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, November 2015, para. 38.

<sup>33</sup> UNJHRO, *Report of the special fact-finding mission on the intercommunal violence of 16 and 17 December 2018 in Yumbi territory*, March 2019, para. 87.

<sup>34</sup> Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, 3 September 2019, para. 25.

<sup>35</sup> Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, 3 September 2019, para. 23.

<sup>36</sup> Human Rights Committee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 8.

<sup>37</sup> Human Rights Committee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 15.

<sup>38</sup> Human Rights Committee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 16.

## C. International Humanitarian Law

### 1. Applicable instruments and conditions of applicability

#### 1.1 Armed conflicts

Unlike Human Rights, IHL rules do not apply at all times, but only in times of armed conflict. Armed conflict is a legal concept that refers to a situation involving the use of armed force between two sufficiently organised armed actors. In a context involving multiple actors, as in Mali, the IHL rules applicable to each actor involved in the armed conflict depend on the relationship of armed hostilities between these two actors.

The main IHL instruments are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. Mali has ratified all these instruments. The four Geneva Conventions and Additional Protocol I apply in the event of an international armed conflict (IAC), i.e. between States. No such conflict is ongoing in Mali at the time of writing.<sup>39</sup> Article 3 Common to the four Conventions and Additional Protocol II (AP II) apply in the case of a non-international armed conflict (NIAC), i.e. between a State and an armed group. In particular, AP II applies in the event of an armed conflict between a State and armed groups which, “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [this] Protocol”. When a NIAC pits several armed groups against each other, only Common Article 3 applies, but it is supplemented by the rules of customary international humanitarian law applicable in NIACs, which are numerous.<sup>40</sup>

Two criteria must be met for a NIAC to exist: the armed group involved must demonstrate a minimum degree of organisation and armed confrontations must reach a certain level of intensity.<sup>41</sup> Only these two criteria are taken into account in determining the existence of a NIAC, regardless of the objective of the armed actors involved or how an act is qualified in common parlance (for example, an act qualified as “terrorist” or an operation qualified as “anti-terrorist” by the State may or may not be part of an armed conflict). It is not necessary for an armed group to be as organised as State forces, but it must be sufficiently organised to be able to conduct hostilities but also to respect IHL (and therefore to be able to give orders to its members and to be able to enforce them). Thus, not every group of armed individuals is necessarily considered to be an “armed group” within the meaning of IHL.<sup>42</sup>

In order to determine whether a so-called “self-defence” or another community-based group qualifies as an armed group under IHL, several indicators can be taken into account: the existence of a chain of command, rules and disciplinary bodies within the group; headquarters; the ability to procure weapons and other military equipment, to recruit, train and equip new combatants; to plan, coordinate and conduct military operations; the ability to speak with one voice and conclude agreements such as ceasefires or peace agreements.<sup>43</sup> As of the date of this note, there are several NIACs taking place in Mali.<sup>44</sup>

When the State uses force against a group that is not sufficiently organised, or when groups that are not sufficiently organised oppose each other, this is not an armed conflict (although, as discussed below, such groups may act in connection with an ongoing armed conflict).<sup>45</sup>

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<sup>39</sup> On the basis of the information available in the public domain, none of these confrontations seem to correspond to an IAC since they do not pit States against each other. Foreign forces (notably French and UN forces) are present in Mali with the consent of the Malian state, and no third State appears to exercise sufficient control over an armed group or groups to qualify itself as a party to a conflict against the Malian state.

<sup>40</sup> Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I - Rules (hereafter “Customary IHL Study”), ICRC, 2006.

<sup>41</sup> See ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-T, 7 May 1997, paras. 561-568.

<sup>42</sup> For more details on the criteria for the application of IHL, see IHL Resource Desk for Mali, *Legal Classification of the Situation in Mali and Applicable International Law*, Diakonia, October 2019.

<sup>43</sup> ICTY, *Prosecutor v. Haradinaj*, IT-04-84-T, 3 April 2008, para. 60.

<sup>44</sup> See IHL Resource Desk for Mali, *Legal Classification of the Situation in Mali and Applicable International Law*, Diakonia, October 2019.

<sup>45</sup> See section 3.1. below.

## 1.2 Link between violence and conflict

Where an armed conflict exists, Human Rights continue to apply, but IHL applies, in addition, to all acts (and omissions) related to that conflict. This link (sometimes called “nexus”) is another condition for the applicability of IHL.<sup>46</sup> Thus, community violence is covered by IHL only if it takes place in the context of and in connection with an armed conflict. In the absence of such a link, IHL does not apply to them, even if they take place in a country affected by one or more armed conflicts, as is the case in Mali.

According to the case law, for such a link to exist, the armed conflict must have “significantly affected the ability of the perpetrator [...] to [commit the violent act], their decision to commit it, the manner in which they committed it or the purpose for which they committed it”.<sup>47</sup> This condition is met if the perpetrators of the violence acted “with a view to or under the cover of serving an armed conflict”.<sup>48</sup> This link can be established when the attackers are parties to the conflict (State forces or armed groups) but also when they are civilians - under the conditions described below.

Violations of IHL can give rise to international State responsibility as well as individual civil and criminal liability. At the criminal level, a violation of IHL can constitute a war crime.<sup>49</sup>

## 2. Relevant provisions: acts of violence prohibited by IHL

As the legal regime applicable to armed conflict, IHL also contemplates and regulates a form of violence specific to this type of exceptional situation: hostilities. When a party to a conflict seeks to take control of a territory, it commits hostilities in the form of “attacks”, i.e. acts of violence against the adversary. In this case, IHL does not prohibit the use of force, but determines its use very strictly. Only members of the armed forces may be targeted - attacks against civilians are strictly prohibited.<sup>50</sup> Any disproportionate attack is prohibited and the parties to the conflict must take all necessary precautions to minimise civilian casualties.

On the other hand, outside the very specific framework of hostilities, IHL absolutely prohibits all acts of violence against persons in the hands of one party - whether they are members of the enemy forces or civilians. Thus, in a NIAC, IHL prohibits attacks on the life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment, outrages upon personal dignity, including humiliating and degrading treatment, rape and any form of indecent assault, collective punishment, pillaging, etc. (Article 3 Common; Art. 4 AP II). The content of some of these prohibitions may be interpreted in the light of the Human Rights case law cited above. IHL also prohibits forced displacement (Art. 17 AP II).

In terms of civilian objects, IHL prohibits the destruction or seizure of the property of the adversary<sup>51</sup> - including civilians perceived to be associated with that adversary - and the destruction of objects indispensable to the survival of the civilian population (Article 14 AP II) - such as food, crops, livestock, drinking water installations and supplies, etc. (Article 14 IHL). - as well as cultural property and places of worship (Article 16 AP II).

This summary is not exhaustive and intercommunity violence could be prohibited by other rules of IHL.

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<sup>46</sup> ICTY, *Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 572.

<sup>47</sup> ICTY, *Prosecutor v. Dragoljub Kunarac et al*, Appeals Chamber, 12 June 2002, IT-96-23/1-A, para. 58.

<sup>48</sup> *Idem*.

<sup>49</sup> See section III.B. 2. a. below.

<sup>50</sup> Except where a civilian takes a direct part in hostilities (Article 13(3) AP II) - a concept that must be interpreted strictly. See Nils Melzer, *Interpretative Guide on the Concept of Direct Participation in Hostilities*, ICRC, Geneva, 2010.

<sup>51</sup> Rule 50, Customary IHL Study.

### 3. Actors

#### 3.1 Violations by parties to armed conflict

It is possible that so-called intercommunity violence may be perpetrated by parties to an armed conflict – State forces or a sufficiently organised armed group.<sup>52</sup> In addition to being prohibited by Human Rights law, they would be covered (and prohibited) by IHL. For this to be the case, such violence must be related to the armed conflict in which these parties are engaged.

This would obviously be the case if the conflict has community roots in the sense that the parties involved define themselves and their opponents on the basis of their membership to a community, whether defined along racial, ethnic, religious or other lines. In this case, when violence is perpetrated against members of the enemy group as defined by the assailant, it serves the purpose of the conflict and is therefore directly related to the conflict. In other words, community violence would be linked to an armed conflict if the perpetrators were actually targeting an enemy group through a civilian population perceived to be loyal to that enemy. This scenario seems particularly relevant in the Malian context where certain populations are perceived to be affiliated to a particular armed group, some of whom are parties to one or more armed conflicts.<sup>53</sup> Such acts of violence, committed by parties to a conflict for a reason related to that conflict (weakening the enemy) would be covered and prohibited by IHL.

IHL may also apply to violence committed on the fringes of the conflict, in particular if the conflict has “significantly affected” the perpetrator’s ability to commit the act or the manner in which it was committed – according to the case law cited above. For example, if members of an armed group or State forces party to a conflict take advantage of the chaos or terror created by the hostilities in order to commit community violence against civilians, the link to the conflict could be sufficient for IHL to apply (this could be the case even if the perpetrators act in contravention of orders received, based on their own community affiliation).

In such cases, violations may involve international State responsibility (if committed by state agents or other individuals whose actions are attributable to the State) and/or the civil and/or criminal liability of individuals acting on behalf of one of the parties to the conflict.

#### 3.2 Violence by civilians

Community violence is also (and perhaps mainly) committed by groups of individuals who are not sufficiently organised in the sense of IHL to be “party” to an armed conflict. Within the meaning of IHL these individuals are, by inference, civilians (since they are not members of a party to an armed conflict). This seems to be the case of at least some so-called “self-defence” groups active in Mali.

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<sup>52</sup> For example, the United Nations has estimated that the Seléka and anti-Balaka groups operating in the Central African Republic constitute armed groups, based on these indicators. See MINUSCA, *Human rights abuses and violations of International Humanitarian Law during clashes between anti-Balaka and ex-Séléka factions* (PFCR/RPRC/UPC), August-September 2018, para. 11. In Mali, for example, it would appear that the Dan Na Ambassagou militia, reportedly comprising several self-defence groups in Dogon country, is sufficiently organised to constitute an armed group within the meaning of IHL: it appears to be led by a leader who presents himself as “chief of general staff” and has a chain of command and the capacity to recruit and arm. In his own words, the militia is made up of “5,000 elements” and has “more than thirty training camps”. “Mali - Youssouf Toloba: Our movement targets criminals, not one ethnic group,” *Le Point*, 12 December 2018, [https://www.lepoint.fr/afrique/mali-youssouf-toloba-notre-mouvement-cible-les-malfaiteurs-pas-une-ethnie-12-12-2018-2278819\\_3826.php](https://www.lepoint.fr/afrique/mali-youssouf-toloba-notre-mouvement-cible-les-malfaiteurs-pas-une-ethnie-12-12-2018-2278819_3826.php). It would seem that the militia is divided into several units each answerable to a leader, themselves under the orders of the chief of general staff. Regarding the Alliance for Salvation in the Sahel (ASS), it also has a leader known as Bacar Sow, who claimed in March 2019 to have a hundred members. “After the massacre of Ogossagou, our interview with an armed Peul leader,” *Mondafrique*, 25 March 2019, <https://mondafrique.com/mali-notre-entretien-avec-le-chef-peul-dune-milice-armee/>.

<sup>53</sup> See, for example, Aurélien Tobie, “Le Centre Mali: Violences et Instrumentalisation croisées”, *SIPRI Insights on Peace and Security*, n° 2017/5, December 2017, p. 12; Human Rights Watch, “We used to Be Brothers – Self-defence group abuses in Central Mali”, 7 December 2018; Namie Di Razza, “Protecting Civilians in the Context of Violent Extremism: The Dilemmas of UN Peacekeeping in Mali”, *International Peace Institute*, October 2018, p. 15.

These community-based groups organise patrols with the claimed objective of ensuring the safety of members of their community,<sup>54</sup>

but some are accused of massacres.<sup>55</sup> Even if they are not parties to an armed conflict, violence perpetrated by civilians could still be covered by IHL if it is linked to one of the NIACs operating in Mali. This could be the case, for example, if such community violence is triggered by an event directly related to an armed conflict (the conflict would have “significantly influenced” the “decision” to commit the violence). For example, if an organised armed group commits murder for a reason related to the conflict opposing them to State forces (such as to take revenge on individuals perceived to be collaborating with the State) and that this is the trigger for community violence,<sup>56</sup> then such violence would have resulted from the conflict and would therefore be covered by IHL.

IHL could also apply if community violence is directly encouraged by parties to an armed conflict. For example, there are indications that some armed groups party to NIACs in Mali are instrumentalising ethnic tensions and inciting self-defence groups to violence.<sup>57</sup> These parties would “externalise” to these groups the commission of violent acts indirectly targeting their adversary, through civilian populations perceived to be loyal to them. This could constitute a sufficient link with the conflict for IHL to apply.

Such violations of IHL by civilians could lead to the civil or criminal liability of the perpetrators (according to well-established case law since the Second World War, civilians can indeed be found guilty of war crimes).

Furthermore, it should be stressed that all States Parties to the Geneva Conventions have a duty not only to “respect” these rules, but also to “ensure respect” of these rules by the entire population over which the State exercises authority (Article 1 Common to the four Geneva Conventions). According to the ICRC, this obligation is a general obligation of due diligence; it implies taking adequate measures to prevent and punish violations of the Conventions by private persons.<sup>58</sup>

The Conventions also specifically provide for an obligation on each State to take “the necessary measures to put an end to acts contrary to the provisions” of the Conventions.<sup>59</sup> The Conventions leave it to the discretion of States to decide what measures are necessary, but these may include criminal prosecution. It should be emphasised that these implementing rules emanating from IHL act as a complement to the duty of investigation emanating from Human Rights.

In the absence of a sufficient nexus to an armed conflict, community violence remains, in any case, covered and prohibited by Human Rights and national law.

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<sup>54</sup> See Aurélien Tobie, “Le Centre Mali: Violences et Instrumentalisation croisées”, *SIPRI Insights on Peace and Security*, n° 2017/5, December 2017, p. 11.

<sup>55</sup> See, for example, MINUSMA, “Preliminary findings of the special fact-finding mission on serious Human Rights violations committed in Ogossagou on 23 March 2019”, 2 May 2019.

<sup>56</sup> For example, the murder of a Bambara vice-mayor in retaliation for his collaboration with the FAMA is said to have triggered a massacre of an ethnic nature in Malémana; the murder of a Dogon chief in June 2017 by a radical armed group triggered massacres between Dogons and Peuls. See Di Razza, note 53, p 15.

<sup>57</sup> United Nations Security Council, “Twenty-fourth report of the Analytical Support and Sanctions Monitoring Team”, S/2019/570, 15 July 2019, para. 31.

<sup>58</sup> ICRC, *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, para. 150.

<sup>59</sup> See, for example, Article 146(3) of the Fourth Geneva Convention. Although the Geneva Conventions are primarily applicable only in the event of an IAC, the Article refers to the “provisions of the present Convention” which include Common Article 3 which applies to NIACs. It can therefore be considered that this obligation also applies to violations committed during NIACs.

# III. PROSPECTS FOR JUSTICE

## A. The responsibility to prosecute those responsible for inter-community violence

Inter-community violence committed by different actors in Mali can be governed by several legal regimes, including domestic law in Mali, IHRL, international criminal law and possibly IHL.

The Constitution of the Republic of Mali provides that “treaties or agreements that have been duly ratified or approved have, as soon as they are published, an authority superior to that of the laws, subject for each treaty or agreement to its application by the other party”.<sup>60</sup> Also, according to the Constitution, every person has the right to life and physical integrity and the State has the obligation to respect and protect it.<sup>61</sup> Consequently, Mali has an obligation to investigate, prosecute and above all punish the perpetrators of Human Rights violations. It is important to note that Mali has ratified several international instruments such as the four Geneva Conventions, the two Additional Protocols and other international Human Rights instruments.

The responsibility for investigating and prosecuting alleged perpetrators of inter-community violence in Mali lies primarily with the Malian State. Malian courts are competent to judge not only ordinary crimes but also international crimes: crimes against humanity, war crimes and the crime of genocide, as defined in the Rome Statute.

Indeed, the prevention of Human Rights abuses and the repression of crimes are primarily the legal responsibility of the Malian State. In order to respond to the need for justice of victims of violence in Mali since 2012, Mali has created a Specialised Judicial Unit against Terrorism and Transnational Organized Crime.<sup>62</sup> The jurisdiction of this Specialised Judicial Unit was expanded in 2019 to deal with war crimes, crimes against humanity and crimes of genocide.<sup>63</sup> The Judicial Unit will be able to play an important role in the fight against impunity for intercommunity violence occurring on the territory of the country.

As already mentioned, Mali has also ratified the Rome Statute of the ICC<sup>64</sup> and incorporated it into its Criminal Code (Law 01-079 of 20 August 2001). The ICC is therefore competent to judge crimes covered by the Rome Statute committed on the territory of Mali or by Malian citizens. By virtue of the principle of complementarity,<sup>65</sup> the ICC only intervenes as a “complement” to the Malian courts. In other words, a case is only admissible before the ICC if the Malian state “is unwilling or unable to genuinely carry out the investigation or prosecution”. Indeed, Mali’s judicial institutions must prosecute and try the most senior officials responsible for these crimes committed on the country’s territory, failing which the ICC could investigate and try those allegedly responsible.

It should be recalled that Mali has referred the situation in its territory since January 2012 to the ICC.<sup>66</sup>

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<sup>60</sup> See Article 16 of the Constitution of the Republic of Mali, adopted on 12 January 1992.

<sup>61</sup> See Article 1 of the Constitution.

<sup>62</sup> Law N° 2013-061 of 21 May 2013 amending Law N° 01-080 of 20 August 2001 on the Code of Criminal Procedure, Articles 610 and 610-1.

<sup>63</sup> The draft amendment to Law N° 01-08 of 20 August 2001 on the Code of Criminal Procedure, aimed at extending the jurisdiction of the Specialised Judicial Pole to prosecute war crimes, genocide and crimes against humanity, was launched during a meeting of the Council of Ministers in May 2019, Council of Ministers of Mali, “Communiqué du Conseil des Ministres du mercredi 29 mai 2019”, 29 May 2019, <http://www.primature.gov.ml/index.php/communiqués-du-conseil-des-ministres?start=5>; Law No. 01-08 of 20 August 2001 on the Code of Criminal Procedure, <http://ilo.org/dyn/natlex/docs/ELECTRONIC/64578/73898/F-784451298/MLI64578.pdf>; United Nations Security Council, ‘Situation in Mali: Report of the Secretary-General’, October 2019, [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S\\_2019\\_782.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2019_782.pdf) (accessed on 29 July 2020).

<sup>64</sup> Mali deposited its instrument of ratification of the ICC Statute on 16 August 2000.

<sup>65</sup> According to this principle, States Parties have an obligation to investigate and prosecute the perpetrators of serious international crimes, failing which the ICC has jurisdiction over these crimes when a State is unwilling or unable to carry out such prosecutions. See paragraph 10 of the Preamble and Articles 1 and 17 of the ICC Statute.

<sup>66</sup> See Referral of the situation to the ICC by the Government of Mali, since 2012, available at <https://www.icc-cpi.int/mali?ln=fr> accessed on 15 July 2020.

This situation led to the conviction of Ahmad Al Faqi Al Mahdi for war crimes<sup>67</sup> and a case pending at the time of writing (Al Hassan Ag Abdoul Aziz case).<sup>68</sup> In the light of the numerous acts of violence committed against civilians in Mali, complementarity between national and international jurisdictions is therefore of paramount importance in order to put an end to impunity, and above all to bring justice to the victims of such violence.

Indeed, violence of an intercommunity nature perpetrated against civilians in Mali may constitute ordinary offences under Malian criminal law. These acts could also be prosecuted by Malian or foreign courts as international crimes (crimes against humanity, war crimes or the crime of genocide, provided they meet the corresponding legal definitions). The classification as war crimes would only be possible if IHL covers such violence.

## B. Possible classifications in criminal law

### 1. Ordinary crimes

Intercommunity violence perpetrated against civilians in Mali may constitute ordinary offences under Malian criminal law as crimes and offences against the integrity of the person<sup>69</sup> such as murder, assassination, homicide.<sup>70</sup> These acts of community violence such as the ones committed against civilians in Mali could also be punished as assault, injury,<sup>71</sup> acts of torture,<sup>72</sup> rape,<sup>73</sup> kidnapping,<sup>74</sup> theft,<sup>75</sup> damage to property<sup>76</sup> and looting.<sup>77</sup> These acts of intercommunity violence in central Mali, among which several victims were illegally arrested and held captive,<sup>78</sup> may constitute offences under Malian criminal law such as illegal arrests and kidnapping of persons, hostage taking and abduction.<sup>79</sup> The Criminal Code provides for different prison sentences for these acts depending on their nature and the circumstances in which they were committed.

### 2. International Crimes

International crimes are crimes that are considered particularly serious and affect the international community as a whole.<sup>80</sup> As mentioned above, intercommunity violence can be extremely serious, and can be classified as crimes against humanity, war crimes or genocide provided that they meet the constituent elements of these crimes.

Their classification as international crimes is based on the fact that the acts that constitute these crimes “defy the imagination and deeply shock the human conscience”.<sup>81</sup> Indeed, these acts violate the very dignity of the human being. Therefore, in addition to the obligation of prevention, all States have an obligation to investigate and prosecute the perpetrators of these crimes. The definitions and specific

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<sup>67</sup> See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, 24 May 2016.

<sup>68</sup> See *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18.

<sup>69</sup> See Articles 199-203 of Law N° 01-079 of 20 August 2001 on the Criminal Code as amended by Law N°2016-039/ of 7 July 2016 amending Law N°01-079 of 20 August 2001 on the Criminal Code.

<sup>70</sup> *Idem* articles 199, 202, 203.

<sup>71</sup> *Idem* article 207.

<sup>72</sup> *Idem* article 209.

<sup>73</sup> *Idem* articles 226 and 227.

<sup>74</sup> *Idem* article 237.

<sup>75</sup> *Idem* articles 252-256.

<sup>76</sup> *Idem* articles 313, 318.

<sup>77</sup> *Idem* article 314.

<sup>78</sup> See International Federation for Human Rights, FIDH “In Central Mali, populations trapped by terrorism and counter-terrorism”, survey report published in November 2018, p.39.

<sup>79</sup> See Articles 237ss. of Law N° 01-079 of 20 August 2001 on the Criminal Code as amended by Law N°2016-039/ of 7 July 2016 amending Law N°01-079 of 20 August 2001 on the Criminal Code.

<sup>80</sup> See Preamble of the Rome Statute.

<sup>81</sup> *Idem*.

elements of these crimes are derived from the 1949 Geneva Conventions and the two Additional Protocols, the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>82</sup> the Rome Statute<sup>83</sup> and other international treaties.

#### a. War Crimes

War crimes are committed in the context of an armed conflict. They are grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols and other violations of the laws and customs applicable in IACs and NIACs, when committed “as part of a plan or policy or as part of a series of similar crimes committed on a widespread scale”<sup>84</sup> These violations lead to the individual criminal liability of their perpetrators.

In addition to war crimes in IACs,<sup>85</sup> the Rome Statute lists war crimes in NIACs. In particular, in situations of NIAC, the Rome Statute highlights a broad list of acts of serious violations of Article 3 Common to the four Geneva Conventions of 12 August 1949 as well as other serious violations of laws and customs applicable in armed conflicts not of an international nature.<sup>86</sup> Some of these acts include injury to life and limb, murder, cruel treatment and torture as well as humiliation, degrading treatment and hostage-taking.

While not all crimes during an armed conflict are war crimes, war crimes are distinguished by the context in which they are committed, i.e. the existence of an armed conflict. According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the classification of an act as a war crime always requires the existence of an armed conflict and a nexus or link between that act and the armed conflict.<sup>87</sup> It is important to clarify that a causal link is not required between an armed conflict and war crimes because war crimes are not necessarily the result of any policy or planned acts.<sup>88</sup> Indeed, war crimes are violations of IHL; IHL must therefore apply to the act in order for it to constitute a war crime.

Consequently, in order to determine whether certain violence of an intercommunity nature such as the one committed in Mali can be qualified as a war crime, a link (nexus) must be established between an armed conflict taking place in Mali at the time of the violence (armed conflict between the Malian State and a group or armed conflict between two armed groups) and the acts of violence as specified below. Indeed, violence of an intercommunity nature (murder, sexual violence, looting, etc.) cannot be qualified as war crimes even if it takes place in a country affected by armed conflicts such as Mali, unless a link with the armed conflict is determined.

According to the information available, intercommunity violence in Mali is committed by community-based groups such as “self-defence” groups.<sup>89</sup> In view of the criteria imposed by IHL, some of these so-called “self-defence” groups do not meet the organisational criteria for constituting a party to the conflict. Intercommunity violence committed by these groups for reasons related to the conflict could still be covered by IHL, and could therefore be prosecuted as war crimes (see section II. C1.2 above).

It is important to note that, in the context of Mali, some community violence could be committed by armed groups that are party to the conflict.<sup>90</sup> The link or nexus between the armed conflict and intercommunity violence leads to the applicability of Common Article 3 of the Geneva Conventions and AP II, which ensure the protection of civilians in situations of NIAC. In this case, such violence could therefore give rise to the criminal liability of the perpetrators as war crimes.

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<sup>82</sup> The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

<sup>83</sup> See also the Elements of Crimes adopted to assist the ICC in interpreting and applying Articles 6 to 8bis of the Statute, which define the crimes of genocide, crimes against humanity and war crimes.

<sup>84</sup> See Article 8bis of the Rome Statute.

<sup>85</sup> See Article 8a, para. 2 (a), (b).

<sup>86</sup> Article 8a, para. 2 (c) and (e).

<sup>87</sup> See *Prosecutor v. Kunarac and others*, ICTY, Case N° IT-96-23 and IT-96-23 /1-A, Appeals Chamber, 12 June 2020.

<sup>88</sup> *Idem*.

<sup>89</sup> See, for example, the report of the UN Secretary-General on the situation in Mali, 31 May 2019, S/2019/454.

<sup>90</sup> See The Defense Post, 30 May 2019, <https://thedefensepost.com/2019/05/30/islamic-state-greater-sahara-west-africa/>. See also “Radical Islamists Have Opened a New Front in Mali”, Foreign Policy, 29 March 2019, <https://foreignpolicy.com/2019/03/29/radical-islamists-have-opened-a-new-front-in-mali/>.

## b. Crimes against humanity

Acts of intercommunity violence could also constitute crimes against humanity if the requisite elements of the crime are established. The Rome Statute enumerates a broad list of acts constituting crimes against humanity, “when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack”.<sup>91</sup> Some of these acts are “murder, extermination, rape, torture, enforced disappearance of persons, persecution and any other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health”.<sup>92</sup> According to the jurisprudence of the ICTY, these acts must be linked to widespread or systematic attacks against a civilian population, failing which they cannot be prosecuted as crimes against humanity.<sup>93</sup> It should be made clear that even a single isolated act, resulting from a political system based, for example, on persecution, could be prosecuted as a crime against humanity.<sup>94</sup> Another conclusive criterion for classifying acts as crimes against humanity is the perpetrator’s knowledge of the context in which their crime was committed.

Acts of community violence directed against civilians in Mali could present constituent elements of a crime against humanity through certain acts such as murder, persecution and other acts of similar gravity. Some attacks directed against civilians in different parts of the country could be part of widespread or systematic attacks and could be classified as crimes against humanity by a competent court.

It should be noted that, as specified by the ICTY, other acts not listed in Article 7 of the Rome Statute may constitute crimes against humanity provided they are of the same gravity.<sup>95</sup> For example, the multiplication of attacks, sometimes widespread or systematic, against civilians in the centre of the country by different groups (sometimes sufficiently organised) could be prosecuted as crimes against humanity.

It is important to clarify that for crimes against humanity, the acts of violence must be linked to the attack on a civilian population and the accused must have been aware that their acts were linked to it. However, the attack on the civilian population need not be both widespread and systematic,<sup>96</sup> and the violence does not consist solely of physical violence.<sup>97</sup> Consequently, violence as committed against civilians in Mali that is not linked to widespread or systematic attacks against a civilian population falls into another category of crimes - ordinary crimes, as discussed above. Therefore, these acts cannot be prosecuted as crimes against humanity.

## c. Crime of genocide

Following the massacres of Peul communities in the village of Ogossagou, in the Bankass circle in March 2019, considered as “the worst atrocity in Mali’s recent history” by Human Rights Watch,<sup>98</sup> the UN Special Advisor on the Prevention of Genocide spoke of “the growing ethnicisation of the conflict in central Mali”.<sup>99</sup> The crime of genocide, which targets the community dimension of the ethnic, racial, national or religious group, is made up of a series of acts of serious violations of the right to life and physical or mental integrity of the members of these groups with the aim of destroying them, in whole or in part.<sup>100</sup> Like crimes against humanity, and unlike war crimes, the existence of a link with the armed conflict is not required for crimes of genocide: a crime can be classified as genocide whether or not it is linked to an armed conflict.

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<sup>91</sup> See Article 7 of the Rome Statute.

<sup>92</sup> *Idem*, para. 1.

<sup>93</sup> See *Prosecutor v. Dusko Tadic*, Appeals Chamber, Case N° IT-94-1-A, ICTY, 1999, para. 271.

<sup>94</sup> See *Prosecutor v. Dusko Tadic*, Trial Chamber, Case N° IT-94-1-T, ICTY, 1997, para. 649.

<sup>95</sup> See *Prosecutor v. Zoran Kupreskic*, Case N° IT-95-16-T, Trial Chamber, 14 January 2000, para. 621.

<sup>96</sup> See *Prosecutor v. Dusko Tadic*, note 93, para. 646.

<sup>97</sup> See *Prosecutor v. Valjevic*, Case N° IT-98-32-T, Trial Chamber II, ICTY, 29 November 2002, para. 29.

<sup>98</sup> See Human Rights Watch, “How much more blood needs to be spilled?” atrocities committed against civilians in central Mali, 2019, report published in February 2020, p.23, available at [https://www.hrw.org/sites/default/files/report\\_pdf/mali0220fr\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/mali0220fr_web_0.pdf) (accessed on 27 July 2020).

<sup>99</sup> See UN News, Global Perspective Human Stories “Central Mali: Top UN genocide prevention official sounds alarm over recent ethnically-targeted killings”, published on 28 March 2019, available at <https://news.un.org/en/story/2019/03/1035661> (accessed on 27 July 2020).

<sup>100</sup> See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948.

The Convention on the Prevention and Punishment of the Crime of Genocide lists the acts<sup>101</sup> that constitute the crime of genocide when committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. This definition has been precisely included in the statutes of international criminal jurisdictions.<sup>102</sup> The crime of genocide differs from other crimes in that it is accompanied by a special intent: the intent to destroy, in whole or in part, a protected group.<sup>103</sup> This criterion of “special intent” which makes a crime of genocide a crime of unique gravity goes beyond the mere mental element that characterises ordinary crimes. Consequently, according to the case law of the international criminal tribunals, the crime of genocide is considered to be “the crime of crimes”.<sup>104</sup> The Genocide Convention also provides that, in addition to the execution of the crime of genocide as such, “conspiracy to commit genocide, direct and public incitement, attempt and complicity shall also be punishable”.

It should be noted that the present analysis on genocide is not intended to conclude whether or not genocide has occurred in Mali. Rather, it serves as an indication of the requirements for the commission of this crime. Indeed, in light of the specific elements of the crime of genocide, the numerous serious acts of violence committed against civilians in Mali do not appear to present the constituent elements of this crime.

Analysis of the painful events in Mali shows that the vast majority of victims of intercommunity violence seem to be targeted because of their ethnicity.<sup>105</sup> However, the analysis of the modus operandi of the commission of this violence is far from demonstrating specific elements constituting the crime of genocide. This being said, in light of the “growing ethnicisation” of the violence committed, particularly in the centre of the country, it is important to recall the obligation to prevent genocide, which is primarily the responsibility of States.<sup>106</sup> In the face of large-scale violence against civilians on the basis of their ethnicity, the government must therefore invest fully in its preventive function in order to take measures to halt the progression towards ethnically based violence. It should be recalled that Mali ratified the Convention on the Prevention and Punishment of Genocide on 16 June 1974.

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<sup>101</sup> These acts are :

- (a) Murder of members of the group ;
- (b) Serious physical or mental harm to members of the group;
- (c) Intentionally subjecting the group to conditions of existence that would lead to its total or partial physical destruction;
- (d) Measures to prevent births within the group;
- (e) Forced transfer of children from the group to another group.

<sup>102</sup> See Article 4 of the ICTY Statute, Article 2 of the ICTR Statute and Article 6 of the ICC Statute.

<sup>103</sup> See *Prosecutor v. Jean Paul Akayesu*, Trial Chamber, Case N° ICTR-96-4-T, ICTR, 2 September 1998, para. 488.

<sup>104</sup> See *Prosecutor v. Jean Kambanda*, Case N° ICTR-97-23-S, Judgment of 4 September 1998, para. 16.

<sup>105</sup> See International Crisis Group, “Central Mali: Halting Ethnic Cleansing”, published on 25 March 2019, available at <https://staging.crisisgroup.org/fr/africa/sahel/mali/centre-du-mali-enrayer-le-nettoyage-ethnique>, (accessed on 10 July, 2020). See also Human Rights Watch, “How much more blood needs to be spilled?” atrocities committed against civilians in central Mali, 2019, note 98.

<sup>106</sup> See Article 1 of the Convention on the Prevention and Punishment of Genocide.

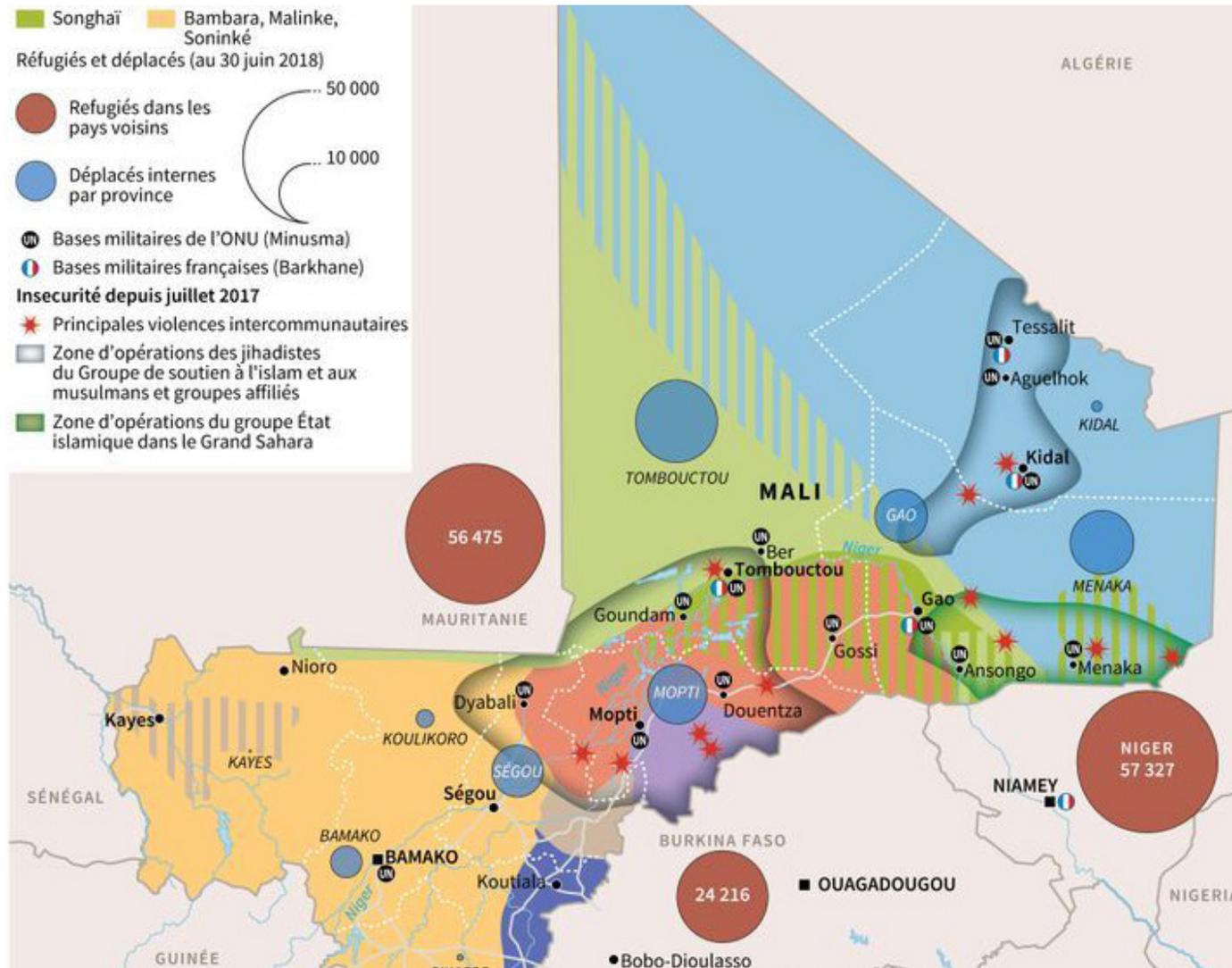
## IV. CONCLUSIONS

This study provides the necessary elements of analysis to qualify intercommunity violence under international law. Such acts, if brought before a competent court in Mali, could constitute crimes under Malian criminal law. The authors of this study also point out that the multiple acts of intercommunity violence committed on the territory of Mali, particularly in the centre of the country, could present elements of international crimes.

It is essentially the obligation of the Malian State to investigate and, where appropriate, prosecute the perpetrators of such violence. The newly established Specialised Judicial Unit against Terrorism and Transnational Organised Crime will therefore be able to play an important role in the fight against impunity for the perpetrators of such violence.

Therefore, in order to respond to the burning need for justice for many victims of this intercommunity violence, this study underlines the importance of complementarity between national jurisdictions and the ICC, which is also competent to judge crimes under the Rome Statute committed on the territory of Mali or by Malian citizens. Hoping that this legal study will be of operational use in the fight against impunity, the IHL Resource Centre of Diakonia Mali recommends to the government the implementation of appropriate measures for the protection of civilian populations in order to curb the cycle of recurring intercommunity violence in Mali.

# ANNEX: MAIN ETHNIC GROUPS IN MALI AND MAIN INTER-COMMUNITY VIOLENCE



# THE INTERNATIONAL HUMANITARIAN LAW (IHL) RESOURCE CENTRE OF DIAKONIA (RC-DIH)

The Diakonia IHL Resource Centre is committed to promoting respect for IHL and International Human Rights Law (IHRL) in Mali and the Sahel region. We believe that by promoting respect for basic legal standards in the most difficult circumstances, we can help create an environment in which people and their communities can live side by side in peace and with full respect for their fundamental rights.

Our work on IHL and IHRL flows directly from Diakonia's overall strategic objectives in six distinct areas of intervention. In particular, the Conflict and Justice Intervention Area sets out the specific objective of strengthening protection in armed conflict, which guides our work in promoting respect for IHL and IHRL.

The priorities under this objective are as follows:

- Mobilise to hold duty bearers accountable for their conduct in armed conflict,
- Provide impartial monitoring and impartial reporting on IHL and IHRL violations during armed conflict,
- To provide objective and strategic information and analysis on IHL and IHRL in armed conflict and develop tools for relevant stakeholders,
- Advocate for the respect, protection and exercise by States of the rules and principles recognised by IHL and IHRL, including so-called "third States" (States not involved in a conflict),
- Strengthen strategies for the protection of women and men during armed conflict.

The Diakonia IHL-RC in Mali adopts a broad and flexible approach to the dissemination of IHL and IHRL with the aim of informing and assisting stakeholders to apply and integrate IHL and IHRL issues in their respective mandates.

**Would you like to know more about IHL and its applicability to the current context in Mali?**

Please contact: [ihl@diakonia.se](mailto:ihl@diakonia.se)



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