



## ***THE ICC'S INVESTIGATION INTO ALLEGED WAR CRIMES IN MALI***

On January 16, 2013 ICC Prosecutor Fatou Bensouda announced the opening of a formal investigation of war crimes in Mali since January 2012.<sup>1</sup> The Prosecutor therefore started collecting evidence in areas where crimes have allegedly been committed and will start constructing cases. Thus, Mali became the eighth situation under investigation by the Court, all of them in Africa. This decision is the result of a seven-month preliminary examination of the Situation in Mali opened in July 2012. This followed a referral by Mali's Government on July 13, 2012<sup>2</sup> which triggered the Court's jurisdiction. It is the fourth African country to refer the situation to the ICC. This decision of the Office of the Prosecutor (OTP) is timed closely with the arrival of foreign military units authorized by the UN Security Council resolution 2085 of December 2012.<sup>3</sup> However, The ICC Prosecutor stressed in her public statement<sup>4</sup> that this decision was made because "the legal requirements are met," suggesting that decision is not connected to the political agenda of the UN but to the judicial agenda of the ICC.

Since January 2012, Mali has experienced an unprecedented crisis that questions both its territorial integrity (rebellion in the north) and its political stability (coup followed by a counter-coup in the region of Bamako). In this turbulent context, the Prosecutor stated that at this stage, there was a reasonable basis to believe that the following war crimes have been committed: murder; mutilation; cruel treatment and torture; attacks against protected objects; passing of sentences and the carrying out of executions without due process; pillages; and rapes. The first conclusions of the OTP presented in this paper do not necessarily control the future investigation, and can evolve as it proceeds.

The aim of this paper is first to present a general background of the conflict, then to explain the first conclusions of the ICC that led to this decision to investigate and finally to analyze the first challenges that are likely to lie ahead for this new investigation.

### Background of the conflict

The geographic peculiarities and the historical development of Mali are key elements to understand the current crisis. For several decades after independence from France in 1960, Mali suffered droughts, rebellions, a coup and 23 years of military dictatorship until democratic elections in 1992. President Alpha Konare won Mali's first two democratic presidential elections in 1992 and 1997. In compliance

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<sup>1</sup> ICC Prosecutor opens investigation into war crimes in Mali, YouTube, January 16, 2013, available at <http://www.youtube.com/watch?v=skCM6DuO8Dc>.

<sup>2</sup> Letter from the Minister of Justice of the Republic of Mali to the ICC Prosecutor, July 13, 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

<sup>3</sup> UN Security Council, Resolution 2085, December 20, 2012, available at <http://www.un.org/News/Press/docs/2012/sc10870.doc.htm>.

<sup>4</sup> ICC Prosecutor opens investigation into war crimes in Mali, YouTube, January 16, 2013, available at <http://www.youtube.com/watch?v=skCM6DuO8Dc>.

with Mali's two-term constitutional limit, Konare stepped down. In 2002, he was succeeded by Amadou Toumani Toure, known as Mali's "soldier of democracy." He was reelected in 2007 in elections that were considered free and fair even if some analysts pointed out some irregularities. Thus, despite socioeconomic challenges<sup>5</sup> since the 1990's, Mali has largely been seen as a blossoming democracy and a stable sub-Saharan Africa country. This picture was shattered by the recent series of events. Yet, the current turmoil occurring in Mali is a mere symptom of structural frailties underlying the Malian state.

Despite democratic practices, the Malian state has been deeply corrupted by drug money and many Malians considered democracy as a cover for a corrupt system unable to provide economic and social welfare for the Malian population. Moreover, the Malian state has had constant difficulty in guaranteeing national cohesion of its whole territory. Its size is just over 1,240,000 square kilometres (480,000 sq mi), slightly less than twice the size of Texas. Desert or semi-desert covers about 65 percent of the country's area, particularly in the north. These precarious environmental conditions have tended to undermine the Malian government's control and administration of its territory. Throughout years, the north has particularly suffered from neglect by the central government. The Tuaregs, a nomadic tribe spread across western North Africa and much of northern Mali and constituting a population of 1.5 million people out of the 14.5 million that make up Malian population,<sup>6</sup> have constantly complained about their political and economic marginalization. They have rebelled against the country's government three times since Mali's independence from France in 1960. In 2006, an agreement signed in Algiers ended the last rebellion. This "pacte de réconciliation nationale" reasserted the government's commitment to encourage the development of the northern Kidal region and to grant local people better participation in the decision-making processes. Since ultimately this accord was not implemented, further resentment arose among the Tuaregs.

#### *The last rebellion*

In January 2012 the delicate 'Tuareg question' reappeared with even greater intensity. A Tuareg rebellion organized by the National Movement for the Liberation of Azawad (MNLA) and fueled by fighters arriving from Libya after the fall of Muammar Gaddafi, launched attacks against the Malian garrisons in the North of the country in early January 2012. Other armed group such as Ansar Dine (Ançar Eddine), the Movement for Oneness and Jihad in West Africa (MUJAO) and al-Qaeda in the Islamic Maghreb (AQIM) were quick to move into this increasingly lawless area and helped the MNLA to seize the North. In early April 2012, the MNLA announced the independence of the Azawad. Nevertheless, the rebel coalition proved short-lived and, in June 2012, some military clashes were reported between the MNLA and Ansar Dine.<sup>7</sup> The militant Islamists became the dominant force on the ground and imposed a harsh form of Islamic Law. The MNLA was progressively driven out of all important cities and remained outside the

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<sup>5</sup> Mali is one of the poorest countries in the world, ranking 178th out of 187 countries. UNDP, Human Development Report 2011, p. 129, available at <http://hdr.undp.org/en/reports/global/hdr2011/>.

<sup>6</sup> The Malian population is composed of various ethnic and religious groups: the Mande 50% (Bambara, Malinke, Soninke), Peul 17%, Voltaic 12%, Songhai 6%, Tuareg and Moor 10%. Muslims make up 90% of the population. CIA, The World Factbook, March 26, 2013, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html>.

<sup>7</sup> Jeune Afrique, "Mali : affrontements entre des islamistes et des Touaregs dans le Nord," June 8, 2012, available at: <http://www.jeuneafrique.com/Article/ARTJAWEB20120608102147/>.

urban centers. Since June 2012, Timbuktu and Kidal were under the firm control of Ansar Dine and Gao under the control of MUJAO.<sup>8</sup> Members of the Nigerian group Boko Haram have appeared in Timbuktu.

#### Who's Who in the Conflict?

##### *The two groups behind the rebellion of January 2012*

**The National Movement for the Liberation of Azawad (MNLA)** is considered to be a secular Tuareg nationalist movement. It was created in October 16, 2011 as a successor to previous rebel groups. Two important figures in the MNLA are the secretary general Bila Ag Cherif and Mohamed Ag Najim, the head of the movement's military wing. Their official purpose is to recover "the specific rights confiscated from the people of Azawad."

**Ansar Eddin** ("movement of defenders of the faith") is a homegrown movement launched in December 2011. It is led by Iyad Ag Ghaly, a former leader of the Tuareg rebellions in the 1990s who converted to Salafism in the mosques of Mauritania in the 2000s. It is regarded as a Tuareg jihadist salafist movement, aiming to impose Islamic Law across Mali. The group split in January 2013, when the IMA - led by Alghabass Ag Intalla, an influential figure in Kidal - was formed. Mr Intalla declared that he split from Ansar Dine because he opposes "terrorism" and favors dialogue.

##### *Other groups settled in the north of Mali without encountering strong resistance from the Malian government*

**Al-Qaeda in the Islamic Maghreb (AQIM)** is the north African wing of al-Qaeda. It has its roots in the Algerian civil war of the early 1990s but it truly emerged in early 2007, after the feared Algerian Salafist Group for Preaching and Combat (GSPC) gave allegiance to Osama Bin Laden's international network. AQIM is composed of fighters of various nationalities, in particular Algerian, Mauritanian, Senegalese and Malian. AQIM declared that its aim was to spread Islamic law, as well as to liberate Malians from the French colonial legacy. The top AQIM commander is the Algerian Abdelmalek Droukdel who is also known as Abu Musab Abdel Wadoud.

**The Movement for Unity and Jihad in West Africa (MUJAO)**, an Islamist group, is an AQIM splinter faction created in 2011. Although the movement has many Malian Tuaregs within its ranks, Mujao is believed to be led by Sultan Ould Badi, an Arab from Mali's Gao region and former AQMI fighters such as Hammad Ould Mohamed Khair and Abou Qoum Qoum. Unlike AQIM, its objective is to spread jihad to West Africa rather than confine itself to the Sahel and Maghreb region.

##### *Other armed groups are also active in the north*

They include the Malian Armed Forces and other local defense groups such as Arab militias and Songhay militias composed of the black populations living along the Niger River, called Ganda Koy ("Masters of the earth" in Songhay) and Ganda Izo ("Sons of the country"). They were organized in the 1990's by the Malian government to fight against armed Tuareg groups. In May 2012, a new armed group was created: The Northern Mali Liberation Front (FLNM). Its official objective is to combat the efforts of Islamist movements to implement Islamic law. It is difficult to say, at this time, who is behind this group and how it is relevant.<sup>9</sup>

A UN report estimated the total number of "core combatants" of the armed groups in northern Mali at "around 3,000" adding that insurgents were actively recruiting and had "relatively sophisticated equipment obtained from Libya" and from Malian stocks.<sup>10</sup> What seems clear in this very complex blend of religious fighters, ethnic militias and secularists is that the balance of military power on the ground is largely in favor of the three Islamist groups. They are very well-funded thanks to their exploitation of activities characteristic of transnational criminality. These include trafficking of drugs and arms, abduction and holding of Western hostages—not only in Mali but also in Niger and Mauritania.

<sup>8</sup> International Crisis Group, *Avoiding Escalation*, July 18, 2011, p. 16-17, available at <http://www.crisisgroup.org/en/regions/africa/west-africa/mali/189-mali-avoiding-escalation.aspx>.

<sup>9</sup> Jeune Afrique, "Mali : formation de groupes d'autodéfense pour 'libérer' le Nord," July 22, 2012, available at <http://www.jeuneafrique.com/Article/DEPAFP20120722201023/>; Radio France Internationale, "Les 'Forces patriotiques de résistance' annoncent la reconquête du nord du Mali," July 21, 2012.

<sup>10</sup> Report of the Secretary-General on the situation in Mali, UN doc. S/2012/894, November 29, 2012, available at <http://www.un.org/en/sc/documents/sgreports/2012.shtml>.

### *Coup d'état*

On March 22, 2012, a week before presidential elections were scheduled to take place, a group of officers from the Malian army led by Captain Amadou Haya Sanogo took power after a military coup that ousted President Amadou Toumani Toure. Captain Sanogo's army officers declared they were taking over because of Toure's mishandling of a Tuareg-led insurrection in the north. Toure formally resigned after the coup and left Mali for Senegal. However, his supporters known as the "Red Berets" continued attacks on the new authorities known as the "Green Berets." On April 30, 2012 they organized a failed counter-coup in Bamako. Following the coup, the international community and in particular the African Union (AU) and the Economic Community of West African States (ECOWAS) put pressure on the Junta and initiated a process of mediation under Blaire Campaoré, the current president of Burkina Faso. As a result, in April 2012, Captain Sanogo formally returned power to a civilian administration with the appointment of interim President Dioncounda Traoré and the Interim Prime Minister Chieck Modibo Diarra. Despite this process of transition, the military Junta still appeared to hold the reins of power. The junta enjoyed a quite strong popular support and used repression and intimidation against their opponents.<sup>11</sup> In contrast, the Traoré suffered a lack of legitimacy and authority as demonstrated by the attack by protesters that he suffered, in May 2012. On December 11, 2012, President Traoré appointed Diango Cissoko as Prime Minister. According to a declaration by Traoré in January 2013, Mali hopes to organize elections on July 31, 2013.

### *The Humanitarian crisis*

This chaotic context has led to an alarming humanitarian situation. According to UN Office for the Coordination of Humanitarian Affairs (OCHA), by February, 22 2012, more than 120,000 persons had been displaced by the conflict, including 60,000 internally and an equal number to neighboring countries (mostly Mauritania, Burkina Faso, Niger and Algeria).<sup>12</sup> The massive displacements of people fleeing the conflict and then the advance of armed groups in Northern Mali worsened an already worrying food and nutrition crisis<sup>13</sup> due to insufficient rainfall and poor harvests that were very erratically distributed. The situation in Northern Mali is all the more serious because security reasons have given humanitarian agencies great difficulty in entering those areas. One of the most serious problems is the refusal of armed groups that control the north to allow "non-Muslim humanitarian actors" access to the region.

### *The International response and the military intervention*

On July 5 and October 2, 2012, the United Nations Security Council (UNSC) adopted Resolution 2056 and 2071, respectively, stressing that violators of human rights and of international humanitarian law shall be held accountable. The Security Council also stated its readiness to consider an international military force. On December 20, 2012 the UNSC adopted Resolution 2085 under Chapter VII of the UN Charter, authorizing the deployment of the African-led International Support Mission in Mali (AFISMA) to support "the ongoing political and security processes in the country."<sup>14</sup> In January 2013, the Islamist fighters captured the central town of Konna and planned to march on the capital. AFISMA was widely seen as

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<sup>11</sup> Amnesty International, Public statement, "Mali: The military junta continues to impose the law," June 22, 2012, available at <http://www.amnesty.org/en/library/info/AFR37/003/2012/en>.

<sup>12</sup> Reuters, "Some 120,000 forced from homes by Mali clashes – UN," February 22, 2012, available at <http://www.reuters.com/article/2012/02/22/mali-displaced-idAFL5E8DMA2E20120222>.

<sup>13</sup> Food and Agriculture Organization, "La crise alimentaire et nutritionnelle du Sahel: l'urgence d'appuyer la résilience des populations vulnérables. Cadre stratégique de réponse régionale," April 2012.

<sup>14</sup> UN Security Council, Resolution 2085, December 20, 2012, available at <http://www.un.org/News/Press/docs/2012/sc10870.doc.htm>.

requiring many months to prepare. As a consequence, France agreed to an urgent request by President Traoré for military intervention. French and Chadian troops rapidly captured Gao and Timbuktu and at the end of January entered Kidal, the last major rebel-held town. ECOWAS has progressively deployed troops; Nigeria forms the backbone of the force, contributing 900 soldiers. Other African countries have deployed troops including Ghana, Ivory Coast, Burkina Faso, Niger and Chad. France announced its plans to withdraw and advocated for the deployment of UN peacekeepers to Mali by April 2013 to secure newly captured towns and to serve as a facilitator for future political talks.<sup>15</sup> Moreover, on February 18, 2013 the Council of the European Union launched the EU mission to support the training and reorganization of the Malian Armed Forces.<sup>16</sup> More generally, within the Strategy for Security and Development in the Sahel of 2011 of the European Union External Action Service,<sup>17</sup> a budget of approximately €450 million has been allocated to the three Sahel countries: Mauritania, Niger and Mali. This is a contribution to the development and the security of the region under the 10th European development fund.

### *The US approach to the Malian Crisis*

The US approach to the Malian crisis is very much shaped by the Defense Department's Trans-Sahara Counter-Terrorism Partnership that includes Mali. This partnership aims to combat terrorism in North Africa by bolstering regional militaries and governments through defense and development aid. Thus, the US was reluctant to intervene on the ground in Mali and favored both diplomatic and logistical support to the French army, especially by sharing intelligence.<sup>18</sup> The US also supports the efforts of the European Union to train the Malian army in sending their Africa Contingency Operations Training and Assistance (ACOTA) program to the ECOWAS states that have troops in Mali. President Obama summarized the US approach in the State of the Union address of 2013 in which he declared, "to meet this [terrorist] threat, we don't need to send tens of thousands of our sons and daughters abroad or occupy other nations. Instead, we'll need to help countries like Yemen, and Libya, and Somalia provide for their own security, and help allies who take the fight to terrorists, as we have in Mali."<sup>19</sup>

### An Explanation of the Court's Jurisdiction in Mali

The OTP has presented a recent report on determining whether there is a reasonable basis to proceed with an investigation, in accordance with the Rome Statute.<sup>20</sup> It has presented its first conclusions in

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<sup>15</sup> Le Monde, "Retrait des troupes françaises du Mali: un calendrier incertain," February 2013, available at [http://www.lemonde.fr/afrique/article/2013/02/06/retrait-des-troupes-francaises-du-mali-un-calendrier-incertain\\_1827712\\_3212.html](http://www.lemonde.fr/afrique/article/2013/02/06/retrait-des-troupes-francaises-du-mali-un-calendrier-incertain_1827712_3212.html).

<sup>16</sup> Council of the European Union, Press release, EU training mission in Mali launched, February 18, 2013, available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/135524.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/135524.pdf).

<sup>17</sup> European Union External Action Service Strategy for Security and Development in the Sahel, [www.eeas.europa.eu/afrika/docs/sahel\\_strategy\\_en.pdf](http://www.eeas.europa.eu/afrika/docs/sahel_strategy_en.pdf)

<sup>18</sup> Associated Press, "US Helping Support French Mali Operation," January 14, 2013, available at [http://www.salon.com/2013/01/14/us\\_helping\\_support\\_french\\_mali\\_operation/](http://www.salon.com/2013/01/14/us_helping_support_french_mali_operation/); Reuters, "US Sharing Intelligence on Mali With France, Eyes Other Support," January 14, 2013, available at <http://www.reuters.com/article/2013/01/14/mali-rebels-pentagon-idUSL2N0AJ8BX20130114>.

<sup>19</sup> President Barack Obama, State of the Union Address, February 12, 2013, available at <http://www.whitehouse.gov/state-of-the-union-2013>.

<sup>20</sup> ICC Office of the Prosecutor, Situation in Mali: Article 53(1) Report, January 16, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53\\_1PublicReportENG16Jan2013.pdf](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf).

relation to jurisdiction, admissibility and the interests of justice on the situation in Mali. The OTP's first conclusions on these issues will be tested by the ICC judges as they consider specific cases against individuals.

### *Jurisdiction*

To fall into the jurisdiction of the ICC, the crimes must have been committed by an individual who is national of a State Party to the Rome Statute or on the territory of a State Party. However, The ICC's jurisdiction over territory and people can also extend beyond those of States Parties if the UN Security Council adopts a resolution referring a situation to the Court or if a non-State Party lodges a declaration of acceptance of jurisdiction with the ICC Registrar.

Mali ratified the Rome Statute on August 16, 2000 and thus has been a State Party since the Statute took effect on July 1, 2002. As a State Party to the ICC, Mali has consented to the Court's jurisdiction from that date over the crimes enumerated in the Statute: crimes against humanity, war crimes and genocide committed on the whole territory of Mali or by its nationals.<sup>21</sup> However, according to the Rome Statute, the Prosecutor may initiate an investigation only on the basis of a referral from a State Party or from the UN Security Council, or *proprio motu* (on his or her own initiative) with the authorization of the Pre-Trial Chamber. The referral from the Malian government on July 18, 2012<sup>22</sup> with respect to alleged crimes committed since the month of January 2012, with no end-date, triggered the jurisdiction of the Court. The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole including the crimes of genocide, the crimes against humanity, and the war crimes.<sup>23</sup>

In determining its jurisdiction over a case, the OTP has to consider whether the crimes committed fell within the jurisdiction of the Court and in which category they belong. Following its preliminary examinations, the OTP has considered that since January 2012, the crimes committed on the territory of Mali may constitute war crimes. This characterization implies the existence of a non-international armed conflict with the required level of intensity and organization of the parties involved in the conflict. The Pre-Trial Chamber II stated, referring to the jurisprudence of the UN International Criminal tribunal for the former Yugoslavia, that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>24</sup> In the case of Mali, the OTP considers that both criteria appear to be met considering the intensity of the fighting and the organizational structure of the different armed group involved in the conflict. At this stage, the OTP considers that the information is insufficient to conclude that those crimes constitute crimes against humanity which require widespread or systematic attack against the civilian population.

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<sup>21</sup> Rome Statute of the ICC, Article 12, available at: [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

<sup>22</sup> Letter from the Minister of Justice of the Republic of Mali to the ICC Prosecutor, July 13, 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

<sup>23</sup> Rome Statute, Articles 5, 6, 7 and 8.

<sup>24</sup> ICC Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, June 15 2009, para. 229, available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>.

### *Admissibility*

A case is admissible if it is of sufficient gravity within each category of crimes. It is inadmissible if it is being genuinely investigated or prosecuted by a State, or if it is willing and able to do so.<sup>25</sup> The OTP considers that at this stage, there are no national proceedings in Mali or in any other State against individuals who appear to bear the greatest responsibility for crimes that it would investigate. Moreover, based on an assessment of their scale, nature, manner of commission and impact, the OTP considers the allegations of sufficient gravity to justify future action on this case. Based on the available information, the OTP considers that there are no substantial reasons to believe that the opening of an investigation into the Situation in Mali would not be in the interests of justice.<sup>26</sup>

### *What are the alleged crimes and who are the alleged perpetrators?*

Although the investigation is not territorially limited to the north of Mali, the OTP announced that it will mostly focus on the three regions in the north.<sup>27</sup> The OTP considers that the majority of the alleged crimes of sufficient gravity have been committed in the regions of Gao and Timbuktu, and to a lesser extent Kidal (northern Mali). Thus, the OTP attributes the greatest responsibilities to the different armed groups that have seized the north such as MNLA, Ansar Dine, AQIM, MUJAO and various militias. Thus, the OTP will seek to prosecute their most responsible leaders. Most of the crimes documented by NGOs<sup>28</sup> occurred in the course of hostilities which started when the different armed groups launched military operations to gain control over the north of Mali.

The alleged crimes include murder (killing of up to 153 Malian Soldiers in Aguelhok, the stoning to death of an unmarried couple, public execution of a member of the MNLA), mutilation, cruel treatment and torture (NGOs documented at least eight cases of amputations and the punishment of an unmarried couple with 100 lashes each). It also includes intentionally directing attacks against protected objects such as the religious building in Timbuktu, the passing of sentences and the carrying out of executions without due process, pillages and rapes (up to 90 cases of rape or attempted rape were mostly reported in this period). All those crimes may constitute war crimes according to the Rome Statute.<sup>29</sup> Other incidents have been reported by NGOs, including the alleged enrollment of child soldiers within the ranks of armed groups operating in Mali, which Human Rights Watch (HRW)<sup>30</sup>, Amnesty International (AI)<sup>31</sup> and the United Nations Children's Fund (UNICEF)<sup>32</sup> have documented in their respective reports.

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<sup>25</sup> Rome Statute, Article 17.

<sup>26</sup> ICC Office of the Prosecutor, Situation in Mali: Article 53(1) Report, January 16, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53\\_1PublicReportENG16Jan2013.pdf](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf).

<sup>27</sup> ICC Prosecutor opens investigation into war crimes in Mali, YouTube, January 16, 2013, available at <http://www.youtube.com/watch?v=skCM6DuO8Dc>.

<sup>28</sup> Amnesty International, "Mali: Five months of crisis: Armed rebellion and military coup," May 16, 2012, available at <http://www.amnesty.org/en/library/info/AFR37/001/2012/en>; FIDH, "Crimes de guerre au Nord-Mali," July 11, 2012, available at <http://www.fidh.org/Crimes-de-guerre-au-Nord-Mali>; Human Rights Watch, "Mali: War Crimes by Northern Rebels," April 30, 2012, available at <http://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels>.

<sup>29</sup> Rome Statute, Article 8.

<sup>30</sup> Human Rights Watch, "Mali: Islamist Armed Groups Spread Fear in North," September 25, 2012, available at <http://www.hrw.org/news/2012/09/25/mali-islamist-armed-groups-spread-fear-north>.

<sup>31</sup> Amnesty International, "Mali: Five months of crisis: Armed rebellion and military coup," May 16, 2012, available at <http://www.amnesty.org/en/library/info/AFR37/001/2012/en>.

The OTP, however, stated in its last report on the situation of Mali (footnote) that it requires additional evidence in order to bring cases on this issue.

*Even-handed investigation?*

The ICC is expected to be even-handed. The OTP is mandated to impartially investigate all grave crimes that took place throughout Malian territory since January 2012. The ICC has been repeatedly accused of partiality for only prosecuting individuals from one party of a conflict and not often the individuals from the referring State Party. In the case of Mali, the OTP stated in its recent communications that the various armed groups operating in the north of Mali will be the primary subject of the investigation. Yet, the Malian army has been accused by several NGOs of committing human rights violations including torture, extrajudicial executions and enforced disappearances particularly against political leaders potentially involved in the failed counter-coup of April 30, 2012. The OTP does mention these incidents in its recent report on the situation in Mali,<sup>33</sup> in addition to the murder by the Malian army of four Tuareg members<sup>34</sup> and of three unarmed persons accused of spying for the MNLA.<sup>35</sup>

The OTP has presented several arguments to justify the focus of the investigation in the North. It stated that at this stage, there was not sufficient information to conclude that those incidents amount to the war crime of murder or to crimes against humanity within the ICC's narrow jurisdiction. The OTP considers that the crimes committed in the context of the dispute between the Red and Green Berets appear to lack the required link with the armed conflict.<sup>36</sup> Nevertheless, the report mentions the killing of 16 unarmed Muslim preachers by the Malian army on September 2012 while they were on their way to Bamako and thus the OTP considers that in this case, there is a reasonable basis to believe that the Malian army committed the war crime of murder.

The ICC is a court of last resort, and therefore recognizes the sovereign right of States to domestically adjudicate crimes if they so request and are able and willing. This is the so-called "principle of complementarity" which requires the Court to defer to genuine domestic proceedings. In the case of Mali, in its referral letter of July 2012, the government of Mali stated that the Malian judicial system was unable to prosecute the suspects of the alleged crimes in Northern Mali. The recent crisis has seriously affected the judiciary system in the north. This means that the state will probably lack effective mechanisms to obtain the accused or the necessary evidence and testimony. Those factors could trigger the ICC's jurisdiction. Yet, Mali has initiated some legal action against suspects in the north. The public prosecutor's department in Bamako has recently issued arrest warrant for 28 members of northern armed groups, including their top commanders.<sup>37</sup> At present, the warrants may facilitate the arrest of

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<sup>32</sup> UNICEF, Press release, "Violence against children mounting in Mali," July 6, 2012, available at [http://www.unicef.org/media/media\\_65232.html](http://www.unicef.org/media/media_65232.html).

<sup>33</sup> ICC Office of the Prosecutor, Situation in Mali: Article 53(1) Report, January 16, 2013.

<sup>34</sup> Human Rights Watch, "Mali: War Crimes by Northern Rebels," April 30, 2012, available at <http://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels>.

<sup>35</sup> FIDH, "Crimes de guerre au Nord-Mali," July 11, 2012, available at <http://www.fidh.org/Crimes-de-guerre-au-Nord-Mali>.

<sup>36</sup> "The crimes must be closely related to the hostilities, meaning that the armed conflict must play a substantial role in the perpetrator's decision and his ability to commit the crime, and the manner in which the crime was committed." ICC Office of the Prosecutor, Situation in Mali: Article 53(1) Report, January 16, 2013.

<sup>37</sup> Radio France Internationale, "Mali: mandats d'arrêt contre des chefs de groupes armés," February 9, 2013, available at <http://www.rfi.fr/afrique/20130209-mali-mandats-arrets-chefs-groupes-armes-iyad-agh-ghali-ansar-dine-mujao-mnla>.

those criminals so that they may be turned over to the ICC in accordance with national legislation in certain cases or prosecuted at the national level in other cases. The future developments on this issue will clarify how the Mali's domestic courts and the ICC will complement each other.

The OTP has underscored that the Malian government had informed it that the alleged crimes committed by the Malian Army were the subject of a national investigation. These include acts of torture and enforced disappearances of Red Berets and the killing of 16 Muslim preachers in Diabali in September 2012.<sup>38</sup> Nevertheless, according to the Rome Statute, when relevant national proceedings exist, the case will continue to be admissible before the Court if the state concerned is unwilling or unable genuinely to carry out the investigation or prosecution.<sup>39</sup> As a consequence, it is likely that the Court will have to assess the capacity and the willingness of the Malian justice system to conduct investigations and prosecute those crimes. The assessment of the existence and genuineness of national proceedings by the OTP is continuous and can evolve throughout an investigation.

To reassert that the Court will not ignore the alleged crimes committed by the Malian army and to encourage Mali to uphold its primary responsibility to prosecute the crimes on its territory or by its nationals, the Prosecutor recently made a public declaration concerning the Malian army:

My Office is aware of reports that Malian forces may have committed abuses in recent days, in central Mali. I urge the Malian authorities to put an immediate stop to the alleged abuses and on the basis of the principle of complementarity, to investigate and prosecute those responsible for the alleged crimes. I remind all parties to the on-going conflict in Mali that my Office has jurisdiction over all serious crimes committed within the territory of Mali, from January 2012 onwards. All those alleged to be responsible for serious crimes in Mali must be held accountable.<sup>40</sup>

In dealing with this issue of the ICC's impartiality, it seems relevant to note the difference between prosecuting all parties to a conflict and being even-handed. The inability of the ICC to prosecute all parties to a conflict does not necessarily entail partiality on the part of the ICC. One should keep in mind the ICC's narrow jurisdiction as it is bound to take into account several factors including the nature of the crimes, the gravity threshold, and the principle of complementarity before prosecuting any crime.

#### Impacts and challenges of the investigation

##### *The ICC and Africa*

Since the decision to investigate in Mali coincided with the beginning of the new Prosecutor's tenure at the ICC, some analysts argue that as a first act, the start of the investigation is likely to add to the African Union's bitter complaint that the Court focuses only on African situations. The Office of the Prosecutor

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<sup>38</sup> AFP, "Mali investigators at scene of mass shooting," September 11, 2012, available at <http://www.google.com/hostednews/afp/article/ALeqM5gmN8Uu583q2e0CJaeY6gbomJsusw?docId=CNG.f0d83e805c19d696138adbc8d99f2154.271>.

<sup>39</sup> Rome Statute, Article 17.

<sup>40</sup> ICC Office of the Prosecutor, Statement by ICC Prosecutor concerning Mali, January 28, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx).

seems to be conscious of this concern which it addresses through its recent communication about the investigation.<sup>41</sup> The OTP stresses two main points. First, the ICC is concerned with countries that have accepted the Court's jurisdiction and Africa is the most heavily represented region in the Court's membership. Secondly, four of the eight situations currently under investigation were referred by African States themselves including Mali. African states tend to condemn vociferously the Court when it intervened as a result of Security Council referrals or when it challenges the immunity of a president, but much less in the case of a self-referral by an African state. The ICC Prosecutor has constantly insisted on the victims that are African, expressing the idea that the ICC is not targeting Africa but protecting Africans. She recently stated, "With due respect, what offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes ... because all the victims are African victims."<sup>42</sup> Yet, it seems essential for the Court to meaningfully address atrocities outside of Africa to undermine to a certain extent this short sighted argument. However, it must be noted that the criticism is not only about targeting Africa but is more generally about targeting "weak" and "non-western" states. This means that even if the ICC were to build cases based on crimes outside the African continent, the criticism would likely remain if political leaders believe that the ICC is picking on a "weak" state.

*The challenges of an investigation in ongoing conflict*

This new investigation poses the challenge of occurring in the context of an ongoing conflict. As a result, there will be great difficulty in obtaining evidence. Moreover, the nature of the groups the ICC wants to investigate will seriously threaten the OTP's work. In this regard, Geraldine Mattioli-Zeltner, advocacy director in the international justice program at Human Rights Watch, stated, "Using intermediaries is unavoidable in those situations, because the intermediaries will know the field very well, be able to contact witnesses in a secure manner and arrange meetings in a way that can be done safely." The intermediaries can be local NGOs, grassroots associations, individuals or any other associations that help the Prosecutor to build cases. Yet, the use of intermediaries is a very controversial issue, particularly during the trial of the DRC's Thomas Lubanga. There, the intermediaries who helped the Prosecutor to build the case were accused of bribing witnesses. Thus, the OTP will have to be cautious when choosing its intermediaries.

Moreover, major concerns were raised concerning the diminished capacity of the Court to handle this new case due to its financial situation. Indeed, its budget has not increased and its staff was reduced while the workload has increased twofold. In this difficult context, an essential challenge to a successful investigation is cooperation from the relevant governments and affected communities. In this regard, a cooperation agreement between the Malian authorities and the ICC was signed on February 13, 2013. Mali has thus reasserted its commitment to facilitate the investigation. In the past, Mali was also the first African country to conclude an agreement with the ICC, in January 2012, to enforce sentences of imprisonment. It is crucial since, according to the Rome Statute and the ICC Rules of Procedure, States Parties are responsible for enforcing sentences of imprisonment that is an essential element of a well-functioning criminal justice system.

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<sup>41</sup> ICC, Questions and Answers: Opening of an ICC investigation in Mali, January 16, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Documents/QandAMaliEng.pdf](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/QandAMaliEng.pdf).

<sup>42</sup> David Smith, "New chief prosecutor defends international criminal court," *The Guardian*, May 23, 2012, available at <http://www.guardian.co.uk/law/2012/may/23/chief-prosecutor-international-criminal-court>.

*The timing of the decision to investigate*

The Malian press and the NGO community including Amnesty International, Human Rights Watch and FIDH, appear to perceive this decision of the OTP to open a formal investigation as a key step towards justice.<sup>43</sup> Yet there is an ongoing debate about it because it was timed closely with the military intervention of the French and African troops. Some analysts considered this as highly detrimental to the credibility of the Court, since it supports the argument that the Court is the new tool of “western oppression” and political agenda.<sup>44</sup> More broadly, it underlines the ongoing debate over whether justice ought to be sequenced after peace is secured or whether there is no possible peace without justice. ICC Prosecutor Fatou Bensouda indirectly responded to those concerns stating when announcing the opening of the investigation: “The legal requirements have been met, we will investigate.” It seems that in its recent public statements, the Court wanted to reassert its core mandate. It puts emphasis on the idea that the Court is a true judicial institution whose mandate is to try individuals accused of committing grave crimes. As a result, the Court is expected to follow a judicial agenda independently of the political agenda set by the political international organizations.

Moreover, if we look at counter-arguments, it seems that the timing of the decision reveals a willingness of the Court to act quickly when atrocities occur. In this perspective, early statements and actions from the ICC are considered virtuous partly because they give a warning both to perpetrators and the State involved of the authority of the ICC to investigate. Paule Rigaud, Deputy Africa Program Director at Amnesty International, declared that this intervention of the Court “sends an important message to those planning and committing such crimes that they cannot act with impunity and may be brought to justice.” Assessing the deterrent effect of the Court is very delicate since there is little evidence about it. However, it seems that the ICC is more likely to deter governments than the rebels. If Ansar Dine’s spokesperson expressed his disdain for the authority of the Court, stating: “We are subject to religion and not to international opinion,” the OTP’s decision may have a more deterrent effect on the Malian government that clearly does not want to become the ICC’s target because it could affect its legitimacy and international standing. Thus, the recent declaration of the Prosecutor<sup>45</sup> could shape, in a certain measure, the behavior of the Malian Government.

This decision to open a formal investigation in Mali is a crucial step. It will enable the OTP to cover all facts and evidence to assess the criminal responsibility of alleged violators of Human right in the context of the Malian “Twin crisis” (coup and rebellion). On that basis, during the duration of the investigation, the Pre-Trial Chamber may issue publicly or secretly a warrant of arrest against alleged perpetrators. This investigation will be closely observed as it is the first case of Fatou Bensouda as the new ICC Prosecutor.

*Researched and drafted by Maryne Rondot  
Updated April 2, 2013*

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<sup>43</sup> Coalition for the ICC, Update on ICC Preliminary Examinations, January 2013, available at <http://us2.campaign-archive1.com/?u=8758bcde31bc78a5c32ceee50&id=c6948386ae>.

<sup>44</sup> Centre d’Observation de la Justice Internationale Transitionnelle, “La croisade ambiguë de Fatou Bensouda,” Université de Limoges, January 18, 2013, available at <http://www.cojite.org/actualites-details/items/mali-cpi-la-croisade-ambiguee-de-fatou-bensouda.html>.

<sup>45</sup> ICC Office of the Prosecutor, Statement by ICC Prosecutor concerning Mali, January 28, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx).