



# Institutional Impunity in West Africa and the Sahel

## Causes, Characteristics & Limitations

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### BACKGROUND

When we consider the problem of institutional impunity, what immediately leaps to mind after long-term observation of countries in armed conflict in the field is the paradox between the massive military and security resources invested, the presence of judicial institutions with a whole array of instruments, laws, standards, and conventions, and the apparent inadequacy of the outcomes in terms of protection of civilians' security and human rights. This is the source of the real difficulties experienced by countries seeking to eradicate institutional impunity.

The political will of the governments alone is often far from sufficient to effectively combat institutional impunity. If we are dealing with weak, powerless, or failed states with judicial institutions that exist, but without the real or effective support of operational defense and security forces, it is difficult to address the issue of institutional impunity in a context of asymmetric conflict.

Often, in failed or weak states, judges responsible for investigating serious and massive human rights violations can conduct their investigations and identify the perpetrators of the crimes, but the problem is that they lack access to defense and security forces capable of arresting them. Worse yet, security conditions can be so dire that it is impossible for the judges to go out on the ground. Sometimes, witnesses disappear or deliberately refuse to come forward for fear of reprisals against them or their families by members of radical armed groups. The case of exchanges of detainees who have committed atrocities and serious human rights violations and who are taken out of prison in exchange for the release of hostages, often Western hostages, is another example of the paradox of double binds, where contradictory messages are sent by the international community to the states concerned: on the one hand, they are asked to combat impunity, yet on the other hand, they are asked to release criminals.



## **The paradox of massive security resources and weak institutions and mechanisms to protect human rights and human security**

The concept of institutional impunity cannot be fully understood without taking into consideration the governments' and judicial and security institutions' inability or inadequacy in implementing African and international human rights commitments and international humanitarian law.

International pressure from major powers and from national, regional and international human rights organizations is not enough to compel weak or failed states to meet the challenges of impunity. Furthermore, this situation is not unrelated to the fact that the International Criminal Court (ICC) seems to target African leaders significantly more often. This often wrongly provokes indignation from an often ill-informed public, unaware that most African countries have not set up courts to try international crimes not subject to the statute of limitations, or that their judicial institutions have simply collapsed.

Hence the categorical imperative for African states to build national or regional judicial sovereignty, allowing them to judge all perpetrators of international crimes by establishing a universal jurisdiction, but also by building solid, legitimate democratic institutions with sufficient authority to stand up to the challenges of impunity.

This study on institutional impunity will focus on the area covering the three border countries, i.e. the Liptako Gourma countries: Mali, Niger and Burkina Faso, which suffer recurrent and particularly violent attacks from the same armed groups. These include Jama'at Nasr al-Islam wal Muslimin (JNIM) and Islamic State in the Great Sahara (ISGS). All three countries share a contiguous territorial, conflict and geopolitical space with the same security challenges, the same armed groups, and similar consequences on the ground.

In order to fully understand the problem of institutional impunity and the paradox with which these three countries are struggling, we will briefly review the strengths and weaknesses that can allow us to understand the logic underlying the different elements

of this paradox: the existence of standards and legislation, and the countries' accession to national, regional and international conventions on human rights on the one hand, and on the other hand, the weakness of judicial and security mechanisms and institutions at the national, regional and international levels to enforce the obligations of the states with respect to impunity.

## **THE LEGAL ARSENAL, STANDARDS & CONVENTIONS VS. ENFORCEMENT MECHANISMS**

Mali, Niger and Burkina Faso are parties to the International Bill of Human Rights, the African Charter on Human and Peoples' Rights, the ECOWAS Supplementary Protocol on Democracy and Good Governance (2001) and the African Charter on Democracy, Elections and Governance (2007), which are international and regional commitments for all three countries.

All three countries are also parties to the 1999 Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

At the national level, all three countries have national human rights commissions responsible for the promotion and protection of human rights. It should be noted that Niger and Mali have strong and independent national institutions. Burkina Faso, on the other hand, needs to strengthen its national human rights commission legally, financially and institutionally.

Yet, despite the international commitments of the states concerned and the existence of human rights and judicial institutions, human rights are massively, systematically and repeatedly violated, often with impunity, in these countries faced with asymmetric conflict.

In Mali, a judicial pole was created in 2013 to deal with crimes related to terrorism, international human rights offenses, and organized crime. It has investigated several dozen cases related to terrorism, culminating in some ten trials. A similar development has taken place in Burkina Faso, where specialized units have been set up within the justice system to try suspected terrorists.



In Mali, although the government dissolved the Dan Na Amassougou militia after the Ogossagou massacre, it continues to operate. The judicial pole prosecutor has completed investigations into a large number of cases, including the Ogossagou and Somane Da cases, but due to the lack of forces capable of arresting and judging those responsible for the crimes and serious human rights violations, they have reached an impasse.

In Burkina Faso, the Koglweogo are theoretically regulated by Decree 2016-1052 of October 5, 2016, on the participation of the population in community policing. In reality, however, the decree is not enforced and the Koglweogo continue to act with impunity.

Despite these efforts, the impression that emerges is that the security approach is still emphasized in the fight against violence by armed groups. In Burkina Faso, the authorities have decreed the mobilization of volunteers to protect the people and combat terrorist groups. While this initiative is understandable in a security environment as bad as the one prevailing in Burkina Faso, the disastrous track record of the Koglweogo in terms of human rights violations should prompt the authorities to be more cautious on this issue.

In the light of all these issues, we should put into perspective the capacity of failed or weak states to fulfill their national and international human rights commitments, especially with regard to the nagging issue of impunity. If pressure from the international community is not accompanied by real support for the restoration of state authority and justice and security institutions throughout the territory of the countries concerned, these imperatives are likely to remain empty.

Impunity for economic crimes committed by administrative elites or certain members of the armed forces, and impunity for serious human rights violations are critical obstacles to the development of the G5 Sahel countries as well as to the fight against social fractures and inequalities. Issues of impunity and social injustice are real cancers in the subregion, and they are among the sources and ferments of conflict in the Sahel.

In Mali, for example, according to the provisions of the Military Justice Code, initiating prosecution proceedings is the sole prerogative of the Minister of the Armed

Forces, who is the sole judge of whether prosecution is appropriate, and no prosecution may take place, on pain of being declared null and void by the Supreme Court, unless ordered by the Minister of the Armed Forces. In this case, justice is totally subordinated to the will of the executive branch, and more specifically to the military hierarchy. This poses a serious problem in terms of the independence and impartiality of the military courts of justice, which are unable to uphold international human rights standards or comply with Article 109 of the Malian Constitution.

Hence the Malian government's inability to comply with the various United Nations resolutions on the issue of impunity, and in particular with the resolutions of the Security Council and the Human Rights Council, as well as the commitments made during the Universal Periodic Review on impunity.

## **STRENGTHS AND WEAKNESSES OF INSTITUTIONS AND MECHANISMS FOR DEFENSE, SECURITY, AND PROTECTION OF INDIVIDUALS AND HUMAN RIGHTS**

The strengths of the defense and security institutions and systems lie, first and foremost, in the colossal military defense and security resources invested for the protection of property and people. The weaknesses lie in the constant deterioration of the security situation in these countries and the disastrous consequences for the protection of human rights and the fight against impunity.

It is this paradox, which has become structural, that explains the permanence of institutional impunity.

### **Strengths, weaknesses, challenges and opportunities**

Assessing the forces deployed on the ground and their inability to address the issue of institutional impunity is key to measuring the nature of the paradox that feeds and develops it.

We will begin by reviewing the forces involved and then assess the state and the capacity of the political,



judicial, and security institutions in all three countries with regard to how they deal with impunity. We will examine their strengths and weaknesses, challenges and opportunities.

There is a disconnect between the enormous security resources deployed to meet the challenges of protecting civilian security and the recurring failures on the ground since 2012 in Mali and 2014 in the other countries.

Security strategies based primarily on the use of weapons have yet to produce the expected responses on the ground, nor have they halted the continued erosion of government authority and the collapse of national institutions. At this point, we will briefly assess the forces at work in order to understand the reasons and causes that explain the governments' inability to fulfil their regalian functions of protecting civilians and their property while at the same time guaranteeing them justice against serious and systematic human rights violations.

### **Weaknesses and inadequacies of the regulatory mechanisms of the African Union (AU) and ECOWAS**

The paradox in the conflict situation in the Sahel lies in the dissymmetry between the impressive strength of the forces on the ground, particularly in terms of numbers, equipment, and logistics and financial resources, on the one hand, and their manifest weakness in terms of ensuring the security of the civilian population and guaranteeing fair justice for all, on the other hand. In Niger, Mali and Burkina Faso, the security situation continues to deteriorate, and institutional impunity is on the rise.

ECOWAS has been the region of the African continent with the strongest and most credible democratic and security institutions. It has been able to find both strategic and security responses to the serious crises and armed conflicts that shook Liberia and Sierra Leone in the years 1990-2000. This was notably due to the presence of a force like ECOMOG, which relied mainly on the Nigerian army and its colossal resources. Unfortunately, since the outbreak of the Boko Haram armed insurgency in 2009, the Nigerian army has been too busy with this front that has significantly under-

mined its capabilities. This situation has incalculable consequences for the security of the entire region and the Sahel. It is no coincidence that ECOWAS has been unable to provide a regional response to the crisis in Mali in 2012 and the ongoing crisis in the Sahel. The alternative that has been found to these security gaps was the creation of the G5 Sahel in 2014. Paradoxically, the G5 Sahel has not only divided and weakened ECOWAS but has also accentuated its dependency in terms of security and geopolitical capabilities.

As for the AU, its strategic and operational presence on the ground is very limited; it primarily plays a diplomatic and symbolic role through the MISAHEL.

Of the 19 security strategies developed in the Sahel, not a single one is African. It is time for the African continent to stop subcontracting its security and build an African army capable of fighting terrorism and protecting the security of African peoples. The time has come for the AU to put the issue of security in the Sahel, which has so far been neglected, on the summit agenda.

### **Institutional impunity and the ongoing deterioration of the security situation**

Despite the presence of national, regional, and international forces, the security situation in the Sahel continues to worsen. Between 2017 and 2020, attacks on civilians increased fivefold, from 205 to 1,096, and the number of civilians and unarmed suspects killed, including women and children, rose from 356 to 2,443, a sevenfold increase, according to data provided by the Armed Conflict Location and Event Data Project (ACLED).

**Radical armed groups**, militias, defense and security forces (DSFs), and foreign armies are regularly accused of serious violations of human rights and international humanitarian law (IHL).

Clashes between national and international armed forces and radical armed groups lead to serious and massive human rights violations in the Sahel. In addition, frequent inter- and intra-community conflicts also cause serious and repeated human rights violations and contribute to the continuous deterioration



of security in the Sahel. These self-defense groups claimed approximately 296 lives in Mali, 179 lives in Burkina Faso, and over a dozen lives in Niger in 2020.

Armed radical groups abduct public figures and exchange them for the release of some of their members. They are the main protagonists defying the authority of the states in the region, using terror and extrajudicial executions, hostage-taking (of Westerners or public figures) and targeted assassinations as their modus operandi. These jihadists carry out a wide range of criminal activities that spare no segment of society: attacks against civilians, attacks against the DSFs, attacks against economic operators, abductions and rapes, hostage-taking, smuggling activities, protection of drug-trafficking rings, etc.

These armed groups increasingly control certain areas in the north and center where they extract mineral resources, especially gold, collect taxes, organize justice (often summary justice with the enforcement of Sharia law), and provide security and basic social services. They act as a state within the state and are the most obvious signs of the failure of the state and inability of the public authorities to fulfil their regalian functions of security and justice for the people. In the year 2020 alone, armed radical groups took more than 200 lives in Mali, 388 lives in Burkina Faso and more than 420 lives in Niger.

One of the genuine conundrums facing judges who arrest, try and imprison perpetrators of war crimes or crimes against humanity is that they are obliged to stand by helplessly as the guilty are released in exchange for Western or national hostages. It is important to emphasize the contradictoriness, if not the outright hypocrisy, of certain major powers that are complicit in paying for the release of hostages, only to denounce impunity. The inconsistencies of certain developed countries also contribute to the persistence of institutional impunity. In short, radical armed groups are major factors in the degradation of public institutions, public security and institutional impunity.

**Self-defense militias** serve as auxiliaries to the regular army. They also carry out attacks and indiscriminate killings in targeted communities with total impunity, as is the case in Mali with the Dogon militias and in Burkina with the Koglweogo. The very existence of

such militias, often supported by the government and the armed forces, is a clear sign of the failure of the states and the powerlessness of their armed forces to deal with national security challenges. Their collusion with governments and national armies, as well as the forces at their disposal, are also aggravating factors for institutional impunity. Often, in the case of massacres committed in certain areas such as Ogossagou (2019-2020), the judicial pole judge may investigate and identify the perpetrators of the crimes as well as the victims, but still be unable to bring them to justice due to the lack of available security forces capable of making the arrests. Proceedings can also often become bogged down when victims and witnesses are afraid to appear before a judge.

These groups are found in central Mali and Burkina Faso:

- **Dan Na Amassougou**, led by **Youssouf Toloba**, is a militia made up of Dogon and Bambara, which is often accused of serious and repeated human rights violations against the Fulani community, particularly in the Mopti region and the Niger Delta. Despite the official dissolution of the Dan Na Amassougou militia by the Malian government, it continues to carry on as usual and, perhaps worse yet, continues to have ties with the state.
- **The National Alliance for the Protection of Fulani Identity and the Restoration of Justice** (ANSIPRJ), led by **Oumar Aldiana**. This movement, which defines itself as neither jihadist nor pro-independence, claims to be fighting against “repression”. It condemns the abuses committed against the Fulani by the DSFs, but also the actions of professional cattle rustlers and community militias.
- **The Koglweogo** in Burkina Faso is an armed militia denounced by human rights organizations as one of the actors that recurrently violate human rights: several NGOs and citizens have condemned its arbitrary arrests and torture, and its involvement in several massacres of civilians has been pointed out by organizations in the center and north of the country. The impunity enjoyed by this group is also denounced by Burkinabe and international human rights organizations.



According to MINUSMA, in its report on trends in human rights violations and abuses in Mali (January 1 - March 31, 2021), human rights violations are also committed by the various national, regional, and international armed forces present in the theaters of operation, namely the defense and security forces (DSFs), Barkhane, and G5 Sahel. During the year 2020, they killed approximately 322+ in Mali, 375 in Burkina Faso and 144 in Niger. In Mali, more civilians were killed in attacks by the military supposed to protect them (35%) than by so-called jihadist groups (24%).

### THE OBJECTIVE LIMITATIONS OF GOVERNMENTS' ACTUAL ABILITY TO ENSURE THE SECURITY OF THE PEOPLE AND COMBAT INSTITUTIONAL IMPUNITY

The Sahelian states have demonstrated objective limitations, which have already been mentioned earlier in this study, in protecting people and property. The absence of the government in some areas due to the vastness of the territory partially explains these shortcomings in terms of human security. In this context, the deterioration of the security situation has led to massive human rights violations in Mali. MINUSMA recorded 409 infractions, including 89 human rights violations and 320 human rights abuses, representing 74 fewer cases than in the previous period.

The majority of these violations were committed by the defense and security forces (DSFs). The report attributed 31 cases to members of the national forces, 7 to state security agents, and 51 cases to representatives of the judicial authorities. Armed groups that had signed the Algiers Agreement reportedly committed 36 violations targeting civilians, while community militias and armed groups were responsible for 88, and armed terrorist groups were guilty of 176 actions aimed at civilians.

In Burkina Faso, the DSFs have carried out counter-terrorism operations culminating in numerous accusations of serious human rights violations. The methods used (arbitrary arrests, extrajudicial executions, abductions, torture, etc.) in the fight against terrorism have been severely condemned by international NGOs such as Amnesty International and HRW, as well as by human rights organizations in Burkina.

According to MBDHP and HRW investigations into the executions of men, women, and children in Kain, Banh, Titao, and Barani, at least 200 people were killed. NGOs strongly doubt that there was any connection with jihadist groups. Most of the victims were Fulani suspected of being jihadists, or accomplices who were purportedly executed by the DSFs.

In Niger, militia-related violence is less prevalent than deaths attributable to so-called jihadist groups, which account for a clear majority (56%). However, Nigerien DSFs were responsible for 37% of civilian deaths in 2020. Alleged Islamist armed groups have been responsible for the massacre of more than 310 people since January 2021. According to Human Rights Watch allegations, 18 serious abuses have been committed by Islamist armed groups and government security forces in the border regions of Tillabéri and Tahoua since October 2019. Human Rights Watch found that security forces were responsible for at least 185 of the 496 reported executions. Investigations have yet to be launched.

### CONCLUSIONS AND RECOMMENDATIONS

The essential question raised when dealing with the issue of institutional impunity, against a backdrop of asymmetric conflicts faced by the Sahelian states, is first and foremost the institutional capacity of their governments to combat impunity. Without a strong and legitimate government, without the confidence of the citizens and without the existence of reliable security and judicial institutions, effective action to combat institutional impunity with concrete results will remain illusory.

As long as the objective factors of security breakdown and the root causes of serious and massive human rights violations are present and able to cause harm that national and international forces are unable to neutralize, it will be difficult to put an end to institutional impunity.

As long as the defense and security forces, which are supposed to protect the civilian population, are also among the perpetrators of extrajudicial executions and serious violations of human rights and international



humanitarian law, and do so with impunity, it will be difficult, even illusory, to expect an end to institutional impunity. Indeed, despite the fact that investigations have been opened against members of the military suspected of abuses, no judgments have as yet been handed down.

In the light of these observations, the fight to end institutional impunity must be sustained, concerted and long-term, because it must be waged simultaneously and concomitantly with the fight against the deterioration of security in the Sahel countries.

- The top priority in the Sahel countries today is to combat and halt the rise of armed jihadist groups, which are increasingly organized, bolder and more powerful, and constitute the most dangerous threats to the survival of the Sahelian states.
- The second priority is to support and strengthen the construction of strong, legitimate governments with reliable and credible security and justice institutions capable of meeting the challenges of security breakdown and the institutional impunity that goes with it.
- African countries should be at the forefront of building sovereign regional security strategies to lead the fight against radical armed groups with determination, because this is the best way to learn from the failures of international interventions in the Sahel.
- The international community must lend every form of support (military, financial, logistical aid, etc.) to all African initiatives aimed at eradicating the ter-

rorist threat in the Sahel and building legitimate states with strong security and judicial institutions capable of addressing institutional impunity.

- The African and international communities must rethink the issue of hostages and payment of ransoms in exchange for their release to develop a strong and consistent position and avoid further contributing to the factors of institutional impunity.
- African and international civil society organizations should urgently set in place:
  - An advocacy strategy and mechanism that must absolutely target the AU, ECOWAS and the international community.
- To avoid situations where the withdrawal of strategic partners from the Sahel could leave a void, as in the case of Chad and potentially any other entity, the AU and ECOWAS must:
  - Prepare for the creation of an army capable of fighting terrorism in the Sahel and guaranteeing the security of people and property,
  - Ensure the security of people and property,
  - Effectively fight impunity, including by drawing on support from the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice, and
  - Take every action to facilitate peace building and security.
- Finally, the international community must unflinchingly deploy financial, military and logistical resources to support AU and ECOWAS security, operational and peace-building strategies.



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