

To respect and ensure respect for IHL: Interview with representatives of the French Ministry for the Armed Forces and Ministry of Europe and Foreign Affairs

Abstract

On 29 June 2021, the Review talked to representatives of the French Ministry for the Armed Forces and Ministry of Europe and Foreign Affairs about France's involvement in Mali and the Sahel region. From the Ministry for the Armed Forces, the Review spoke to Claire Legras, Director of Legal Affairs, Camille Faure, Deputy Director of Legal Affairs, and Philippe Lejeune, Head of the Operational Legal Unit of the Armed Forces Staff. From the Ministry of Europe and Foreign Affairs, the interviewees were François Alabrune, Director of Legal Affairs, and Sandrine Barbier, Deputy Director of Legal Affairs.*

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Can you remind our readers of the reasons why France became involved in Mali in 2013, and the form your involvement has taken?

Claire Legras: As you know, the situation in Mali at that time was critical and deteriorating sharply, especially in the north of the country. It was in response to an

* This interview was conducted by Ghislaine Doucet, Bruno Demeyere and Julie Boulmier.

express request from the president of Mali that the president of France decided, in January 2013, to intervene in Mali. This decision led to the deployment of forces on the ground in just a few days. The mobilization of the French armed forces was therefore extremely rapid, and they were part of the operation that was baptized Operation Serval. This first operation mobilized up to 4,500 French soldiers. Operation Barkhane, which succeeded it as of 1 August 2014, mobilized even more troops.

From a legal point of view, the basis of these operations is quite clear and in fact it is both plural and complementary. In terms of *jus ad bellum*, these operations are based, first and foremost, on the request for assistance that was addressed to the president of France by the interim president of Mali, Dioncounda Traoré, which took the form of an exchange of letters between them. This exchange was then taken up by Mr Traoré's successor, President Ibrahim Boubacar Keïta. This is therefore a "classic" basis for military intervention, following a request from Mali to France to intervene on its territory. The legal basis for Operation Serval lies in the resolution adopted by the United Nations [UN] Security Council, under Chapter VII of the UN Charter – Resolution 2100 of 25 April 2013.¹ This resolution, which has since been extended each year, authorizes French forces to use "all necessary means", within its capacities and areas of deployment, to support MINUSMA² if elements of that force are exposed to serious and imminent danger. I will not talk further about MINUSMA and the exceptional nature of this UN mission, in terms of the number of troops it has mobilized, the particularly dangerous nature of the mandate it has assumed, and the duration of its presence in Mali.

It should also be recalled that UN Security Council Resolution 2085 of 20 December 2012³ had also reaffirmed more generally the need for all UN member States – including France – to support Mali in its efforts to restore peace and security, given the dangers to that State and more broadly to regional peace.

Operation Serval began in January 2013. It achieved conclusive results very quickly, in that it put a stop to the actions of armed groups, notably by recapturing the city of Timbuktu. The operation also made it possible to liberate all the towns in the Niger loop that were under the control of organized armed groups and to push them back into their refuge areas. This was indeed the mission of Operation Serval; it was not intended to eradicate these organized armed groups or completely end their activities. They therefore continued to thrive in a habitat and terrain that offered a foothold for their activities and an opportunity to carry them out. As time went on, it became clear that these groups were organizing rear bases in a certain number of neighbouring States, using cross-border logistics.

This prompted the general staff of the French Army – in close collaboration with its Malian counterpart – to reorganize and restructure its operations

1 UNSC Res. 2100, 25 April 2013, available at: [https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2100\(2013\)&Lang=E](https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2100(2013)&Lang=E).

2 MINUSMA is the UN Multidimensional Integrated Stabilization Mission in Mali. For further information, see the MINUSMA website, available at: <https://minusma.unmissions.org>.

3 UNSC Res. 2085, 20 December 2012, available at: [https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2085\(2012\)&Lang=E](https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2085(2012)&Lang=E).

throughout the Sahel-Sahara region. In early August 2014, a new operation named Operation Barkhane succeeded Operation Serval. This operation was structured differently and placed more emphasis on sharing resources between the coalition forces. In fact, this operation merged Operation Serval in Mali and the resources of Operation Épervier in Chad. It is important to point out that Operation Barkhane is taking place within the framework of the status of forces agreement [SOFA]⁴ that we concluded with the Malian authorities, which stipulates that a detachment of French soldiers will intervene in support of the forces of the Republic of Mali to restore peace and security on its territory. This operation immediately became part of a partnership with the main States of the Sahel-Sahara region: Burkina Faso, Chad, Mali, Mauritania and Niger.

The aim of Operation Barkhane was both to carry out autonomous operations within the framework authorized by the Malian authorities and, from the outset, to provide combat support to the Malian armed forces, while also providing broader support to the other forces engaged in Mali as part of a stabilization mission: MINUSMA, EUTM Mali⁵ and the forces of other partner States fighting against organized armed groups that use terrorist methods. Then, starting in February 2014, France encouraged and supported the grouping of forces from five major partners in the Sahel-Sahara region within the G5 Sahel. The joint force was launched in February 2014 and reached full operational capability in late 2017. Such a process was quite unprecedented, and took time. France's objective is not to be alone on the front line, but to promote and support a coordinated, combined regional response by all the forces of these sovereign States and to help them meet the immense challenge they are facing.

Operation Barkhane has remained a combination of an autonomous operation and a support mission. On 11 June 2021, President Macron announced a major change to France's military posture in the Sahel. The final step in that process was to implement the president's announcement by conducting final planning exercises, in very close cooperation with the local partners of Operation Barkhane. This is both a change and a deepening of a certain number of what have been the operation's main features for a number of years: internationalization, action and cooperation, followed by Europeanization of the fight against organized armed groups in the Sahel that use terrorist methods. In reality, this is a variation, or a deepening, of the guidelines that were decided upon with the Sahelian partners about a year and a half ago at the Pau Summit.⁶

4 Agreement between the Governments of France and Mali in the Form of an Exchange of Letters Defining the Status of the Serval Force, signed in Bamako on 7 March 2013 and in Koulouba on 8 March 2013 (Serval SOFA), available at: www.legifrance.gouv.fr/jorf/id/JORFTEXT000027376103.

5 EUTM Mali is the European Union Training Mission in Mali. See the EUTM Mali fact sheet, available at: https://eutmmali.eu/wp-content/uploads/2022/01/20220113_Fact-Sheet-EUTM-sans-elections-22FEB_ENG.pdf (earlier version available in French at: https://eas.europa.eu/archives/docs/csdp/missions-and-operations/eutm-mali/pdf/factsheet_eutm_mali_fr.pdf).

6 The Pau Summit took place in January 2020. See "G5 Sahel: Conférence de presse des Chefs d'État à l'issue du Sommet de Pau", *Elysee.fr*, 13 January 2020, available at: www.elysee.fr/emmanuel-macron/2020/01/13/sommet-de-pau-declaration-conjointe-des-chefs-detat.

How is the partnership with the various national, regional and international armed forces organized? Will changes to the system have consequences, for example with regard to the monitoring of detainees?

Philippe Lejeune: France maintains close relations with its partner armed forces to ensure that they are adequately trained, resilient, effective and capable of carrying out the missions entrusted to them.

France's partnership with these armed forces has three major components: structural cooperation, which includes a network of personnel seconded to the armies of partner States; operational cooperation, which involves training partner armed forces; and combat support, which is more specifically the task of foreign armed forces. Before the French authorities decided to suspend cooperation between the Barkhane force and the Malian armed forces, following the second coup d'état in Mali in May 2021, most of France's operations in the Sahel took the form of a combat partnership, in which the French armed forces operated mainly alongside the armed forces of Mali and Niger.

In practice, this partnership consisted of seconding French personnel to strategic, operational and tactical headquarters. One example is the international humanitarian law [IHL] training that the Barkhane force's legal advisers provided to nearly 60 Malian soldiers stationed in Gao, as part of Operation Bourrasque, at the end of 2020. The main objective was to strengthen our partners' training in IHL and their monitoring of its operational implementation, to ensure that operations remained lawful, despite breaches of IHL by armed terrorist groups.

Claire Legras: Even if there are elements of continuity within the changes to the operational mechanism in relation to all that has already been stated since the Pau Summit, it is true that we are moving towards a different mechanism, with more cooperation, priority for combat support and increasing activation of the Takuba Task Force, for which a number of partners – and others who will join us over time – are sending equipment and personnel (mainly special forces detachments) to provide combat support under French military command for partner armed forces in the region.

These changes therefore form part of a continuum, and from a legal point of view, continuity obviously prevails. The legal basis for our intervention in these States remains the same. It is part of our response to a request for assistance, and President Macron is therefore currently engaged in discussions with representatives of the Malian State and with the president of Niger.

What also remains unchanged is the very act of intervening. We have numerous and regular exchanges with the International Committee of the Red Cross [ICRC] on this matter, because we are in a situation that qualifies as a non-international armed conflict. The legal framework for this new phase of the operation will be as before: IHL will apply, and France will abide by it and ensure respect for it. It should also be pointed out that the existence of rear bases for organized armed groups led France, in close discussion with all its partners, but also with the ICRC, to take the view that a non-international

armed conflict was in progress, and was being exported to Mali's neighbours. A number of factors prompted this conclusion. The armed groups that were operating in Mali were also active in neighbouring countries; there was an operational continuum, in that they were using these rear bases to participate in combat within Mali. We therefore considered that they should be fought within the framework of an exported non-international armed conflict, and that IHL should be applied to the entire operation, both in Mali and in neighbouring countries that were serving as zones of refuge. It is within this legal framework that the French military detachment is operating and will continue to operate.

Camille Faure: The president's words must be understood as referring to a fight against organized armed groups that use terrorist methods. IHL remains the legal cornerstone of France's operations. France and its partners in the Takuba Task Force are operating under IHL, as are all the international forces.⁷

Our commitments are also part of a continuum. The Serval SOFA remains applicable to Operation Barkhane. We have also concluded agreements with Niger and Burkina Faso that cover the right to capture and detain and which specify the framework for the handing over of detainees to the territorially competent authorities. These authorities may or may not agree to receive those persons, but under these agreements, which remain in force, they are obliged to apply both IHL and international human rights law to them. This allows us to operate in these theatres in accordance with our European and international commitments. From our point of view, as time goes by and as things change – Serval yesterday, Barkhane today, and another operation tomorrow – the monitoring of these people remains a legal imperative at the domestic, European and international levels.

Can you tell us what practices and mechanisms have been put in place regarding capture, detention, transfer and non-refoulement?

Camille Faure: Under IHL, it is legal to detain people for compelling security reasons related to the conflict, if they represent a serious threat to the security of the force or the civilian population. We are basing ourselves on IHL and on the resolutions of the 32nd International Conference of the Red Cross and Red Crescent.⁸ This right to detain is also reaffirmed in agreements with

7 The participation of operational partners under French command is based on two grounds. With regard to *jus ad bellum*, each partner in the operation was invited by the president of Mali to intervene on its territory in order to fight organized armed groups carrying out terrorist-type activities. With regard to *jus in bello*, the detachments of the operational partners integrated by France into the Takuba Task Force have the mission of conducting operations in Mali to support the Malian armed forces in their fight against organized armed groups carrying out terrorist activities in Africa. The status of the military detachment of each operational partner is identical. It is governed by Articles 1 to 11 of the Serval SOFA, above note 4, and extended to those partners that have expressly agreed to it.

8 See 32nd International Conference of the Red Cross and Red Crescent, "Resolution 1: Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty Geneva", 8–10

governments – for example, Article 10 of the Serval SOFA – but it is also set out in agreements with other partners that are not public. In addition, we have robust procedures from capture to handover and follow-up, so that there is double monitoring – by the French force under its obligations, and by the ICRC as a neutral intermediary – and there is also follow-up on the host State’s obligations.

Individuals benefit from two types of guarantee: material and procedural. Material guarantees mean that when a person is captured, she or he is treated as well as a member of the French forces, especially in terms of food and access to health care. In addition, we must take into account vulnerable persons, the right to worship, the protection of their physical well-being, etc. This is the first set of guarantees, about which we are particularly vigilant and which are reflected in the medical examination and information procedures and in the capture files that trace the treatment of captured persons from the first moment they are in the hands of the French forces.

As far as procedural guarantees are concerned, the length of time for which the forces can hold captured persons for imperative reasons of security is, of course, a key element. This must be reviewed at intervals. If detention needs to be extended to protect the force or the population, the level of decision is graded so that such a decision is not taken lightly and is monitored. This procedure is rigorous and controlled, and the aim is that the person be detained for as short a time as possible. Once a person no longer poses a threat, they are released. When there are grounds for handover – i.e., when it is considered that the person should be prosecuted by the competent local authorities – then, on the basis of the agreements that we have concluded with Burkina Faso, Mali and Niger, handover is subject to compliance by the territorially competent State with our constitutional obligations, as under the French Constitution, the death penalty is prohibited.⁹ Furthermore, handover is subordinated to our conventional obligations, as we are a State party to the protocols of the European Convention on Human Rights [ECHR], on the prohibition of the death penalty,¹⁰ and on the prohibition of inhuman and degrading treatment;¹¹ and, more generally, to our obligations under international human rights law, including the prohibition against exposing a person to any violation of their fundamental rights.¹² These guarantees are quite demanding and must be respected at all times. To ensure

December 2015, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

9 French Constitution, 4 October 1958, Art. 66-1. Law No. 81-908 of 9 October 1981 abolishing the death penalty was incorporated into the French Constitution in 2007 by Constitutional Law No. 2007-239 of 23 February 2007.

10 See European Convention on Human Rights, 4 November 1950, Art. 2, available at: www.echr.coe.int/pages/home.aspx?p=basictexts&c=.

11 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (entered into force 26 June 1987), available at: www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

12 See Claire Landais and Léa Bass, “Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, available at: <https://international-review.icrc.org/articles/reconciling-rules-international-humanitarian-law-rules-european-human-rights-law>.

that they are respected, there is a mechanism for regular visits to detainees by the operational legal adviser [LEGAD] of Operation Barkhane, accompanied by doctors. Furthermore, the ICRC has the unconditional right to make unannounced visits. The most important thing is to make the action sustainable, because from our point of view – although we have not found a clear answer in the jurisprudence of the ECHR – we are required to continue these visits until the person has completed his/her sentence, or has been definitively convicted.

More broadly, how does France understand its obligations under Article 1 common to the Geneva Conventions?

François Alabrune and Sandrine Barbier: To respect is an obligation on oneself, an obligation that could be described as internal. A State, especially a State Party, must do everything possible to ensure that its own entities (armed forces, civil authorities, military authorities) and all persons under its control comply with the above-mentioned obligations. “Respecting” IHL implies taking all necessary measures to ensure that France’s actions are in conformity with its obligations.

In a non-international armed conflict, this obligation may have an effect on organized armed groups. The obligation to respect is an obligation of means and of results, implying that those responsible can be held legally liable. This is perhaps the least complicated obligation.

The obligation to “ensure respect for” is more complex because it is an obligation vis-à-vis others, an external obligation, and implies that third States which are not parties to a conflict are obliged to take steps to ensure that the parties to the conflict respect their obligations under IHL. This obligation is contained in the Geneva Conventions and in Additional Protocol I [AP I]. It also appears in the jurisprudence of the International Court of Justice [ICJ], in particular in the case of *Nicaragua v. United States*,¹³ where the Court ruled that the United States had “the obligation to respect and ensure respect for these conventions” in all circumstances. The obligation to ensure respect can be seen as having two dimensions. On the one hand, there is a negative obligation to do nothing that might encourage or even facilitate breaches of IHL. On the other hand, there is a positive obligation to take appropriate measures to put an end to breaches of the Conventions and to bring a party to the conflict that is in breach of its obligations back into compliance.

In other words, it is a matter both of abstaining and of acting. Training is essential to ensure that parties to a conflict comply with their IHL obligations. We believe that IHL will only be respected when there is acculturation and improved knowledge and awareness of the fundamental nature of IHL, vis-à-vis others and oneself. Ultimately, it is a pact. This work of training and dissemination of IHL,

13 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports 1986, available at: www.icj-cij.org/en/case/70/judgments.

in which France is particularly involved – especially in the G5 – is particularly important.

This leads to a question: is it an obligation of means or of result? Can someone who has an obligation to ensure respect be held responsible for someone else's failure to fulfil their obligations?

What is clear to us is that States which have this obligation to ensure respect have an obligation of diligence, the intensity of which depends on the influence they have. They must take all possible measures and use all lawful means at their disposal to try to ensure that other States comply with the rules of international law. It is interesting to note that the ICJ jurisprudence on genocide in *Bosnia and Herzegovina v. Serbia and Montenegro*¹⁴ affirmed that the legal obligation to prevent genocide enshrined in Article 1 of the Genocide Convention was an obligation of due diligence. The Court added that due diligence can only be assessed *in concreto* – i.e., according to the circumstances. We believe that both the assessment and the scope of this reasoning are important.

Several means can be used to ensure respect for IHL: diplomatic pressure, legal assistance, coercive measures or measures involving international cooperation.

Everything we do to encourage third States or third parties to the conflict to respect their obligations is ultimately part of prevention.

How have the French armed forces operationalized the obligation contained in common Article 1 and in AP I to “respect and ensure respect for” IHL?

Claire Legras: Our position remains the same on this point. Over the years, we have had in-depth discussions on this obligation, which is a major one for a State like France. We fully agree with this interpretation of Article 1; it is an obligation of means and not an obligation of result.

In addition, in our discussions with the ICRC, we have emphasized the need to meet this obligation under the real-life conditions that apply in theatres of operation. To say this is not to minimize our responsibility – it is simply a matter of facing the conditions in which we operate. The situation is not the same in every theatre. As we are providing support, the Malian theatre gives us the opportunity – first through Operation Serval, then through Operation Barkhane, and tomorrow within the new Takuba Task Force – to exercise not a form of control, but a form of awareness-raising that can go a long way, because it involves concrete activities such as delivering operational briefings or producing rules of engagement for such operations. All military commanders agree that the most important thing on the ground is the example set by partner forces. When you operate under the gaze of these forces and you see how they behave, that is probably the best way to ensure respect for common Article 1.

14 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, *ICJ Reports 2007*, available at: www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf.

On the ground, in an operation like Barkhane – in other words, when we have a large number of men on the ground – this involves a series of very concrete actions. Moreover, in a theatre like Mali, complementary activities are undertaken at all levels. If an act is considered to be inconsistent with our vision of the application of IHL, we always intervene. Our representations, even if they are not made public, are made at the level of the military commander or force commander. The minister of the armed forces and all French ministers, in all the bilateral contacts they have with the authorities in the region, make respect for IHL one of the first topics of their discussions.

The situation is quite different in a theatre like the Middle East, where we have no men on the ground. That is not the same thing at all. We bear a very intense responsibility and experience it as such. This is something I have heard from several military commanders; we must not delude ourselves that in other theatres, where we are not on the ground, we could supervise our partners, when we are simply doing upstream training. This does not mean that we cannot do anything at all, but what we do is limited by the reality of the different theatres.

What has France been doing in the Sahel to encourage and ensure respect for IHL by partner armed forces, both State and non-State?

Philippe Lejeune: The French authorities are aware that under common Article 1,¹⁵ France is required, to the extent of its means and capabilities, to exert influence on its Sahelian partners to ensure that the provisions of the Geneva Conventions and their Additional Protocols¹⁶ are complied with. Since the beginning of Operation Serval in 2013, France has had occasion to remind the Malian side, in particular, of its obligations and commitments, through diplomatic notes and other actions. For instance, the force commander has expressed this concern in his discussions with his counterparts and with the political authorities of the Sahelian States.

Article 10 of the Serval SOFA¹⁷ is also an example of the implementation of common Article 1 through the guarantees that France obtained from the Malian authorities concerning the detention of persons handed over to them by the Operation Barkhane force.

In recent months, France has committed itself – together with the European Union – to developing the training of Malian provost units and to systematizing their integration into the Malian armed forces with a view to improving compliance with the law on the conduct of hostilities. At a more tactical level, the French armed forces are also participating in the dissemination of IHL. In the Sahel, for instance, where French forces are stationed with allied troops, IHL training is conducted as needed. In the event of joint deployment with the Barkhane force, the tactical command of the partner armed forces is

15 Common Article 1 is available at: <https://tinyurl.com/2p94kvsu>.

16 Additional Protocols I and II are available at: <https://ihl-databases.icrc.org/ihl/INTRO/470> and <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>.

17 Serval SOFA, above note 4, Art. 10.

always briefed in order to prevent the commission of abuses. Our impression is that the commanders of the partner armed forces are very sensitive to these issues, which affect the reputation of their armed forces and more broadly of their State. Today, the focus is on training the armed forces of the G5 Sahel joint force. A French LEGAD is assisting the force's legal adviser, particularly in drafting operational procedures and developing a soldiers' manual.

In 2018, legal advisers to Operation Barkhane provided IHL training to members of the Movement for the Salvation of Azawad and the Tuareg self-defence group Imghad and its allies. These groups, which are recognized by the Malian government, cooperate with the State and have undertaken to comply with IHL. Our legal advisers have also developed a combatants' booklet, which has been translated into eight languages and distributed to the organized armed groups that the French armed forces may encounter during their operations. This booklet contains very simple explanations and illustrations together with some very basic rules, with the aim of promoting compliance with IHL.

Claire Legras: The action of the LEGADs on joint deployments, plus the people we second to the G5 Sahel command, mean that the French army is making a real long-term investment, in order to conduct these training courses as close to the field as possible. We are also promoters, partners and supporters of many other activities, some of which are carried out jointly with the ICRC,¹⁸ including the training courses at the San Remo Institute,¹⁹ which are financed by the European Union, Switzerland and the Office of the UN High Commissioner for Refugees. The last session was held in Bamako, at the beginning of December 2021.

These initiatives are consolidated because they are long-term. Their durability is quite reassuring.

Did this training cover topics such as sexual violence?

Camille Faure: Sexual violence has been the subject of training for our own soldiers and for our partners. It is a question of setting an example, and it also shows the ability of the French forces to adapt to a new issue that was not necessarily on our radar before.

Claire Legras: A number of activities are also being carried out by non-governmental organizations [NGOs], notably CIVIC,²⁰ which the ICRC knows well. Those NGOs pay particular attention to the issues of sexual violence and

18 See, for example, IHL in Action, "Mali, IHL Training for Organised Armed Groups and Malian Armed Forces", available at: <https://ihl-in-action.icrc.org/case-study/mali-ihl-training-organised-armed-groups-and-malian-armed-forces>.

19 See, for example, International Institute of Humanitarian Law, "175th International Military Course on LOAC (French)", 23 May 2018, available at: <https://iihl.org/event/cours-militaire-international-sur-le-dih/>.

20 CIVIC is the Center for Civilians in Conflict. For further information, see the CIVIC website, available at: <https://civiliansinconflict.org>.

gender issues. Partner forces – especially INTM – are undertaking other activities.²¹ This makes up a rich bouquet of actors and I believe that this is commensurate with the stakes involved. While France sees this dissemination of law by means of theoretical and practical tools as a real mission, it cannot carry out that mission alone, because we are talking about a vast territory the size of Europe, where these questions are major issues. What is important is that this joint action be sustained over time.

Have you conducted any specific awareness-raising regarding the protection of cultural property in armed conflict?

Philippe Lejeune: The protection of cultural property is a subject that cannot be ignored when running general IHL training courses, just like the protection of the civilian population.

Camille Faure: The protection of cultural property has always been an integral part of the French forces' operations. We have simply formalized it further following France's ratification of the Second Protocol to the Hague Convention for the Protection of Cultural Property.²² We needed a mapping of the sites and have been working with the UN Educational, Scientific and Cultural Organization [UNESCO] to ensure that the LEGAD has a precise and detailed overview of sites that are protected as world heritage. Over time, work in this area has become more formalized and precise. The army drafted a manual, in conjunction with the Directorate of Legal Affairs, and this was then taken up and distributed by UNESCO.²³ So this is not a new issue, but our approach to the subject has been enhanced by the availability of a more detailed catalogue of the sites to be protected. There is also the "no strike list". These are lists of sites that must not be subjected to strikes, in accordance with the provisions of the Hague Conventions and Additional Protocol II (AP II).²⁴

Sandrine Barbier: The Geneva Conventions stipulate that cultural property must be protected, and this has always been a concern. But following the decision to ratify the Second Protocol of the Hague Convention, this protection has been improved.

21 For further information, see the INTM Group website, available at: <https://intm.com/en/about-us/>.

22 See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (entered into force 9 March 2004), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/590>.

23 See: Roger O'Keefe *et al.*, *Protection of Cultural Property: Military Manual*, UNESCO, Paris, 2016, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000246633>. Secretariat of the 1954 Hague Convention and Its Two (1954 and 1999) Protocols, *List of Cultural Property under Enhanced Protection*, available at: www.unesco.org/culture/1954convention/pdf/Enhanced-Protection-List-2017_EN.pdf.

24 See AP II, Art. 16, available at: <https://tinyurl.com/39988jrh>.

You spoke of “non-State armed groups that use terrorist methods”. What is your position on the tendency to designate certain armed groups as “terrorists”?

Claire Legras: There is no ambiguity on that. We must distinguish between communication and a certain number of simplifications on the one hand, and on the other hand, the vision – which is very clear – that both the minister of the armed forces and the French armed forces have of the framework in which their actions take place. The entire operational chain of the Ministry of the Armed Forces is part of a framework that it masters and applies. These armed forces are intervening in a situation of armed conflict and are confronting structured armed groups with a high degree of organization and military objectives. We are very careful how we interpret the concept of “direct participation in hostilities”. This is not only the framework of thought of the French armed forces, but also the framework of their action. Terrorism is a method of action. Our intervention in Mali is not intended to make us the auxiliaries of criminal investigators who go after terrorists with a view to prosecuting them.

Camille Faure: To complete the picture: this also makes it possible to territorialize the armed conflict. This is not a war without borders, simply because non-State armed groups are resorting to terrorist modes of action. Rather, it is a non-international armed conflict, identified as such after a detailed legal assessment of hostilities with non-State armed groups, within a given country, or several countries in the case of an exported armed conflict – a categorization that presupposes the agreement of the territorially competent State to the use of force by a foreign army such as that of France, and an operational continuum of hostilities within borders. This is fundamental.

Claire Legras: As far as the non-international armed conflict against the so-called Islamic State group in the region is concerned, I think our logic of exported non-international armed conflict is even more rigorous in terms of territorialization of action, which is also very important.

France is very committed to the fight against impunity. When you see breaches of IHL, within your forces or those of your partners – State or non-State – what happens? Are there specific mechanisms in place?

Philippe Lejeune: As far as the French armed forces are concerned, there are mechanisms for holding military personnel individually responsible, at both the disciplinary and criminal levels. Conduct constituting a war crime is also a crime under French criminal law.²⁵ French criminal law gives French courts jurisdiction to deal with such offences, whether committed in France or elsewhere.

²⁵ See France, Code Pénal, Livre IV *bis*, “Des crimes et des délits de guerre”, Chap. I, “Des différents crimes et délits de guerre (Articles 461-1 à 461-31)”, available at: <https://tinyurl.com/ywa8wh9t>.

The French Code of Military Justice²⁶ also sets out a specific criminal liability regime for members of the French armed forces. Under this system, any member of the French army or person under the authority of the French army who commits an offence of any kind outside France is subject to the ordinary courts specializing in military matters.²⁷ This is also an important point to note, because it means that any member of the French armed forces who commits an offence of any kind while abroad is liable to prosecution.

In addition, in order to help establish the truth, Article 40 of the French Code of Criminal Procedure²⁸ requires any constituted authority, public officer or civil servant who acquires knowledge of a crime or misdemeanour in the performance of their duties to inform the public prosecutor without delay. Under this provision, the military authorities are required to report to the judicial authorities any offences of which they may become aware in the performance of their duties, in order to facilitate their prosecution.

Compliance with legal standards is very much a factor in the planning and conduct of operations. We have operational legal advisers at all levels of command, to ensure that the law applicable to operations is taken into account. When a military commander is vested with the authority to use force or coercion, the headquarters of the armed forces appoints an operational legal adviser to advise them on the application of IHL, in accordance with Article 82 of AP I.²⁹

Finally, we have provost marshal detachments deployed to the chain of command at the operational level, in particular to record offences, gather evidence and search for perpetrators. The provost marshals act independently, under the direction of the judicial authorities. In parallel, commanders may initiate a command investigation, which is also independent and is conducted whenever there is credible information regarding a violation of IHL.

I believe that this comprehensive system allows for an effective response to any violation of either the norms of international law or the specific instructions and directives that commanders issue to military personnel.

26 France, Code de Justice Militaire, last updated 1 January 2021, available at: www.legifrance.gouv.fr/codes/id/LEGITEXT000006071360/.

27 *Ibid.*, Art. L 121-1: “Outside the territory of the Republic and subject to international commitments, the Paris courts specializing in military matters hear offences of any kind committed by members of the armed forces or persons attached to the army by virtue of an authorization” (*Review’s* translation).

28 See the French Code of Criminal Procedure, Article 40, which states: “If the public prosecutor considers that the facts brought to his attention in application of the provisions of Article 40 constitute an offence committed by a person whose identity and domicile are known and for whom no legal provision prevents the initiation of public action, he shall decide whether it is appropriate to: 1. Initiate proceedings. 2. Implement an alternative procedure to prosecution in application of the provisions of article 41-1, 41-1-2 or 41-2. 3. Close the case without further action if the particular circumstances related to the commission of the facts justify such action” (*Review’s* translation).

29 See Article 82 of Additional Protocol I, concerning legal advisers in the armed forces. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 141, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule141.

Camille Faure: To complete the picture, the SOFAs that govern the status of military personnel in these operations generally provide for the status of “experts on mission” in accordance with the 1946 UN Convention on the Privileges and Immunities of the Specialized Agencies,³⁰ ensuring that they enjoy immunity from prosecution. However, they are not exempt from the jurisdiction of the French judicial authorities. What this arrangement means is that they can only be prosecuted by the French authorities.

Our response to violations of IHL by our partners is very discreet, by definition. The commander of the French force will speak to his counterparts, requesting that these actions cease. Such incidents may also be the subject of local diplomatic representations, or exchanges between ministers, to emphasize that such violations are unacceptable and must cease immediately, and that the perpetrators must be prosecuted. In other words, our reactions to violations take more than one form. The French forces have very clear instructions to report any abuses or violations, and to react themselves. Such behaviour may result in our terminating cooperation, for instance.

Philippe Lejeune: When joint military operations take place that involve the French armed forces and partner armed forces, the French armed forces have precise instructions for responding to any abuses they may witness. If it discovers material evidence of abuses or corroborating testimony regarding the commission of abuses, the Barkhane force is also required to inform the local and national authorities of the State concerned and the UN human rights observers. Here again, it seems to me that the armed forces are taking a very active approach to ending breaches of IHL and ensuring that the perpetrators are punished.

If violations are committed, whether by partner State forces or by allied non-State armed groups, could this lead to criminal liability for the French armed forces?

Camille Faure: In order to address this issue, we need to examine the authority of French forces over these forces. In reality, although these operations may well be planned jointly, no French commander ever has authority over these forces. There is therefore no chain of criminal responsibility such as exists in the relationship between a commander and a subordinate. This being so, it would be difficult to attach criminal responsibility under French law. I think that the main point, to quote General Bentégeat’s words at the Directorate of Legal Affairs’ 20th anniversary symposium,³¹ is that the French soldier’s backpack contains many things, and one of those things is a set of legal armour. This means that he

30 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947 (entered into force 2 December 1948), available at: https://treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf.

31 General Henri Bentégeat, former Chief of Staff of the French armed forces, “Droit et excellence de l’armée française”, presentation given at “Le droit et les armées: Glaive, bouclier ou entrave”, colloquium on the

is required to comply with international law, and this is one of the means of action of the force – it is what gives it its legitimacy, and it contributes to the success of operations. It is an integral part of the culture of the French armed forces, and something to which we pay careful attention.

Philippe Lejeune: This is a factor in all our planning and operations. It is not simply an effect to be achieved, but a framework within which commanders plan their operations.

How do you view cooperation with the ICRC in the field? How do you see its action?

Claire Legras: We see the ICRC as a privileged interlocutor. We maintain a dialogue with the ICRC, at both the local and central levels, in a continuous and complementary manner. The French armed forces and their commanders are very grateful for the work of the ICRC. Military leaders know the ICRC, know that it is a reliable and demanding body, and are familiar with its work in the field. As you know, the armed forces are constantly reflecting on the meaning of their action and seek demanding partners who can provide them with additional insights. For them, this dialogue is always fruitful and it forces them to excellence.

In the field, relationships remain very strong despite changes in personnel, both in Mali and in other theatres. At the central level, at our level and at that of the minister, the same applies. For us, the humanitarian work the ICRC carries out (in accordance with its mandate) is essential. That is why we have given the ICRC broad access to those individuals currently held by the Barkhane force. We have negotiated with our partners in the region, in published and unpublished documents, the ICRC's right of access to captured and transferred persons as a precondition for the deployment of a French operational military detachment. This is part of the French system and is an essential back-up.

Philippe Lejeune: Military leaders completely accept the role of the ICRC as guardian of the Geneva Conventions, to the point that we almost always ask the ICRC's opinion regarding the procedures implemented by the French armed forces. When local representatives of the ICRC come to discuss the appropriateness or absence of certain material or procedural safeguards that the French armed forces grant to persons they detain, their observations are carefully examined and taken into account.

What are the main consequences of the disengagement of French forces in Mali with regard to the implementation of and respect for IHL? For example, with regard to the treatment of detainees?³²

The disengagement of France and its operational partners from Mali is in principle intended to take place within the framework of the SOFAs for Operation Serval and the Takuba Task Force.³³

The additional protocol to the Serval SOFA, defining the status of the non-French detachments of the Takuba Task Force, in the form of an exchange of letters signed on 6 and 10 March 2020 between the governments of France and of Mali, includes similar stipulations for the benefit of our operational partners, since it “will produce its effects until the end of the missions of the Takuba Task Force and its complete and permanent departure from the territory of the Republic of Mali”.³⁴

An intensive dialogue must therefore be maintained with the Malian authorities and all our operational partners in order to guarantee the coherence of the disengagement of all Barkhane forces, including those of the Takuba Task Force.

Furthermore, the preservation of the robust legal framework, established in light of the lessons learned from operations in Afghanistan and the jurisprudence of the European Court of Human Rights, relating to the conditions of transfer, guarantee of rights and follow-up of captured persons, is a point that will receive careful attention after the departure of the French detachment.

In our analysis, the commitments to respect IHL and international human rights law made by the Malian side concerning all persons transferred to it under the Serval SOFA are also based on the universal international instruments to which it is a party independently of the Serval SOFA. Our objective will also be to reiterate that the death penalty will not be applied and that no one will be extradited without our agreement, and to secure and organize the continuation of visits of persons handed over to the Malian authorities, respecting the role of the ICRC under common Article 3.

32 This question was added in February 2022 to reflect current events.

33 Under the terms of the 4th paragraph of the preamble and Article 12 of the Serval SOFA, above note 4, its stipulations are applicable “for the duration of [the] deployment [of the French detachment] on the territory of the Republic of Mali”, and are effective “until the end of the missions of the French detachment and its complete and final return to the territory of the French Republic” (*Review’s* translation).

34 *Review’s* translation.