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INTERNATIONAL LAW AND PRACTICE

Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict

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Abstract

Responding to an urgent request by the authorities of Mali, France launched Operation Serval against several terrorist armed groups in January 2013. The French troops were assisted by a Chadian contingent and by forces progressively deployed by other African countries within a UNSC authorized African force (Resolution 2085). While the French and African military operations in Mali were clearly legal, they raise important questions of *jus ad bellum* in relation to the two legal arguments put forward to justify them: intervention by invitation, and UNSC authorization. In this paper we first discuss the general rules of international law applying to intervention by invitation. We explain that such an intervention could sometimes be contrary to the principle of self-determination and we propose a purpose-based approach. We then apply these rules to the situation in Mali and conclude that the French and Chadian interventions were legal because, on the one hand, the request was validly formulated by the internationally recognized government of Mali and, on the other hand, their legitimate purpose was to fight terrorism. The UNSC approved this legal basis and 'helped' France and Chad appeal validly to it by listing the enemy as 'terrorist groups'. It gave its 'blessing' to these interventions, without authorizing them, and observed the events with relief. The adoption of Resolution 2100 on 25 April 2013 raises new legal questions. The Council creates a UN peace enforcement mission in Mali, MINUSMA, which has a robust use-of-force mandate. Created just a few weeks after the DRC Intervention Brigade, this force seems to indicate an ongoing evolution (revolution?) in UN peacekeeping, notwithstanding the assurances by some UNSC member states that MINUSMA will avoid 'offensive counter-terrorism operations'. At the same time Resolution 2100 gives a restricted use-of-force mandate to France (to protect MINUSMA), without challenging the legal validity of intervention by invitation for all other tasks. The conflict in Mali might thus remain for some time yet between the latitude of UNSC authorization and the longitude of unilateral intervention by invitation.

Key words

use of force; United Nations Security Council; intervention by invitation; terrorism; peacekeeping; self-determination; secession

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1. INTRODUCTION

Responding to an urgent request by the transitional authorities of Mali, on 11 January 2013 France launched air strikes to stop the offensive of terrorist armed groups towards the south of Mali. Soon after, France deployed several troops on the ground, under Operation Serval, in support of Malian defence and security forces. At its culmination, Operation Serval counted 4,500 French troops on the ground. The French troops were substantially assisted by a Chadian contingent of 2,000 deployed in January 2013, and by forces progressively deployed by ten other African countries within the framework of the African-led International Support Mission in Mali (AFISMA)[1] authorized by the United Nations Security Council (UNSC). While, as we will see in this article, the French and African military operations in Mali were clearly legal, they raise important questions of *jus ad bellum*, especially concerning the role of the UNSC and the relationship between the two basic legal arguments put forward to justify them: the theory of intervention by invitation on the one hand, and authorization of the UNSC on the other. Before discussing these questions[2] we would like to provide some basic information about the context and background of the Malian conflict.

During 2012 Mali's vast north progressively became an ungoverned region, hosting a range of non-state armed groups including at least two terrorist organizations (AQIM[3] and MUJAO[4]), and another extremist Islamist group (Ansar al-Dine[5]). At the same time a secular Tuareg group, the National Movement for the Liberation of Azawad (MNLA), had separatist aspirations for the north of the country and on 6 April 2012 it unilaterally declared the independence of the 'Republic of Azawad', which France, alongside the international community, has considered null and void. The MNLA initially made an alliance with the three Islamist groups, but later this alliance collapsed and the Islamist groups' forces defeated the MNLA and drove them out of the main northern towns. As the rebels were gaining ground in the north, Malian soldiers staged a mutiny which culminated in a coup d'état in March 2012. President Amadou Toumani Toure fled to Senegal. In order to force the mutineers to hand over power to the civilian authorities, on 2 April 2012, the Economic Community of Western African States (ECOWAS) adopted a set of sanctions against the junta in Bamako. Five days later these sanctions were lifted following an agreement

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1 As of the end of March 2013, AFISMA had deployed 6,500 troops.

2 We will not discuss here other interesting questions in relation to the intervention in Mali such as those concerning international humanitarian law, human rights law, or international criminal law. Researchers interested in these questions could refer, amongst others, to the provisions of the SOFA Agreement signed on 7 March 2013 between France and Mali where both states accept the applicability of Protocol II and make arrangements in relation to the transfer of prisoners and other human rights issues. Text available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103.

3 Al Qaeda in the Islamic Maghreb is al Qaeda's North African wing, made up mostly of foreign fighters.

4 Or 'MUJWA': the Movement for Oneness and Jihad in West Africa is an AQIM splinter group whose aim is to spread jihad to the whole of West Africa.

5 Ansar Al-Dine (Defenders of the Faith) was the only genuine home-grown movement, led by former Tuareg rebel leader Iyad Ag Ghaly. Its members were mostly Malians from the nomadic Tuareg ethnic group (although many young mujahideen from different areas across the Islamic world joined its ranks recently).

with the military junta negotiated by ECOWAS, laying down a plan for the transition of power with the nomination of interim president Dioncounda Traoré.

Following the military seizure of power, the Malian army collapsed in the northern part of the country and it became clear that it was unable to recover control. African (and many other) states were worried that the proliferation of narcotics and weapon smugglers, human-trafficking gangs, and especially terrorist groups could destabilize the Sahel region and have even greater consequences beyond West Africa. Until the beginning of 2013 all international actors agreed that it was up to the 'Africans themselves' to 'resolve this issue'. Indeed, on 20 December 2012 the UNSC adopted S/RES 2085 authorizing the use of force by an African-led International Support Mission in Mali (AFISMA).

It is astonishing, nonetheless, that notwithstanding the aggravation and urgency of the situation, this UN-approved deployment of ECOWAS forces was not expected to take place before September 2013. This gave terrorists time to consolidate their positions, start digging bunkers in the mountains, and acquire heavy weapons. Worse still, several combat units from terrorist groups moved towards the south at the beginning of January 2013, capturing the town of Konna. Bamako's fall was a question of hours and Mali requested France's military assistance. On 11 January 2013, France intervened, thereby stopping the progression of terrorists and helping to liberate the towns of the north. This intervention pushed ECOWAS to accelerate the deployment of AFISMA, but its troops were facing operational and logistical difficulties and often had to be deployed in non-combat zones, leaving the burden of combat operations to French and Chadian troops.

The French and African military interventions in Mali received a consensual international approval concerning their legality. France did not receive a single protest on the legality of Operation Serval.[6] On the contrary, the number of expressions of support has been overwhelming: many individual states, regional organizations,[7] the UN Secretary-General,[8] and the UNSC itself[9] have expressed their total support and understanding. This contrasts with various military interventions in the past which were met with strong criticism by the international community.

In fact, in order to justify Operation Serval the French MFA initially put forward three legal arguments: the invitation of the legitimate government of Mali, the UNSC resolutions, and (collective) self-defence.[10] However, France soon abandoned

6 Some rare states like Egypt (*Le Monde*, 21 January 2013), Qatar (www.fri.fr/afrique/20130118-qatarun-religieux-influent-critique-fortement-intervention-française-mali), or Tunisia (www.en.starafrica.com/news/tunisia-oppose-foreign-intervention-in-mali.html) questioned the appropriateness of the intervention without ever putting in doubt its legality.

7 See, e.g., Statement of the President of the ECOWAS Commission on the situation in Mali, 12 January 2013, at www.news.ecowas.int/presseshow.php?nb = 006&lang = en&annee = 2013.

8 UN News Centre, 'Mali: Ban Welcomes Bilateral Assistance to Stop Southward Onslaught of Insurgents', 14 January 2013, at www.un.org/apps/news/story.asp?NewsID = 43920&Cr = +mali+&Cr1 = #.UbTPne1OLIU.

9 See the preamble of S/RES 2100 (25 April 2013) where the UNSC 'welcom[es] the swift action by the French forces'; or M. Doyle, 'Mali Conflict: UN Backs France's Military Intervention', 15 January 2013, at www.bbc.co.uk/news/world-africa-21021132.

10 According to him the legal basis of the intervention was as follows: 'firstly, the appeal and the request made by Mali's legitimate government, so here this is a case of legitimate self-defence; and secondly, all the United Nations resolutions, which not only allow but require those countries capable of doing so

the argument of self-defence, which, as we have tried to demonstrate elsewhere, was not relevant here and could even become counterproductive.[11]

In this article we will thus not discuss the argument of self-defence. We will focus instead on the two other legal bases put forward in order to justify the French and African military operations in Mali, and also discuss their interoperability. In the first part of the article we will analyse the theory of intervention by invitation. We will try to identify the limits of this theory and also demonstrate how the UNSC 'helped' France and Chad appeal validly to this theory by listing officially all the 'enemies' targeted by these two states as 'terrorists'. In the next part of this article we will focus on the role of the UNSC during this conflict. The Council was permanently present throughout the conflict: it met several times, formally and informally, to discuss the situation and adopted several resolutions, presidential statements, and press statements in relation with the situation in Mali. This does not mean, however, that the UNSC authorized the use of force in Mali by all intervening states. While it clearly gave a use-of-force mandate to African states acting under AFISMA, the French (and in part the Chadian) intervention took place without a UNSC authorization but with the UNSC's 'blessing'. The Malian crisis is thus a very interesting blend of approved unilateralism and authorized multilateralism. It raises interesting questions concerning the relationship between intervention by invitation and UNSC action in a case of a threat to international peace and security. These questions did not disappear after the adoption by the UNSC of Resolution 2100 on 25 April 2013. The Council created a UN peace enforcement mission in Mali, MINUSMA, which will absorb AFISMA and which has a robust use-of-force mandate. Created just a few weeks after the DRC 'Intervention Brigade', this force seems to indicate a major shift in UN peacekeeping, notwithstanding the assurances by some UNSC member states that MINUSMA will avoid 'offensive counter-terrorism operations'. At the same time Resolution 2100 gives a restricted use-of-force mandate to France (to protect MINUSMA), without challenging, as we will see, the legal validity of intervention by invitation for all other tasks.

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to support the fight against the terrorists in this matter. … [T]o this legitimacy, drawn from Article 51 – to the legitimacy drawn from the United Nations resolutions – I'd like to add, if it were needed, two other forms of legitimacy: firstly the request by ECOWAS, the Economic Community of West African States, and [secondly] the position taken by the African Union …, who asked everyone to provide, in line with the relevant decisions by the Peace and Security Council, the required support on the logistical and financial levels and in terms of strengthening the capabilities of the Malian defence and security forces. So nobody is going to challenge this legitimacy'. Press conference by M. Laurent Fabius, French MFA, 11 January 2013, at www.basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html. See also his speech in the French Senate, 'La France agit à la demande des autorités légitimes du Mali, qui, à deux reprises, lui ont lancé un appel à l'aide. Elle s'inscrit dans le respect de la charte des Nations unies et de son Article 51, en parfaite cohérence politique avec les résolutions du Conseil de sécurité'. www.basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=bafr2013-01-16.html#Chapitre4.

11 T. Christakis and K. Bannelier, 'French Military Intervention in Mali: It's Legal but… Why? Part 1: The Argument of Collective Self-Defense', at www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i.

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2. The legal basis: request for assistance by Mali and the theory of intervention by invitation

In its official letter sent to the UN Security Council on 11 January 2013 France states that:

> France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population … [T]he French armed forces, in response to that request and in coordination with our partners, particularly those in the region, are supporting Malian units in combating those terrorist elements. The operation, which is in conformity with international law, will last as long as necessary.[12]

The international community and the UNSC itself (section 3) accepted the validity of this argument. As Susan Rice, the US permanent representative to the UN, said just before the start of Operation Serval, 'there is clear-cut consensus about the gravity of the situation and the right of the Malian authorities to seek what assistance they can receive' and any state 'can support and encourage the Malian government's sovereign request for assistance from friends and partners in the region and beyond'.[13] Even states, such as the UK, who offered logistical support only to the military effort in Mali requested an official letter by the authorities in order to justify their operations.[14] This means that, at any time, states operating in Mali were doing so either under the official request of the Malian authorities or under the UNSC authorization given to African states by Resolution 2085. The 2,000-strong contingent of Chad, which has played a leading part in the fight against jihadist militants in Mali, used successively both legal justifications: initially it was not placed under AFISMA's operational command and was acting solely on the basis of the official invitation by Mali, but it finally joined the regional African force early in March 2013.

The consensus about the legality of foreign intervention by invitation in Mali should not lead to the conclusion that third states have an unlimited right to military intervention on the basis of the consent of the authorities of the state where the intervention takes place. Indeed, before discussing the situation in Mali, we will examine the general rules of international law applying to intervention by invitation, and explain why such an intervention could sometimes be contrary to the principle of self-determination and thus illegal (section 2.1). This was not the case in Mali, nonetheless: as we will see the French and Chadian intervention was legal because, on the one hand, the request was validly formulated by the internationally recognized government of Mali (section 2.2) and, on the other hand, its legitimate purpose was to fight terrorism (section 2.3).

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12 S/1013/17, Identical letters date 11th January 2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council.

13 'Remarks at a Press Gaggle Following UNSC Consultations on Mali', at www.usun.state.gov/briefing/statements/202714.htm (last visited 25 May 2013).

14 See S/2013/58, Letter dated 23rd January 2013 from the Permanent Representative of the UK to the UN addressed to the President of the UNSC.

2.1. The limits of consent: prohibition of intervention in internal strife in violation of the principle of self-determination

Some scholars focus only on the question of legitimacy of the inviting government and seem to consider that if valid consent has been given by a representative and a still-effective government, intervention by invitation is always legal.[15] To support this position, they refer to the famous quote of the ICJ in the *Military and Paramilitary Activities* case where the court said that:

> it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.[16]

While these scholars are right, as we will see (section 2.2), about the necessary requirement of representativeness, this dictum of the court cannot, nonetheless, be read as authorizing intervention in all circumstances of invitation by a representative government. As we have tried to demonstrate in a study published almost ten years ago, the principle of self-determination imposes important limits to the principle *volenti non fit injuria*. The criterion of the purpose of the foreign military operations is thus decisive and external intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation.[17]

There is of course no international treaty on this topic but there is enough state practice, *opinio juris*, and doctrinal support to back this conclusion.[18]

Let us emphasize from the outset that, contrary to some scholars,[19] we consider that such a military intervention by invitation of the legitimate government will not be in principle (if intervention respects the limits of valid consent) in violation of Article 2(4) of the UN Charter: this article is inoperative in such a situation because there is no use of force of one state against another, but two states co-operating together within an internal strife.[20]

The principle of self-determination, nonetheless, is applicable in this field and keeps a tight rein on the legitimating power of consent. This principle goes far beyond the 'traditional' right to independence for colonial peoples and must be understood

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15 See A. Tanca, *Foreign Armed Intervention in Internal Conflict* (1993), 26; C. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', (2003) 35 *International Law and Politics* 741, at 742; or A. Kassim Allo, 'Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia', (2009) 3 Mizan L. Rev. 201, at 215.

16 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*,Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 246.

17 T. Christakis and K. Bannelier, 'Volenti non fit injuria? Les effets du consentement à l'intervention militaire', (2004) 50 *Annuaire Français de droit international*, 102.

18 Another limit to the legality of intervention by invitation is in case this is contrary to UNSC resolutions. See *infra* part 3.1.

19 M. Bennouna, *Le consentement à l'ingérence dans les conflits internes* (1974), 76; O. Corten, *The Law against War* (2010), 289.

20 There will be no use on force 'in their international relations' (see Art. 2(4)). See our analysis,*supra* note 17, at 111–13. In this same study (at 104–11) we explain why the theory of consent as a 'circumstance precluding wrongfulness' elaborated by the ILC and codified in Article 20 ARSIWA is not relevant here: the problem of military intervention by invitation is not a problem of international responsibility and 'secondary' rules, but one concerning the scope of 'primary' rules.

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here to imply the right for a people that have already formed a state to maintain its political independence from third states and to choose its own government with no outside interference.[21] This is clearly expressed in common Article 1 of the two UN Covenants of 1966,[22] in Resolution 2625 (XXV),[23] and in other relevant resolutions of the UNGA.[24]

On the basis of this principle,[25] several scholars working on the question of intervention by invitation in civil war concluded that 'an internal challenge to the authority of a government cannot be arbitrated by a foreign state'[26] and that in case of civil war 'the settled government's position is legally neither better nor worse, vis-à-vis third States, than the one of the insurgents'.[27]

In his seminal book on consent to military intervention, published in 1974, now Judge Mohamed Bennouna took a very tough stance against the legality of intervention by invitation of the government in case of civil war.[28] Eleven years later, Louise Doswald-Beck referred to the principles of self-determination and non-interference in the internal affairs of states to conclude that 'there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime'.[29] While leaving some room for exceptions, Georg Nolte also argues in his book on the topic published in 1999 that

> the right to self-determination is violated if it is evident that the foreign troops have intervened against the clearly expressed wish of the people of the state concerned, in particular if they have intervened against clear and comprehensive popular uprisings.[30]

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21 For the relation between this dimension of the principle and the 'internal' aspect of self-determination as a principle of democratic legitimacy see T. Christakis, *Le droit à l'autodétermination en dehors de situations de decolonization* (1999), at 345 ff.

22 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status'.

23 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Chapter of the UN, all peoples have the right to determine, without external interference, their political status'.

24 See A/RES/54/168 (25 February 2000): 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes', § 1.

25 It goes without saying that the right of people within a state to choose their own government should be exercised by ballot, not by bullet. But in case a civil war erupts, third states should not have a right to military intervention in order to decide the outcome of the conflict in favour of their political interests and preferences. Such a right could exist nonetheless in case of collective self-defence (if there is external aggression) or if there is a UNSC authorization to use force.

26 J. Noel, *Le principe de non-intervention: Théorie et pratique dans les relations inter-américaines* (1981), 143.

27 Ch. Chaumont, 'Cours général de droit international public', *RCADI*, (1970-I), at 406.

28 Bennouna, *supra* note 19. The only exception he conceded (not without warning against risk of abuse) was assistance as a response to external intervention in favour of the rebels.

29 L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', (1985) 56 BYBIL 189, at 251.

30 G. Nolte, *Eingreifen auf Einladung* (1999), 638. He considers nonetheless that 'it is less clear whether foreign troops may be invited to influence directly a classical and full-scale civil war. It is submitted, however, that such operations are permissible as long as the extent of the foreign military support does not exceed the dimension of an auxiliary enterprise. An auxiliary operation may be important or even decisive for a possible victory but it may not call the political control of the inviting government into question'.

More recently C. Gray[31] and O. Corten[32] concluded in favour of the idea of unlawfulness of an intervention specifically designed to support a government against rebel forces.

The works of the Institute of International Law (IDI) are also very instructive in this field. The IDI adopted in 1975, at its Wiesbaden session, a Resolution on the Principle of Non-Intervention in Civil Wars which articulated a very broad and clear-cut prohibition of intervention in civil wars including interventions on request of the government.[33] More than 30 years later the IDI decided to revisit the topic and created a Sub-Group on Intervention on Invitation. Rapporteur Gerhard Hafner submitted a first report at the Naples session in 2009,[34] then a modified report and draft resolution at the Rhodes session in 2011.[35] In a sharp contrast with the 1975 resolution, the Rapporteur suggested to the IDI a draft article which would have recognized the permissibility of military assistance on request, below and above the threshold of non-international armed conflict, while acknowledging nonetheless that the principle of self-determination could sometimes stand against the permissibility of such an intervention.[36] But this proposal was met with negative reactions from many members of the IDI who feared that this might be perceived as putting in question the principle of non-intervention in civil strife.[37]

The Resolution on Military Assistance on Request finally adopted by the IDI at the Rhodes session in 2011 could appear as a turnaround from the original proposal: the initial article in favour of military assistance on request was replaced by an article entitled 'Prohibition of military assistance'.[38] As G. Nolte observed:

> 'pro-request references' do not appear anymore in the adopted resolution, but rather 'contra-request references' which recall 'the need for strict observance of the principle

31 C. Gray, *International Law and the Use of Force* (2008), 81.

32 Corten, *supra* note 19, 289.

33 (1975) 56 AIDI, at 545–9. According to Art. 2 of this resolution: 'Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State'. The only exception recognized (Art. 3) authorized states to (a) grant humanitarian aid, (b) continue to give any technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war, and (c) give any assistance prescribed, authorised or recommended by the United Nations in accordance with its Charter and other rules of international law' See also the report of Dietrich Schindler, 'Le principe de non-intervention dans les guerres civiles', (1973) 55 AIDI 416.

34 (2009) 73 AIDI 299.

35 (2011) 74 AIDI 183.

36 According to draft Art. 3 proposed by the Rapporteur: 'International law does not prohibit any State from rendering direct military assistance to another State in a situation that does not amount to an international armed conflict, subject, however, to the latter's prior consent and further legal conditions set out below'. Among these conditions we could find the requirement that the author of consent must be 'a legitimate, effective, and generally recognized government' (Art. 8) and the 'obligations of the assisting state, in particular those resulting from the principle of self-determination' (Art. 14).

37 For a detailed analysis of the history of this resolution see G. Nolte, 'The Resolution of the *Institut de Droit International* on Military Assistance on Request', (2012) *Revue Belge de droit international* 241.

38 Art. 3: 'Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population'. Art. 2 explains that: 'This resolution applies to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature including acts of terrorism, below the threshold of non-international armed conflict in the sense of Art. 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977'.

> of non-intervention', the duty 'that each State must respect the principle of equal rights and self-determination of peoples', and 'the necessity of strict observance of the Charter of the United Nations, in particular its Article 2(4) and Article 2(7)'.[39]

Beyond these doctrinal positions, the practice and *opinio juris* of states demonstrate the illegality of intervention by invitation which aims to settle an internal strife in favour of the established government. States who undertake such military interventions on the basis of invitation or consent usually take all necessary precautions to convince that their action should not be regarded as an intervention in a civil war. Thus, intervening states either try to minimize the purpose of their action, claiming, for example, that their only purpose is to 'protect their nationals', to 'maintain order', to help calm down a simple 'mutiny' or to help the fight 'against terrorists' or 'drug smugglers' – or, on the contrary, try to maximize the causes of their intervention by claiming that there was 'external aggression' against the inviting state. Whatever the reality on the ground and their sometimes hidden intentions, states almost never claim a right to military intervention in order to save the government from the rebels in a situation of civil war.[40] On the contrary, they often clearly express their opposition to such intervention as a violation of the principle of self-determination. They do so either by criticizing states who undertook controversial 'invited' interventions,[41] or directly, by making legal statements intended to clarify their intervention policies and doctrines.[42]

Here, in order to limit ourselves to the attitude of France, which is of particular relevance in relation to the situation in Mali, we can observe that this state, which sometimes in the past had been accused of neo-colonial interventionism in former colonies in Africa (hence the famous expression *la France Gendarme de l'Afrique*), has officially been adopting a very clear position against intervention in favour of established governments in civil strife for more than two decades now. In 1990, President F. Mitterrand famously said during a meeting with the Heads of African States and Governments:

> Chaque fois qu'une menace extérieure poindra qui pourrait attenter à votre indépendance, la France sera présente à vos côtés. Elle l'a déjà démontré plusieurs fois et parfois dans des circonstances très difficiles. *Mais notre rôle à nous, pays étranger, fut-il ami, n'est pas d'intervenir dans des conflits intérieurs.* Dans ce cas-là, la France en

39 Nolte, *supra* note 37. G. Nolte explains that 'the impression that the resolution constitutes a complete turnaround from the original proposal is, however, misleading' (at 248) and proposes a refined analysis of the Rhodes resolution in order to try to identify in which cases such military assistance might be permissible after all according to the IDI. It seems nonetheless clear that the principle and the exception have been reversed between the draft and the final resolution: in the former the presumption was in favour of permissibility of military assistance (unless if there is violation of the principle of self-determination); while in the latter the principle is clearly prohibition of military assistance (unless if there is no violation of the principle of self-determination).

40 Christakis and Bannelier, *supra* note 17, at 127; and Corten, *supra* note 19, at 290.

41 For examples see Christakis and Bannelier, *supra* note 17, 129; or Doswald-Beck, *supra* note 29, 214.

42 According to the UK, for example, 'any form of interference or assistance is prohibited (except possibly of a humanitarian kind) at a time of civil war, and control of the State's territory is divided between parties at war. However, it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other, as happened in the Spanish Civil War and, more recently, in Angola'. (1986) 57 BYBIL 616.

> accord avec les dirigeants, veillera à protéger ses concitoyens, ses ressortissants; *mais elle n'entend pas arbitrer les conflits.*[43]

France has maintained this official position until today (although there have been occasional complaints concerning the coherence between official theory and practice ...). Indeed, in several cases, France refused to respond to requests from African governments to intervene in their favour in civil strife, considering that there was no legal entitlement to do so in the absence of external aggression and interference. Famously this was the case in 2002 when Laurent Gbagbo of Ivory Coast asked for help just to obtain a *fin de non recevoir*.[44] And just a few days before the intervention in Mali, President François Hollande made it clear that French forces could not and would not intervene in any way in the internal affairs of the Central African Republic (CAR), a former French colony. 'Those days are gone', he answered, pouring cold water on this latest request for help the day after a number of furious demonstrators had gathered near the French embassy in Bangui to protest against the 'inaction' of France over the issue of rebels.[45]

If external intervention by invitation is normally unlawful when its objective is to settle an exclusively internal political strife in favour of the established government, it goes otherwise when the purpose of the intervention is different. In our 2004 study we tried to explain why it is necessary to opt for an approach focused on the purpose of the intervention, and we showed that military assistance on request is perfectly legal in a series of cases, including the hypothesis of joint fight against terrorism.[46] Of course the problem which arises immediately is that of who can make the decision that a specific group is a terrorist group. Indeed, established governments often try to portray their opponents as 'terrorists' in order to delegitimize them politically and be legally able to request external help against them. But as we will see (section 2.3) in the case of Mali there is no such problem and thus no doubt about the legality of intervention by invitation.

So let us now turn to the situation in Mali in order to find out why it was different from the situation in Côte d'Ivoire or in CAR. We will first examine the preliminary

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43 Déclaration du Président de la République française à l'occasion de la 16ème conférence des chefs d'État de France et d'Afrique, La Baule, 19–21 juin 1990, *Documents d'actualité internationale*, November 1990 (emphasis added).

44 See Christakis and Bannelier, *supra* note 17, at 129.

45 See Reuters, 'Central African Republic Appeals for French Help against Rebels, Paris Balks', 27 December 2012, at www.uk.reuters.com/article/2012/12/27/uk-car-rebels-france-idUKBRE8BQ03720121227. Could we consider that the current events in relation with the civil war in Syria put in question these positions? Not yet, because for the time being no state has claimed the existence of a right to military intervention in Syria in favour of the one or other sides to this conflict.

46 *Supra* note 17, at 120–36. On the basis of state practice we have identified as lawful interventions by invitation aiming at: saving nationals abroad or having similar humanitarian ends (liberation of hostages, etc.); fighting against terrorists, drug smugglers, and other criminals; protecting the interests of the intervening state by launching, e.g., extraterritorial operations against rebels who use the territory of the neighbouring state as 'safe haven' etc. Corten, *supra* note 19, at 289, adopts the same 'purpose-oriented' classification, adding to the list some other legitimate objectives such as the deployment of 'peacekeeping operations'. In the *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the ICJ accepted that the DRC validly consented to the presence of Ugandan troops in its eastern border area in the period preceding August 1998 and that such a consensual intervention and co-operation in order to assure the security of a common border was legal. It insisted, nonetheless, on the fact that such an intervention becomes illegal in case of withdrawal of consent. Merits, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 196, para. 42.

question of the validity of the invitation by the Malian authorities, then we will explain why there was no violation of the principle of self-determination.

2.2. The validity of the invitation: the 'representativeness' of the Malian authorities

As the International Law Commission (ILC) already emphasized in 1979, in order to produce any legal effects, consent must be 'valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers'.[47] The history of military intervention by invitation is indeed full of cases where the existence or validity of the invitation had been disputed on several grounds.[48] In the case of Mali, there is no doubt about the fact that the consent has been 'freely given' and 'clearly expressed' by the Malian authorities prior to the French intervention.

The potential problem with the Mali case instead concerns the legitimacy and 'representativeness' of the author of the invitation, the interim president of the Republic of Mali, Dioncounda Traoré, as well as the effectiveness (or lack thereof) of his government. Indeed, at the time of the events, some observers put in doubt the legitimacy of President Traoré. They observed that he was sworn in as interim president of Mali in April 2012 after the military coup in Bamako. His legitimacy was contested from the beginning by some Malians and in May 2012 supporters of the coup attacked Mr Traoré in his office, forcing him to seek medical treatment in France. During the days leading up to the first French air strikes, Bamako was at a boiling point; Malian institutions were on the brink of another upheaval; and, according to the press, the toppling of the fragile local authorities led by Traoré seemed 'almost certain'.[49]

However, this cannot put in doubt the validity of Mali's consent. The government of President Traoré was indeed internationally recognized as the only government representing Mali and nobody ever suggested recognizing instead the three Islamist groups ruling in the north of the country. This case therefore has no similarities with former cases (such as the US intervention in the Dominican Republic in 1965[50]) where concurrent governments claim to represent the state. The partial lack of effectiveness of the Malian authorities was not relevant either. The internationally recognized government of Traoré was still controlling the south of Mali, including the capital, Bamako. This situation thus has no similarities with cases such as Somalia in 1992.[51] The events following the beginning of Operation Serval showed that both Traoré's government and his decision to invite the French troops enjoyed

47 Commentary to draft Art. 29, §11, (1979) *ILC Yearbook*, Vol II(2), at 112.
48 For example absence of *ex ante* consent in cases where the government which launched the request was formed after the military intervention and often thanks to it, and cases where there were doubts about the existence or the 'free' character of the consent or where clearly the invitation was elicited and used by strong states to fulfill their own agenda. Among the most famous cases we can mention the interventions of the USSR in Hungary in 1956, in Czechoslovakia in 1968, and in Afghanistan in 1979.
49 J. P. Rémy, 'Le pouvoir malien sauvé des putschistes par les militaires français', *Le Monde*, 14 January 2013.
50 Doswald-Beck, *supra* note 29, at 226.
51 Corten, *supra* note 19, at 281.

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widespread popular support.[52] And no state ever questioned the representativeness of the Malian authorities. It is therefore clear that the invitation was valid.

2.3. The legality of the purpose: permissibility of military assistance to Mali to fight terrorism

We have seen that external intervention by invitation is normally legal when the purpose of the intervening state is not to settle an internal political strife in favour of the established government, but to realize other objectives, such as helping the requesting government in the fight against terrorism. Such a purpose could of course raise important questions of legal definition (what is terrorism?) and classification – especially taking into consideration the risk of a unilateral labelling of a rebel group as 'terrorists' by the requesting and the intervening states in order to legitimize intervention.

In the case of Mali there was no doubt that at least two of the three Islamist groups against whom France was intervening were 'terrorist groups'. Both AQIM and, more recently,[53] the MUJAO had been placed by the UN Security Council and individual states[54] on the al Qaeda sanctions list established and maintained by the Committee pursuant to Resolutions 1267 (1999) and 1989 (2011). Things were initially more complicated concerning the third Islamist group, Ansar al-Dine, which was not, at the time of the beginning of Operation Serval, on the UN terrorist lists. However, the terrible practices applied to the civilian population of Mali in the occupied northern territories during the months before the intervention (stoning, amputations, floggings, and other forms of corporal punishment) had been commonplace for the three Islamist groups who claimed their will to strictly enforce sharia law in Mali. The delicate question was whether it was possible to consider these acts as 'terror' in order to assimilate the Ansar al-Dine movement with the two other Islamist groups, a question which could certainly lead to uncharted waters as these penalties and corporal punishments also apply in some states strictly enforcing sharia law. The UNSC helped avoid answering this question: on March 20 the UNSC 1267/1989 al-Qaeda Sanctions Committee placed Ansar al-Dine in company with the two other terrorist groups operating in Mali,[55] providing thus full legitimacy to the French 'anti-terrorist' campaign.

Things could have been more complicated if the French intervention had also been directed against the MNLA, which was not a terrorist movement but a group fighting for the rights of Mali's minority Tuareg community, and initially seeking independence for 'Azawad'.[56] France made 'a clear distinction' between the MNLA

52 See, e.g., A. Hirsch, 'Why Malians Are Welcoming French Intervention with Open Arms', *The Guardian*, 16 January 2013.

53 See §2 of S/RES 2085 (20 December 2012).

54 See 'Terrorist Designations by the US Department of State', 7 December 2012, at www.state.gov/r/pa/prs/ps/2012/12/201660.htm.

55 See www.un.org/sc/committees/1267/NSQE13513E.shtml. See also 'Terrorist Designations of Ansar al-Dine', US Department of State, 21 March 2013, www.state.gov/r/pa/prs/ps/2013/03/206493.htm.

56 It is not perfectly clear nonetheless that intervention by invitation having as a purpose to help the authorities of the state fight a separatist group and restore its territorial integrity should be deemed unlawful. Indeed, taking into consideration that there is no right to 'external' self-determination outside the colonial context,

and the 'terrorists' and declared that 'there will be no action against the Tuareg'.[57] France has respected this red line so far, insisting on the fact that the Tuareg problem should find a solution within the wider political process of reconciliation in Mali, despite the continuous pressure from the Malian army, who are looking forward to taking advantage of the situation in order to crush the Tuareg rebellion and restore the territorial integrity of Mali. The rebels of the MNLA made several declarations in favour of Operation Serval from the outset, promising to help a successful outcome of the 'operations against terrorism'. They also dropped their demand for independence in favour of autonomy and self-rule while asking the Malian army not to enter Tuareg territories before an autonomy agreement had been signed.[58] On the day of submission of this article (6 June 2013) the Malian army was launching a major offensive against the MNLA, recovering several Tuareg strongholds, a situation which might test France's position of neutrality.

3. The role of the UN Security Council: blessing or authorizing?

The UNSC followed the Malian crisis very closely from the beginning, dedicating to it several formal or informal meetings. It used the whole range of acts available in its toolbox, adopting up until now four resolutions, five presidential statements and three 'press statements'.[59] The UNSC was already very active during 2012, starting with a strong condemnation of the coup in Mali in March 2012[60] and ending the year with the adoption of Resolution 2085 on 20 December 2012 which authorized the use of force by an African-led International Support Mission in Mali (AFISMA) in order to carry out a series of tasks. It remained very active in 2013, culminating with the adoption of Resolution 2100 on 25 April 2013, which transformed AFISMA into a UN-led stabilizing force (MINUSMA), to be deployed on 1 July 2013 at the earliest, authorizing both MINUSMA and a parallel French intervention force to use 'all necessary means' to accomplish their tasks.

What is very interesting from an international-law point of view is that, despite all this presence and activity of the UNSC, the French military intervention in Mali took place from the start and until now (pending the future implementation of S/RES 2100) without a clear authorization by the Council. The UNSC was 'there', overseeing the events and 'welcoming the swift action by the French forces', but did not rush to replace the unilateral legal basis of the intervention (request of

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it is possible to consider that the principle of self-determination would not be violated in such a case – and the practice does not seem to support a contrary conclusion. See Christakis and Bannelier, *supra* note 17, at 133–5; or Nolte, *supra* note 30, at 637. *Contra* Corten, *supra* note 19, at 309.

57 I. Mandraud, 'Les populations civiles du nord du Mali sont menacées', *Le Monde*, 19 January 2013.

58 For various press statements from the MNLA see www.mnlamov.net.

59 For a complete timeline of the actions of the UNSC in relation with Mali with links to all documents see www.franceonu.org/france-at-the-united-nations/geographic-files/africa/mali-1202/article/timeline-6896.

60 See SC/10590 (SC Press Statement on Mali Crisis, 22 March 2012) and S/PRST/2012/7 (Presidential Statement, 22 March 2012) where the Council 'strongly condemns the forcible seizure of power' in Mali, calls 'for the immediate restoration of constitutional rule and the democratically-elected Government', and 'emphasizes the need to uphold and respect the sovereignty, unity and territorial integrity of Mali'.

the Malian authorities) by a clear, multilateral use-of-force mandate. This led to an interesting and original combination of legal justifications for the use of force by foreign states in Mali, some of them acting on the basis of the consent of the Malian authorities (with the informal praise of the UNSC) and others on the basis of UNSC authorization (with the applause of the Malian government). From this point of view the foreign military intervention in Mali was a unique blend of UNSC blessing and authorization.

3.1. The interpretation of UNSC Resolution 2085

Without ever clearly claiming that Operation Serval had been authorized by the UNSC,[61] France often stated that its intervention in Mali was 'in line with the Security Council resolutions'[62] and had 'a legitimacy drawn from the United Nations resolutions'.[63]

In §9 of Resolution 2085 it is indeed rather clear that the UNSC only authorized the use of force ('all necessary measures') by AFISMA in order to carry out several tasks, including:

> (b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population ...

In several other paragraphs[64] S/RES 2085 urges all UN member states, including 'interested bilateral partners', to 'provide coordinated assistance, expertise, training' to both the Malian forces and AFISMA, to help the deployment of AFISMA and offer it 'any necessary assistance in efforts to reduce the threat posed by terrorist organizations'. Resolution 2085 does not, nevertheless, authorize the use of force by others than AFISMA. Indeed, France did not claim to act on the basis of an express UNSC authorization and did not refer either to the (controversial) theory of 'presumed' or to 'implicit' authorization.[65] This is interesting because France argued that its intervention was essential in order to accomplish the objectives of the UNSC fixed in S/RES 2085 and previous resolutions.

Hours before the start of French air strikes in Mali, the members of the Security Council met urgently in order to deal with the reported military movements and attacks by 'terrorist and extremist groups' in Mali. The UNSC published a press statement[66] immediately afterwards in which it observed that 'this serious deterioration of the situation threatens even more the stability and integrity of Mali and constitutes a direct threat to international peace and security'. The members of the

61 See the official French letter to the UN, *supra* note 12, which indicates that France does not consider the act as under UNSC authorization but in line with S/RES 2085, the 'accelerated implementation' of which is necessary, according to France, 'in order to resolve all aspects of the Malian crisis, both political and military'.
62 Statement by M. F. Hollande, President France, 12 January 2013 in www.basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html.
63 Press conference by M. Laurent Fabius, French MFA, 11 January 2013, in ibid.
64 Paras. 7, 11, 13, and 14.
65 For a discussion on this theory (and relevant practice) see Corten, *supra* note 19, at 348–400.
66 SC/10878, 10 January 2013.

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UNSC recalled in this statement 'the urgent need to counter the increasing terrorist threat in Mali' and, while asking for a 'rapid deployment of the AFISMA', they also called upon 'Member States to assist the settlement of the crisis in Mali and, in particular, to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'.

Could this press statement give the impression that, confronted with 'the urgent need to counter the increasing terrorist threat in Mali', the UNSC had changed its tune? AFISMA should be deployed more rapidly but, while waiting, and in order to avoid an irreversible situation which could completely jeopardize the realization of Resolution 2085, member states should 'provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'. This interpretation of Resolution 2085 in a way that authorizes not only AFISMA but also all other memberl states to provide military assistance to the Malian Forces in order to counter the terrorists has apparently been adopted by the African regional body most directly concerned, the Economic Community of West African States (ECOWAS). On 12 January 2013 ECOWAS published a statement in which it 'welcomes UN Security Council Press Release of 10th January 2013 *authorising immediate intervention in Mali to stabilise the situation*' and 'thanks the French Government for its initiatives to support Mali'.[67]

It is impossible, from a legal point of view, to claim that a press statement by the UNSC can amend a Chapter VII resolution, especially on such an important issue as the delegation of the power to use force. It would certainly be better to interpret this UNSC press statement as indicating that the Security Council accepts both the legitimacy of the imminent French intervention and the soundness of the legal basis of military assistance on request. The UNSC gives France its blessing for an intervention that is not 'authorized', but still legal (on the basis of valid consent) and perfectly in line with the spirit of the existent UNSC resolutions on Mali.

Indeed, the context of the French intervention in Mali was not comparable to other situations where the attitude of the UNSC clearly indicated that a military intervention by invitation would be unacceptable.[68] For example, when the UNSC imposes an arms embargo on all sides (including the government) in an internal strife, it would be absurd to pretend that while it is prohibited to arm the government it would be possible to intervene militarily upon its invitation.

The case of Mali could also be used as a first precedent for the emergence of a customary obligation binding upon states intervening on the basis of a valid invitation, to report their actions to the Council. We do know that according to Article 51 of the UN Charter: 'Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council'. Although the ICJ considered in 1986 that this requirement was not part of customary law[69], the universal ratification of the UN Charter since then, and the 'tendency to

67 See *supra* note 7 (emphasis added).
68 See, e.g., O. Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie et ses implications sur l'argument de l'intervention consentie', (2007–8) *RGDIP*, at 529.
69 *Military and Paramilitary Activities*, *supra* note 16, §200.

over-reporting'[70] observed since the ICJ's warning on the legal consequences of a failure to report,[71] could indicate that today this requirement is also part of custom. If states using force on the 'unilateral' legal basis of self-defence thus have a requirement to report to the Council, we could consider *mutatis mutandis* that states undertaking a military intervention abroad on the legal basis of consent should also have such a requirement. In its official letter to the UNSC of 11 January 2013 France promised that it 'will of course continue to keep [the Council] informed, as appropriate',[72] and, indeed, acted in accordance with this pledge throughout the crisis.

Last but not least, we could also make a parallel between self-defence and intervention by invitation in relation with the last sentence of Article 51 stating that unilateral measures ' shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time, such action as it deems necessary in order to maintain or restore international peace and security'. This is easier to establish as the UNSC has indeed, under Chapter VII, the prerogative to intervene at any time, taking 'necessary measures' capable of limiting not only the exercise of self-defence but also, a fortiori, the scale and conditions of intervention by invitation. In the case of Mali the UNSC decided to intervene on 25 April 2013 with the adoption of Resolution 2100.

3.2. The grey zones of UNSC Resolution 2100

It is a secret to no one that while deploying important (and costly) military means in Mali, France was anxiously seeking a 'way out' of it, fearing what many observers in France and elsewhere were calling a possible Afghani- or Somali-style quagmire.[73] But France was not the only state hoping to be able to hand over the Malian crisis to the UN. The ECOWAS and all African states participating in the AFISMA were hoping that this African-led force would soon be transformed into a UN peacekeeping mission, so that they would not have to support the financial burden of the operations and so that other states would send troops and logistical support to Mali.

Hence it comes as no surprise that, notwithstanding the hesitations expressed by the UN Secretary-General on his 26 March 2013 report on the situation in Mali,[74] the UNSC finally voted in favour of a 'robust' UN peacekeeping mission in its Resolution 2100 of 25 April 2013. This resolution transformed the AFISMA into a UN-led stabilizing force (MINUSMA) of up to 12,600 'blue helmets', to be deployed, if all conditions are present, on 1 July 2013, and having the capacity to use force. Resolution 2100 also authorizes a French 'parallel' force to intervene militarily, if necessary, in order to support MINUSMA. Innovative, unusual, and unclear, this resolution raises at least two important questions.

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70 Gray, *supra* note 31, at 123.

71 The ICJ warned that the absence of a report could weaken a claim of self-defence because failure to report could indicate that the state was not itself convinced that it acted in self-defence (§200).

72 See *supra* note 12.

73 See for example O. Roy, 'Vaine stratégie française au Mali', *Le Monde*, 5 February 2013; or A. Geneste and I. Mandraud, 'Interrogations sur le mandat de la force de l'ONU au Mali', *Le Monde*, 5 April 2013.

74 S/2013/189.

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The first question concerns the exact nature and magnitude of the 'robust' mandate of MINUSMA. Drafted less than a month after the adoption of Resolution 2098 which decided to create an 'Intervention Brigade' in DRC 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping',[75] Resolution 2100 desperately tries to avoid the impression of a *bis repetita* and to deflate the 'robustness' of MINUSMA's mandate to use force.

Indeed, in his March report the UN Secretary-General had warned that:

> Combating extremist groups in the deserts and mountains of northern Mali requires very particular and demanding military capabilities that are difficult to obtain but will nonetheless be vital for any force engaged in such operations. The United Nations is not configured to oversee such operations at a strategic level, nor are its peacekeepers typically trained, equipped or experienced in the kind of operations that would be required to implement such a mandate. Moreover, an effort of this nature falls well outside the scope of the United Nations peacekeeping doctrine. It is also doubtful that the Organization would have the ability to absorb the numbers of casualties that could be incurred through such combat operations.[76]

During the discussions at the UNSC, Russia made a parallel with the Intervention Brigade in DRC and stated that:

> [W]e are disturbed by the growing shift towards the military aspects of United Nations peacekeeping. What was once the exception now threatens to become unacknowledged standard practice, with unpredictable and unclear consequences for the security of United Nations personnel and their international legal status. … There should be a clear boundary between peacekeeping and enforcing peace.[77]

The consequence of these hesitations was that that MINUSMA's mandate has been interpreted by members of the UNSC as 'excluding offensive or counter-terrorism operations'.[78] However, this is not clearly announced in Resolution 2100. In paragraph 17 of this resolution the UNSC 'authorizes MINUSMA to use all necessary means, within the limits of its capacities and areas of deployment, to carry out its mandate as set out in paragraphs 16 (a) (i) and (ii), 16 (c) (i) and (iii), 16 (e), 16 (f) and 16 (g)', which means that use of force is permissible in order:

- to help the Malian authorities stabilize the key population centres, deter threats, and take active steps to prevent the return of armed elements to those areas;
- to help the Malian authorities to extend and re-establish state administration throughout the country;
- to protect civilians under imminent threat of physical violence;
- to protect the UN personnel, installations, and equipment, and ensure the security and freedom of movement of UN and associated personnel;

75 S/RES 2098 of 28 March 2013, §9.
76 S/2013/189, §§69–70.
77 S/PV.6952, 25 April 2013, at 2.
78 Ibid.

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- to support humanitarian assistance;
- to protect from attack the cultural and historical sites in Mali;
- to support the efforts to bring to justice those responsible for war crimes and crimes against humanity in Mali, taking into account the referral by the transitional authorities of Mali of the situation in their country since January 2012 to the International Criminal Court.

In order to explain how such a broad use-of-force mandate could be conciliated with the idea that 'MINUSMA is not going to conduct any anti-terrorism activity', the French ambassador at the UN said that:

> In military terms, it means that if in the city of Timbuktu there are terrorist cells, they will dismantle them. It is a robust mandate, it is a mandate of stabilization, but it is not an anti-terrorist mandate, they are not going to chase the terrorists in the desert.[79]

If we have understood correctly, this means that MINUSMA forces will be able to conduct 'anti-terrorism activity' if the terrorists 'come to town', but will not be able to exercise 'hot pursuit' if the terrorists leave the town with hostages, nor intervene if the terrorists prepare their attacks in their strongholds in the mountains or in the desert. The military efficiency of such an arrangement certainly needs to be tested.

This brings us to the second grey area of Resolution 2100: the role and the use-of-force mandate of French forces. It is amazing that, although France has been by far the principal military actor in Mali since last January, Resolution 2100 only dedicates a single paragraph (out of 35) to France, authorizing:

> French troops, within the limits of their capacities and areas of deployment, to use all necessary means, from the commencement of the activities of MINUSMA until the end of MINUSMA's mandate as authorized in this resolution, to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General ...[80]

There is no indication about the permissible number of French soldiers or their areas of deployment. The mandate nonetheless seems very restricted. Under it, French troops can only use force 'in support of elements of MINUSMA when under imminent and serious threat', which raises important questions about the definition of this term. It seems also clear that a 'double key' mechanism has been instituted as France should only be able to use force in such a case 'upon request of the Secretary-General'. Paragraph 18 also imposes on France strict requirements in terms of reporting, and announces that the UNSC will review this mandate within six months of its commencement. All these requirements and the limited scope of the mandate contrast with the elasticity and flexibility of the UNSC in several previous use-of-force mandates.

At the same time there is no direct indication about the 'fate' of the legal basis used by France until now, namely the request of the Malian authorities. It is very

79 Remarks to the Press by Mr G. Araud, 25 April 2013, at www.franceonu.org/france-at-the-united-nations/press-room/speaking-to-the-media/remarks-to-the-press/article/25-april-2013-mali-adoption-of-7151.

80 S/RES 2100, para. 18.

clear that this legal basis (as also the authorization given to AFISMA by Resolution 2085) still remains valid until the deployment of MINUSMA, normally on 1 July 2013.[81]

The question is what will happen once this is finally done? Will the invitation of the Malian authorities still remain a valid legal basis for France to use force beyond the mandate provided by paragraph 18 of Resolution 2100? Or should we consider that intervention by invitation is just a temporary right and that Resolution 2100 put an end to it, because the Security Council 'has taken measures necessary to maintain international peace and security'? Here of course we find *mutatis mutandis* questions similar to the ones concerning the 'temporary character' of self defence.

Our position is the following: intervention by invitation is indeed a 'temporary' right and the UNSC has the power, under Chapter VII, to put an end to it at any time. However, the UNSC did not want to exercise this power with Resolution 2100. First, nothing in Resolution 2100 expressly indicates a will to put an end to this parallel legal basis. Second, nothing in the preparatory works of Resolution 2100, formal[82] or informal,[83] indicates such an intention either. Last, but not least, the maintenance of this legal basis might prove to be very useful from a practical point of view: indeed, a probable unwillingness of MINUSMA's forces to carry out anti-terrorist operations and the limited mandate provided to France under paragraph 18 will probably push all actors to rely upon the legal basis of intervention by invitation, acknowledging that France can carry out operations beyond the scope of paragraph 18.

4. Conclusion

The case of French, African, and, soon, UN military interventions in Mali is a unique blend of universalism, regionalism, and unilateralism, and a tale of the contrast between officially proclaimed strategies and cautiously whispered wishes. Faced with an extremely dangerous situation in Mali, which could have devastating consequences far beyond the Sahel region, the UNSC initially estimated that the 'African solutions to African problems' strategy would be enough – and gave a use-of-force mandate to an ECOWAS force. In the heat of the moment, nevertheless, in January 2013, the UNSC gave its blessing (but not its authorization) to France and Chad in order to save Mali from the imminent terrorist threat. The attitude of the UNSC during these interventions clearly demonstrates that the Council accepted the validity of the legal basis of intervention by invitation and observed the events with great relief. When both France and the African states asked with insistence for the UN to get involved, the UNSC adopted, on 25 April 2013, Resolution 2100, which is interesting from many points of view. It puts in place, just a few weeks after the creation of the DRC Intervention Brigade, a new peace enforcement mission, MINUSMA. Although this new force has also a robust mandate, some members of the UNSC tried

81 See ibid., §8.
82 See S/PV.6952, 25 April 2013.
83 Our conversations with legal advisers from some UNSC member states directly involved with the adoption of Resolution 2100 indicate that at no time did the UNSC have the intent to challenge the continuous validity of intervention by invitation.

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to 'play down' its importance in order to appease the fears of several UN members (and the UN Secretary-General himself) about the ongoing evolution (revolution?) in UN peacekeeping. It will be interesting to see how MINUSMA's mandate will be interpreted and how this force will avoid 'counterterrorism operations'. Apparently, the wish of the UN might be that France continues to do 'the dangerous job' in Mali – with the help of newly trained Malian forces. Indeed, the legal basis of intervention by invitation probably remains valid, notwithstanding adoption of Resolution 2100. It should have certainly been easier and more satisfying from a legal point of view for the UNSC to directly authorize France to use force beyond the restricted situations of paragraph 18 of Resolution 2100 – but maybe France was not ready to accept this, for reasons related to domestic policies and the announcement to the French people that 'now that the UN takes over' France will progressively withdraw its troops from Mali. All things considered, it is probable that the conflict in Mali will remain for some time yet between the latitude of UNSC authorization and the longitude of unilateral intervention by invitation.