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THE FRENCH MILITARY INTERVENTION IN MALI, COUNTER-TERRORISM, AND THE LAW OF ARMED CONFLICT[©]

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I. Introduction

Non-state armed groups are increasingly a source of global insecurity.¹ Developing and fragile states in Africa are especially vulnerable to myriad terrorist groups and transnational criminal organizations that seek to exploit the inability of poorer countries to contain them.² The threats in these regions are, however, not only dangers to those on the African continent. As the 1998 bombings of the U.S. Embassies in Kenya and Tanzania demonstrated with brutal

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¹ See ROBERT MANDEL, DARK LOGIC: TRANSNATIONAL CRIMINAL TACTICS AND GLOBAL SECURITY 1, 17 (2011).

² *Id.* at 23.

lethality, Africa-based terrorist groups can also threaten the interests of the United States and other countries.³ In that regard, the region in Africa known as the Sahel⁴ represents a growing international security concern due to its ungoverned spaces in which transnational criminal networks, extremist groups, narcotraffickers, and terrorist organizations operate.⁵ Emphasizing the dangers faced in the region, the U.N. Security Council, in a resolution focusing on peace and security in Africa, has expressed “serious concern about the insecurity and rapidly deteriorating humanitarian situation in the Sahel region, which is further complicated by the presence of armed groups and terrorist groups and their activities,” as such malevolent elements “threaten the peace, security and stability of regional States.”⁶

The Republic of Mali is a specifically important Sahalean country, which has been plagued for decades by cycles of violence and insecurity.⁷ Mali has long been considered the Sahelean country that is

³ See Office of the Press Secretary, *Fact Sheet: Partnering to Counter Terrorism in Africa*, WHITE HOUSE (Aug. 06, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/06/fact-sheet-partnering-counter-terrorism-africa> (noting, “As the 1998 bombings of the U.S. Embassies in Kenya and Tanzania underscored, Africa-based terrorists threaten the interests of the United States in addition to those of our African partners”).

⁴ Chester A. Crocker & Ellen Laipson, *The Latest Front in a Long War*, N.Y. TIMES, Mar. 7, 2013, http://www.nytimes.com/2013/03/08/opinion/global/the-sahel-is-the-latest-front-in-a-long-war.html?_r=0 (The Sahel divides the Sahara desert from the grasslands to the south. The unstable region stretches 3,400 miles west to east across parts of Senegal, Mauritania, Mali, Algeria, Niger, Chad, Sudan, South Sudan and Eritrea. Militias roam the region trafficking in drugs and arms, seizing hostages for ransom, and trading livestock.) The Sahel is a semi-arid area that “marks the physical and cultural divide between the continent’s more fertile south and Saharan desert north.” See *SAHEL: Backgrounder on the Sahel, West Africa’s poorest region*, IRIN (June 2, 2008), <http://www.irinnews.org/report/78514/sahel-backgrounder-on-the-sahel-west-africa-s-poorest-region>. The word “Sahel” is derived from the Arabic word “sahil,” which means shore. *Id.*

⁵ See John Campbell, *Does Washington Have a Stake in the Sahel?*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2014), <http://www.cfr.org/africa-sub-saharan/does-washington-have-stake-sahel/p32195>; President Barack Obama, State of the Union Address to the Congress of the United States (Jan. 28, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>. (“In Yemen, Somalia, Iraq, and Mali, we have to keep working with “partners to disrupt and disable [terrorist] networks.”).

⁶ See S.C. Res. 2056, U.N. Doc. S/RES/2056 (July 5, 2012) (Peace and security in Africa).

⁷ See Johnnie Carson, Assistant Sec’y, Bureau of African Affairs, U.S. State Dep’t, Testimony before the House Committee on Foreign Affairs (Feb. 14, 2013), *available at* <http://www.state.gov/p/af/rls/rm/2013/204778.htm>; see also Edward Cody, *France’s*

the most prone to Islamist destabilization⁸ – and the events that occurred in 2012-2013 validated that assertion.⁹ The internal conflict that erupted in Mali during that time, in which terrorist groups exploited existing identity cleavages and tore the country in two, serves as a fascinating study in 21st century conflict and counter-terrorism.¹⁰ Although an internal conflict, its origins were, in many ways, transnational – and resulted in the eventual intervention by French military forces. The ensuing military operation, in which French forces aligned with the Malian government against a complex grouping of non-state armed groups and terrorist organizations, provides a worthy object of study for military strategists and counter-terrorism experts.¹¹ In addition, as this article demonstrates, the French intervention in Mali is notable from an international legal perspective. This is because the legality of the French intervention in Mali rests, in part, on international legal concepts that straddled the shadow line between accepted international legal norms and the *lex ferenda* of the law of armed conflict, specifically: (a) the U.N. Security Council’s implied authorization for the intervention, which was based on ambiguous language in various U.N. Security Council resolutions, and (b) the notion of intervention by invitation in an internal armed conflict. Both the ideas of “implied authorization” and “intervention by invitation” as bases for the use of military force are

Hollande sends troops to Mali, WASH. POST, Jan. 11, 2013 (“The slide into political chaos in northern Mali concerns the West for several reasons, including the possible spillover of militancy and weapons to neighboring nations and the relative ease with which West Africa-based militants might attack Europe.”).

⁸ See Anouar Boukhars, *The Paranoid Neighbor: Algeria and the Conflict in Mali*, in PERILOUS DESERT: INSECURITY IN THE SAHARA 89 (Frederic Wehrey & Anouar Boukhars eds., 2013)

⁹ See Magdalena Tham Lindell & Kim Mattsson, *Transnational Threats to Peace and Security in the Sahel: Consequences in Mali*, SWED. DEF. RESEARCH AGENCY (June 2014),

<http://www.foi.se/Documents/Tham%20Lindell%20och%20Mattsson,%20Transnational%20Threats%20to%20Peace%20and%20Security%20in%20the%20Sahel,%20FOI-R--3881--SE,%202014.pdf> (noting that violent separatism, armed Islamism and transnational organized crime “form a complex nexus that led to the collapse of state control in northern Mali in 2012 and that now complicates the re-establishment of state authority and contributes to insecurity in the wider region”).

¹⁰ See, e.g., Michael A. Sheehan & Geoff D. Porter, *The Future Role of U.S. Counterterrorism Operations in Africa*, COMBATING TERRORISM CTR. (Feb. 24, 2014), <https://www.ctc.usma.edu/posts/the-future-role-of-u-s-counterterrorism-operations-in-africa> (“France’s Operation Serval in Mali may provide many lessons for how to contain the threat by using carefully coordinated coalition operations.”).

¹¹ *Id.*

contested concepts in international law. This has led some commentators to express doubts regarding the legality of the French intervention.¹²

This article posits that while criticism based on the seeming selectivity of U.N. approval may be warranted,¹³ the changing nature of armed conflict and the threats posed by non-state armed groups and terrorist organizations operating in ungoverned spaces has led, prudentially, to a more generous view of the legality of the use of military force by intervening states against non-state armed groups in weak states or ungoverned spaces, both in terms of accepting invitation as a legal basis for the use of force and in permitting implied authorization for the use of force. Otherwise stated, the new paradigm of armed conflict has served as a catalyst for a degree of international legal evolution. In that regard, Vidan Hadzi-Vidanovic, a lawyer in the Registry of the European Court of Human Rights, has asserted that the specific approach seen in the French intervention in Mali “presents a fine mixture of a long-awaited effective and responsive collective security system and the preservation of the importance of state sovereignty.”¹⁴

Through an analysis of the conflict in Mali and the legal authority for the French military intervention, this article explores the contours of this changing international legal landscape. This article examines relevant provisions of the France-Mali Status of Forces Agreement (SOFA) to analyze what state practice can be derived from that document, and posits that the French intervention in Mali represents a subtle shift in

¹² See, e.g., Isaline Bergamaschi & Mahamadou Diawara, *French Military Intervention in Mali*, in PEACE OPERATIONS IN THE FRANCOPHONE WORLD: GLOBAL GOVERNANCE MEETS POST-COLONIALISM 143 (Bruno Charbonneau and Tony Chafer eds., 2014); see also Brian Lee Crowley & Robert Murray, *Is the French intervention in Mali even legal?*, THE RECORD (Jan. 16, 2013), <http://www.therecord.com/opinion-story/2621676-is-the-french-intervention-in-mali-even-legal/> (“Mali highlights once more that interventionism is an inherently selective strategy with little grounding in law or international institutions. As fighting intensifies, and calls for more western states to assist their allies become louder, the Security Council may be asked to rule on intervention yet again, but with no clearer principles this time than before.”); see also THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 151 (2009) (noting “the United Nations’ lack of reaction against France’s ouster of the head of the former Central African Empire”).

¹³ See, e.g., Crowley & Murray, *supra* note 12.

¹⁴ See Vidan Hadzi-Vidanovic, *France Intervenes in Mali Invoking both SC Resolution 2085 and the Invitation of the Malian Government – Redundancy or Legal Necessity?*, EJIL: TALK! (Jan. 23, 2013), <http://www.ejiltalk.org/france-intervenes-in-mali-invoking-both-sc-resolution-2085-and-the-invitation-of-the-malian-government-redundancy-or-legal-necessity/#more-7474>.

international law vis-à-vis military force in counter-terrorism operations. This article then considers the implications of that subtle shift for U.S. counter-terrorism operations when U.S. forces are arrayed against non-state armed groups in ungoverned spaces.

II. The Rise of the Conflict in Mali

Before analyzing the international legal characteristics of the French intervention, it is worth detailing the history of the conflict in Mali. The crisis in northern Mali, as is the case with almost any armed conflict, is rooted in the history of the region. The course of events that led to the crisis in northern Mali and subsequent French intervention, however, is most immediately traced to the political upheaval (commonly referred to as “the Arab Spring”) that occurred throughout North Africa and the Middle East in 2011. The effects of that phenomenon produced forces that overwhelmed the capabilities of the Malian state and permitted non-state actors to rise to dominance.

A. The Tuareg, the Arab Spring, and the MNLA

The Tuareg are a nomadic group that inhabit much of northern Mali, as well as neighboring Algeria, Niger, and Libya, and have generally dominated the central Sahara desert. In most cases, the Tuareg live alongside other ethnic groups, above all Arabs and Songhay, who sometimes ally with, and sometimes fight against, the Tuareg. In the Sahelian states (Mali and Niger), Tuareg and Arabs have had turbulent relations with the post-colonial states, and some Tuareg factions, seeking autonomy, have led several rebellions. The Tuareg, of course, are not a monolithic group. Rather, they are divided by clan, tribe, and caste, and are only loosely organized into tribal confederations, each with political and social hierarchies.¹⁵ Certain Tuareg factions have consistently

¹⁵ STEPHANIE PEZARD & MICHAEL SHURKIN, TOWARD A SECURE AND STABLE NORTHERN MALI: APPROACHES TO ENGAGING LOCAL ACTORS 6 (2013), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR296/RAND_RR_296.pdf (“Tuaregs have historically organized themselves into confederations divided by caste and clan and both horizontal and vertical hierarchies. In brief, each confederation consists of numerous clusters of noble clans, with each cluster associated with clusters of subordinate clans as well as artisan clans and former slave clans. At the top of the system is a (usually elected) chief known as an amenokal. Some noble clans and amenokals have derived their legitimacy historically from their warrior status—they protected

agitated for autonomy in northern Mali and have been the source of numerous rebellions since colonial penetration into Africa,¹⁶ though Stephanie Pezard and Michael Shurkin caution that “it is seldom, if ever, the case that all Tuaregs or Arabs make common cause and rebel. On the contrary, Mali’s Tuareg rebellions have always been the work of a few specific clans seeking specific objectives.”¹⁷ References to the Tuareg as a general group, therefore, must take into account a degree of internal diversity and political individuation.¹⁸

The Tuareg were pushed, in recent decades, “into a state of nearly perpetual crisis”¹⁹ caused by environmental factors, such as drought, and neglect by the Malian government. This prompted many Tuareg to travel to Libya, where the government of Muammar Qadhafi actively recruited them to serve in his military due to their reputation for desert warfare – assigning them into special brigades within the Libyan army. Qadhafi would eventually incorporate the Tuareg into a paramilitary force called the Islamic Legion,²⁰ which saw active combat in Chad, the Middle East, and South Asia.²¹ Peter Gwin notes that Qadhafi considered the Tuareg

vassals—while others combined warrior status with prestige associated with Islamic credentials and pretensions to descent from Islamic notables close to the Prophet Mohammed.”).

¹⁶ Berny Sèbe, *A Fragmented and Forgotten Decolonization: The End of European Empires in the Sahara and Their Legacy*, in *THE ART OF CREATING A STATE* 113, 119 (2014), available at <http://www.bak-utrecht.nl/media/attachments/W1siZiIsIjU0NWNiNTBmMzU0MWRIZjdhOTAwMDAwOCJdXQ?sha=3f12582d>.

¹⁷ See PEZARD & SHURKIN, *supra* note 15, at 7.

¹⁸ LIEUTENANT COLONEL KALIFA KEITA, *CONFLICT AND RESOLUTION IN THE SAHEL: THE TUAREG INSURGENCY IN MALI* 6 (1998), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub200.pdf> (“Though they have a common language and recognize a shared ethnicity, Tuaregs are divided by tribe and clan. Tuareg society also is highly stratified by caste, including well-defined categories of nobles, freemen, and slaves. In traditional Tuareg society, nobles and freemen depended on their slaves for manual labor. Tuareg histories suggest that until the advent of the colonial era, tribes and clans constantly were engaged in shifting coalitions of alliance and hostility as they competed with each other (and with neighboring peoples) for scarce water, grazing, and control of the trans-saharan trade routes.”).

¹⁹ See PEZARD & SHURKIN, *supra* note 15, at 5.

²⁰ See Laura Grossman, *Into the Abyss in Mali*, *J. INT’L SEC. AFFAIRS*, Dec. 16, 2013, at 66.

²¹ Azam Jean-Paul et al., *CONFLICT AND GROWTH IN AFRICA: THE SAHEL* 168 (1999); see also Keita, *supra* note 18, at 13 (“Qadhafi incorporated some Tuareg volunteers into his regular military forces. Others, he inducted into a Libyan sponsored Islamic Legion from which he subsequently dispatched Islamic militants to Lebanon, Palestine, and Afghanistan. By the mid 1980s, some of Qadhafi’s Tuareg volunteers had acquired

to be “the military cornerstone for his dream of building a united Muslim state in North Africa.”²²

Long before AQIM arrived in northern Mali and began cultivating its relationships with the Berbiche tribes, Muammar Qaddafi had been building deep relationships with Mali’s Tuareg communities, which have long felt disenfranchised by the ruling powers in Bamako. In the 1980s, he broadcast radio appeals to young Tuareg from Mali and Niger to come to Libya to join his military. Thousands responded and were organized in isolated training camps and deployed in special units loyal to Qaddafi personally.²³

Emphasizing the interconnected nature of the regional political landscape, the catalyst for the most dramatically effective Tuareg rebellion would not originate from within Mali or Libya but, instead, would occur in a distant country to the north. On December 17, 2010, a young Tunisian man named Mohammed Bouazizi, in an act of protest, set himself on fire in front of the local government offices in the town of Sidi Bouzid,²⁴ setting in course the Arab Spring²⁵ and its destabilizing political shockwaves. As the disruptive effects of that phenomenon pulsed out from its Tunisian epicenter, protests began in Libya against Qadhafi’s brutal and autocratic rule. On October 20, 2011, Libyan

considerable combat experience in the various conflicts of the Near East and South Asia.”).

²² See Peter Gwin, *Former Qaddafi Mercenaries Describe Fighting in Libyan War*, PULITZER CTR. ON CRISIS REPORTING (Aug. 2011), <http://pulitzercenter.org/reporting/libya-qaddafi-tuareg-rebels-war-obama>.

²³ *Id.*

²⁴ See MARC LYNCH, *THE ARAB UPRISING: THE UNFINISHED REVOLUTIONS OF THE NEW MIDDLE EAST* 7 (2012) (“The uprisings that have profoundly shaped the Middle East began in a remote outpost of southern Tunisia on December 17, 2010, with the self-immolation of an unknown young man named Mohammed Bouazizi in protest against abusive and corrupt police.”); see also Wyre Davies, *Doubt over Tunisian ‘martyr’ who triggered revolution*, BBC NEWS, June 16, 2011.

²⁵ See LYNCH, *supra* note 24; see also Asher Susser, *The “Arab Spring”: The Origins of a Misnomer*, FOREIGN POLICY RESEARCH INST. (Apr. 2012), <http://www.fpri.org/articles/2012/04/arab-spring-origins-misnomer> (“The tumultuous events that have swept through the Middle East during the last year or so were widely referred to in the West as the ‘Arab Spring’”).

rebels, with the assistance of NATO countries, killed Qadhafi and extirpated all remnants of Qadhafi and his government.²⁶

The fall of Qadhafi, however, unleashed a variety of unforeseen political forces and created tertiary effects, which would have negative consequences for regional stability.²⁷ When the Libyan revolution ousted Qadhafi, large numbers of Tuareg returned from Libya to Mali, many of whom were trained and armed as a result of their time serving in Libya's military.²⁸ As one scholar described it:

As his regime disintegrated, thousands of Tuareg, fearful of a backlash, began returning to northern Mali and Niger, putting immense pressure on already impoverished communities. As they left, many Tuareg fighters were able to smuggle weapons out of Libya's well-stocked armories.²⁹

Qadhafi's fall meant the end of Libyan support of the Tuareg and, consequently, a return to the territory of a sovereign many Tuareg had come to despise. This bears a resemblance to an earlier armed exodus of Tuareg after the dissolution of the Libyan-financed Islamic Legion in the 1980s, which also brought armed and trained Tuareg back to Mali – a factor that is credited with laying the groundwork for the Tuareg rebellion in Mali in 1990.³⁰ It is also not difficult to draw parallels between the return of militarized Tuareg to Mali and the foreign fighter phenomenon that is now of acute concern to the United States and European countries.

The post-Qadhafi wave of armed Tuareg returnees from Libya vitalized already-existing non-state armed groups in northern Mali and

²⁶ See *Libyan Law Enforcement Trained on TiP*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/middleeastandnorthafrica/en/web-stories/libyan-law-enforcement-trained-on-tip-and-som.html> (noting, “Having recently emerged from a historic revolution inspired by the Arab Spring, Libya is going through a delicate post -conflict transitional period that offers both opportunities and challenges”) (last visited Apr. 29, 2015).

²⁷ See Gwin, *supra* note 22 (describing a conversation with a Tuareg officer in the Malian army in which the Tuareg officer stated, “If Qaddafi goes, it’s going to be very bad for Mali” and that “[i]f Qaddafi is killed or loses power, [the Tuareg] will all have to leave. The Arabs won’t let them stay”).

²⁸ See Grossman, *supra* note 20, at 66.

²⁹ See Gwin, *supra* note 22.

³⁰ See Keita, *supra* note 18, at 1, 14.

exacerbated tensions in the region. One of these groups was the Movement for the Liberation of Azawad (MNLA), a Tuareg rebel group that was formed for the stated purpose of creating an independent state in northern Mali.³¹ The MNLA has been described as a “secular separatist Tuareg rebel group” and is led by Bilal Ag Cherif, an Ifoghas Tuareg, and his deputy, Mahamadou Djeri Maiga, who is an ethnic Songhay.³² This group, “composed of a mosaic of armed groups bound by loose loyalties and conditional alliances,”³³ launched a rebellion against the government of Mali in 2012.³⁴ The MNLA found assistance in its cause from Islamist and terrorist organizations operating the region, namely al-Qaeda in the Islamic Maghreb (AQIM),³⁵ Ansar Dine,³⁶ and the Movement for Oneness and Jihad in West Africa (MUJWA). These combined forces succeeded in posing a far greater challenge to the Malian military than had been the case in earlier insurrections.³⁷ Their convergence marked a significant point in the downward spiral that would result in Mali’s fracturing.

B. Captain Sanogo’s Coup and Mali’s Downfall

An African proverb states that a village without a leader is destroyed by a single enemy³⁸ – and this ancient saying would prove prescient in

³¹ Grossman, *supra* note 20, at 66.

³² See May Ying Welsh, *Making sense of Mali’s armed groups*, ALJAZEERA (Jan. 17, 2013), <http://www.aljazeera.com/indepth/features/2013/01/20131139522812326.html>. The Songhai are an African ethnic group that primarily inhabit southeastern Mali. The Songhai include many regional subgroups and are mostly subsistence farmers. See 2 ANTHONY APPIAH & HENRY LOUIS GATES, *ENCYCLOPEDIA OF AFRICA* 404 (2010).

³³ See Boukhars, *supra* note 8, at 91.

³⁴ See Grossman, *supra* note 20, at 67.

³⁵ See DONA J. STEWART, *WHAT IS NEXT FOR MALI? THE ROOTS OF CONFLICT AND CHALLENGES TO STABILITY* 41 (2013) (“AQIM pursued an integration strategy in Mali; marriage with locals has proven effective in developing strong, local ties. For example, Mokhtar Belmokhtar, an Algerian AQIM leader, married a Tuareg woman, the daughter of one of the chiefs of the Arab Barabicha tribe in Northern Mali.”)

³⁶ *Id.* at 42 (“Ansar Dine, also known as ‘Defenders of the Faith,’ rose out of a splintering inside the Tuareg nationalist movement. The group was founded in November 2011 and led by the influential Tuareg nationalist leader, Iyad ag Ghali. Ag Ghali had become a follower of the fundamentalist Islamist group, Tabligh I Jumaat, and was subsequently sidelined by the broader nationalist movement. Ag Ghali rejected the MNLA goal of independence, instead stating that the imposition of sharia, rather than independence should be the primary goal.”).

³⁷ See Boukhars, *supra* note 8, at 91.

³⁸ See JOHN PAUL II, *OUR COUNTRY – OUR RIGHTS AND RESPONSIBILITIES: A CIVIC EDUCATION GUIDE FOR SECONDARY SCHOOL TEACHERS AND STUDENTS IN UGANDA* 32,

Mali, where internal political developments exacerbated the process of state implosion. In March 2012, a Malian Army captain named Amadou Sanogo launched a coup against the Malian government, ostensibly motivated by the lack of perceived support by the Malian government for the Malian military effort against the Tuareg rebellion.³⁹ Captain Sanogo and his followers were able to seize power and proceeded to suspend Mali's constitution, but they were not able to mount an effective counteroffensive against the MNLA and the other the non-state armed groups in northern Mali. Moreover, the coup was the source of extensive international criticism, resulting in Mali's ostracization on the international stage. Mali was, as a result, suspended from the Economic Community of West African States (ECOWAS) and sanctions were imposed.⁴⁰

On March 22, 2012, the deposed Malian president, Amadou Toumani Toure, officially resigned. With his resignation, Malian army leaders stepped down and began the transition back to democratic rule.⁴¹ Thereafter, Dioncounda Traore, the head of Mali's national assembly (and a former Malian army paratrooper), took over as Mali's interim president.⁴² But the political transition could not fully assuage the negative effects of the disarray in Mali's government, and the amalgam of non-state armed groups opportunistically seized on this moment of frailty.

Taking advantage of the political upheaval in Bamako, the MNLA pressed its advantage. On April 2nd, the MNLA seized major cities in the north, including Gao, Kidal, and Timbuktu. Days later, the group announced a cease-fire, claiming that they had enough land to form their own state of Azawad. The country was thus effectively split in two, with Bamako in control of the south and the rebels holding the north.⁴³

available at <http://jp2jpc.org/downloads/Manual%20for%20Civi%20Education%20.pdf> (undated).

³⁹ See Grossman, *supra* note 20, at 67.

⁴⁰ *Id.*

⁴¹ See *Profile: Mali's Dioncounda Traore*, ALJAZEERA (Apr. 12, 2012), <http://www.aljazeera.com/news/africa/2012/04/20124917549965212.html>.

⁴² *Id.*

⁴³ See Grossman, *supra* note 20, at 67.

Soon after the rebel victories in the north, on May 26, 2012, the MNLA and Ansar Dine merged to form an Islamist state in Mali's north, imposing a variant of Islamic law on its inhabitants.⁴⁴ Ansar Dine, however, then splintered from the more secular MNLA and, with the help of MUJAO, pushed MNLA out of key cities like Gao, taking control of northern Mali.⁴⁵ With Ansar Dine's ascendance came a more radical interpretation of Islamic law, which included severe punishments for those violating its precepts, the enforcement of strict codes of dress, and the destruction of cultural property.⁴⁶ Further indications were that these non-state armed groups would not be content with controlling Azawad in the north. At the beginning of January 2013, elements of various terrorist groups moved towards the south, capturing the town of Konna and threatening the city of Mopti.⁴⁷

C. Diplomatic Engagement and U.N. Response Before the French Intervention

The months preceding the French intervention were marked by robust diplomatic engagement by Malian authorities, as well as their European and U.S. counterparts.⁴⁸ Malian leadership acutely understood the gravity of the situation and began aggressively seeking military assistance. The interim president reached out to ECOWAS shortly after taking power⁴⁹ and, as noted, would eventually reach out to France as well. France, in turn, was also engaging on the diplomatic front.⁵⁰

⁴⁴ *Id.* at 68.

⁴⁵ *Id.*

⁴⁶ *Id.* at 67.

⁴⁷ *Mali*, FR. AT THE UNITED NATIONS, <http://www.franceonu.org/france-at-the-united-nations/geographic-files/africa/mali-1202/article/mali> [hereinafter France, Mali].

⁴⁸ See Anne Gearan, *U.S. pushes Algeria to support military intervention in Mali*, WASH. POST, Oct. 29, 2012, http://www.washingtonpost.com/world/us-pushes-algeria-to-support-military-intervention-in-mali/2012/10/29/fee8df44-21a3-11e2-92f8-7f9c4daf276a_story.html ("The United States joined France in a diplomatic lobbying campaign Monday to win key Algerian support for an emergency military intervention in northern Mali, where al-Qaeda-linked militants are waging a terror campaign that the Obama administration warns could threaten other nations.").

⁴⁹ See *Mali requests military assistance to free north: France*, REUTERS (Sept. 4, 2012), <http://www.reuters.com/article/2012/09/05/us-mali-ecowas-troops-idUSBRE88403120120905>.

⁵⁰ See *UN Security Council backs French intervention in Mali*, DW (Jan. 15, 2013), <http://www.dw.de/un-security-council-backs-french-intervention-in-mali/a-16521496> [hereinafter *UN Backs French in Mali*]; see also Faith Karimi & Katarina Hoije,

The international community and U.N. machinery began to react. On October 12, 2012, the U.N. Security Council passed U.N. Security Council Resolution 2071, which called upon member states to “provide as soon as possible coordinated assistance, expertise, training and capacity-building support to the Armed and Security Forces of Mali, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups[.]”⁵¹

This was repeated on December 20, 2012, when the U.N. Security Council passed resolution 2085, which called on member states to “provide coordinated assistance” to Malian forces in order to “restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups” and that further invited those states “to regularly inform the Secretariat of their contributions[.]”⁵² That same resolution called for “an African-led International Support Mission in Mali (AFISMA),” which was to be deployed “for an initial period of one year” and which was “[t]o 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.”⁵³

International leaders push for military intervention in Mali, CNN (Oct. 19, 2012), <http://www.cnn.com/2012/10/19/world/africa/mali-intervention-meeting>.

⁵¹ S.C. Res. 2071, ¶ 9, U.N. Doc. S/RES/2071 (2012).

⁵² S.C. Res. 2085, U.N. Doc. S/RES/2085 (2012) (“Urges Member States, regional and international organizations to provide coordinated assistance, expertise, training, including on human rights and international humanitarian law, and capacity-building support to the Malian Defence and Security Forces, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, further invites them to regularly inform the Secretariat of their contributions[.]”).

⁵³ See Grossman, *supra* note 20, at 68.

On January 10, 2013, terrorist groups attacked Konna, which placed them only 48 hours away from Bamako, Mali's capital city.⁵⁴ The French response was immediate.⁵⁵

France responded within a matter of hours by redirecting [nearby Special Forces] assets to do what they could to stop the Islamist offensive and, in effect, pushing the button that set in motion the French military's emergency-alert system and focused France's military resources around the Herculean task of getting forces to the fight and sustaining them.⁵⁶

On that same day, the U.N. Security Council issued a press statement in which it noted that "[t]he members of the Security Council reiterate their call to 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."⁵⁷ The very next day, on January 11, 2013,⁵⁸ France began to deploy additional military personnel to the region to assist Malian efforts against the rebels – and Operation Serval began.⁵⁹

Michael Shurkin, in his detailed analysis of Operation Serval, notes that while France had no forces in Mali on January 10, there were French military assets stationed nearby, including 250 soldiers in Dakar, Senegal; 950 troops and Mirage 2000D fighter jets based in Ndjamen, Chad; 450 soldiers in Côte d'Ivoire; and a special-operations contingent in the region, which was part of a counter-terrorism operation known as Operation Sabre and which was based in Ouagadougou, Burkina Faso.⁶⁰ As a consequence, France was able to immediately redirect its nearby special-operations forces (Sabre) to Mali even as it began to deploy

⁵⁴ MICHAEL SHURKIN, *FRANCE'S WAR IN MALI: LESSONS FOR AN EXPEDITIONARY ARMY* 7 (2014), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR700/RR770/RAND_RR770.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Press Release, Security Council, Press Statement on Mali, U.N. Press Release SC/10878-AFR/2502 (Jan. 10, 2013), available at <http://www.un.org/News/Press/docs//2013/sc10878.doc.htm> [hereinafter Security Council Press Statement].

⁵⁸ See France, Mali, *supra* note 47.

⁵⁹ See Grossman, *supra* note 20, at 69.

⁶⁰ See SHURKIN, *supra* note 54, at 7.

conventional forces.⁶¹ France also started facilitating the movement of allied African forces into the battle space.⁶² Shurkin notes that “[t]he French deployment topped out at 4,000, while the combined African forces reached 6,400—2,300 of which were Chadians.”⁶³

French diplomatic efforts persisted through the initial deployment of French troops. As French military forces touched down in Mali, French diplomats were engaging with U.S. and European partners, as well as the U.N.⁶⁴ Almost immediately after the initial deployment of French troops, Gerard Araud, French Ambassador to the United Nations, announced that he had met with all members of the Security Council and obtained the support of all 14 members for the French intervention.⁶⁵

D. Epilogue to a Counter-terrorism Effort

During the course of Operation Serval, French armed forces conducted major combat operations and, through the use of military force, curtailed the operational capabilities of the non-state groups and terrorist organizations that had threatened Mali. “Key militant logistical and operational bases were destroyed in ground and air operations, while drug-trafficking networks, considered a significant revenue-generating industry for Sahel- and Maghreb-based terrorist groups, were similarly dismantled.”⁶⁶ In the course of French operations, numerous terrorists were killed, including Ahmed el Tilemsi, founder of MUJAO, leader of Belmokhtar's Al-Murabitoun group in Mali, and a U.S.-declared “specially designated global terrorist.”⁶⁷

The opposing alliance of non-state armed groups also degraded and splintered. The relationship had already begun to deteriorate between the more secular MNLA and the more Islamist groups, Ansar Dine and

⁶¹ *Id.* at 13.

⁶² *Id.*

⁶³ *Id.* at 16.

⁶⁴ *UN Backs French in Mali*, *supra* note 50.

⁶⁵ *Id.*

⁶⁶ See Ryan Cummings, *Mali's Elusive Peace*, THE GLOBAL OBSERVATORY (Oct. 17, 2014), <http://theglobalobservatory.org/2014/10/mali-elusive-peace-minusma-serval/>.

⁶⁷ See Bill Roggio & Caleb Weiss, *French troops kill MUJAO founder during raid in Mali*, THE LONG WAR J., Dec. 11, 2014; see also Press Release, U.S. Dep't of State, Terrorist Designations of the Movement for Unity and Jihad in West Africa, Hamad el Khairy, and Ahmed el Tilemsi (Dec. 7, 2012), *available at* <http://www.state.gov/r/pa/prs/ps/2012/12/201660.htm>.

MUJAO – and, after a schism emerged, the Islamists expelled MNLA from the city of Gao.⁶⁸ Reports further indicate that Ansar Dine and MUJAO began fighting one another.⁶⁹ In fact, by the time the French were intervening in Mali, Ansar Dine had abandoned Timbuktu to MUJAO, and MNLA was openly seeking an alliance with French forces.⁷⁰

In July 2014, the French ended Operation Serval and transitioned to a new counter-terrorism operation called Operation Barkhane,⁷¹ which spanned the wider Sahel region.⁷² Operation Barkhane’s mission, which is ongoing at the time of this article’s publication, is to deploy French forces in support of the armed forces of France’s partners in the Sahel to counter “armed terrorist groups” and to prevent the reconstitution of terrorist sanctuaries in the region.⁷³ It consists of 3,000 French soldiers who are deployed across two permanent support bases in Gao (Mali) and N’Djamena (Chad).⁷⁴ Operations are generally carried out jointly with the Malian armed forces and have helped to neutralize hundreds of terrorists.⁷⁵ Operation Barkhane, therefore, has decidedly counter-terrorism focus. Day-to-day security in Mali is now the responsibility of a 6,500-strong United Nations stabilization force, which is known by its French acronym, MINUSMA.⁷⁶

⁶⁸ STEPHEN A. HARMON, TERROR AND INSURGENCY IN THE SAHARA-SAHEL REGION: CORRUPTION, CONTRABAND, JIHAD, AND THE MALI WAR OF 2012-2013, at 183 (2014) (quoting a Malian government official as stating, “MNLA started the rebellion. MNLA asked MUJAO to help them. MUJAO had bases across West Africa: Chad, Mauritania, Mali, Niger, especially Mauritania. MNLA did not have an Islamic agenda. They robbed, looted, and raped the people. MUJAO turned on MNLA because the people complained about the abuses of MNLA. MUJAO fought MNLA near Gao. Many MNLA fighters were killed, buried in mass graves, some of which are a few kilometers from Gao in the desert. The rest were driven from Mali. They [MNLA] fled to Burkina. The MNLA spokesman fled to France”).

⁶⁹ *Id.* at 203.

⁷⁰ *Id.* at 207.

⁷¹ See Caleb Weiss, *9 UN troops killed in Mali ambush*, THE LONG WAR J. (Oct. 4, 2014), http://www.longwarjournal.org/archives/2014/10/un_troops_killed_in.php#ixzz3PYiVw400.

⁷² See *France to deploy troops across Africa's Sahel region*, ALJAZEERA (July 14, 2014), <http://america.aljazeera.com/articles/2014/7/14/france-end-mali-offensive.html>.

⁷³ See *Opération Barkhane*, FR. MINISTRY OF DEF. (Nov. 8, 2014), <http://www.defense.gouv.fr/operations/sahel/dossier-de-presentation-de-l-operation-barkhane/operation-barkhane>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *François Hollande’s African adventures*, THE ECONOMIST, July 19, 2014.

Established by Security Council resolution 2100, MINUSMA seeks to support the Malian political process by “carry[ing] out a number of security-related stabilization tasks[.]”⁷⁷ It is worth noting that in its description of MINUSMA, the U.N. states that MINUSMA will be engaging in military operations against hostile elements in Mali.

The Mission would operate under robust rules of engagement with a mandate to use all necessary means to address threats to the implementation of its mandate, which would include protection of civilians under imminent threat of physical violence and protection of United Nations personnel from residual threats, within its capabilities and its areas of deployment. This could include the conduct of operations on its own or in cooperation with the Malian defence and security forces. French forces deployed in Mali were also authorized to intervene in support of MINUSMA when under imminent and serious threat upon request of the Secretary-General.⁷⁸

Reports indicate that MINUSMA continues to engage with hostile forces in Mali.⁷⁹ For instance, in January 2015, MINUSMA confirmed it used force in response to machine-gun fire directed at its troops and a town inhabited by civilians.⁸⁰

Although French troops remain, providing a “parallel force alongside MINUSMA,”⁸¹ MINUSMA has been viewed as an insufficient replacement for the higher numbers of French forces that were deployed

⁷⁷ See *United Nations Stabilization Mission in Mali*, UNITED NATIONS, (<http://www.un.org/en/peacekeeping/missions/minusma/background.shtml>) (last visited Apr. 29, 2015).

⁷⁸ *Id.*

⁷⁹ See Weiss, *supra* note 71 (“Although most UN deaths in Mali have been caused by IEDs or landmines detonated under vehicle convoys, at least 15 suicide bombing attacks have taken place in Mali since the first one in February 2013. In addition to the 12 suicide attacks in Mali tallied by The Long War Journal as of May 2013, suicide attacks were also carried out in September 2013 and in July and August of this year. Al Qaeda in the Islamic Maghreb (AQIM), al Qaeda’s official affiliate in North Africa, took responsibility for the Aug. 16 suicide bombing that killed two UN troops in Ber, a town close to Timbuktu.”).

⁸⁰ See *Mali: UN mission wards off rebel attack; urges armed groups to respect ceasefire*, UNITED NATIONS (Jan. 21, 2015), (<http://www.un.org/apps/news/story.asp?NewsID=49866>).

⁸¹ See Peter Nadin, *UN Peacekeeping in Mali: A Pre-history*, UNITED NATIONS UNIV. (July 29, 2013), (<http://unu.edu/publications/articles/un-peacekeeping-in-mali.html>).

during Operation Serval. Only 1,000 French soldiers remain deployed in Mali in comparison to the 4,000 that were deployed during Operation Serval.⁸² Citing ongoing security concerns, the decreased French troop level, and the limited nature of MINUSMA's mandate, commentators note that the successes of Operation Serval may not be maintained.⁸³

III. The United Nations and the Legal Language of Collective Security

Since the termination of World War I, the global international security framework has been based on the concept of "collective security."⁸⁴ This security framework is centered around the United Nations, which (in theory) maintains a degree of primacy over the use of force by member states. Article 2(4) of the U.N. Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." The authority to control the use of force finds expression in the United Nations Security Council,⁸⁵ which, under the Charter, may authorize member states to use armed force in the territory of another if it determines that there is a "threat to the peace, breach of the peace, or act of aggression."⁸⁶

⁸² *François Hollande's African adventures*, *supra* note 76.

⁸³ See Cummings, *supra* note 66 ("The inevitable void which has accompanied the French withdrawal from northern Mali is simply not being filled by MINUSMA. While the peacekeeping mission has established a presence in several northern towns and settlements, a lack of human and logistical resources, particularly that of aerial capabilities, is severely hampering its effectiveness. Its deficiencies are also unlikely to be resolved in the interim."); see also Sofia Sebastian, *Why Peace Negotiations in Mali Will Not Succeed*, INT'L RELATIONS AND SECURITY NETWORK, Apr. 27, 2015 ("From an operational standpoint, while the UN Security Council resolution that authorized MINUSMA acknowledged the roles of transnational crime and terrorism in the Malian conflict, the mission was not mandated to address these issues (given that peacekeeping missions are often over-extended and under-resourced, this was, to a certain degree, understandable). The mission's police, for example, have no authority to arrest suspected criminals or to assist with border security. Instead, they are assisting local police with capacity-building through a UN Police Transnational Organized Crime Cell co-located with Malian counterparts, but progress has been slow. The UN Secretary-General observed in December 2014 that transnational organized crime units in Mali remained ineffective due to a lack of resources.").

⁸⁴ See RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY 32-33 (2006).

⁸⁵ *Id.*

⁸⁶ See U.N. Charter art. 39.

Initially, the United Nations Charter envisioned that the use of armed force by member states would be channeled through the United Nations, which, pursuant to Article 43 of the Charter, would have at its disposal armed forces contributed by member states that were coordinated through U.N. organs.⁸⁷ Since the Charter's signing, the model for how the international community permits the use of force has evolved from one in which the U.N. would maintain international security through use of military forces at its disposal (a U.N. military force) to one in which the UN legitimates the use of force by individual member states (ad hoc coalitions of the willing).⁸⁸ Even so, it is worth noting that, under international law, the U.N. Security Council still retains legal primacy with regard to the legitimization of the use of force. As Dinstein notes, "the Council is empowered to employ force in the name of collective security, and the degree of latitude bestowed upon [the Security Council] by the Charter is well-nigh unlimited."⁸⁹ Indeed the "enlargement of the notion of threat to the peace," some commentators argue, has allowed the Security Council to authorize the use of force by member states for the purposes of "restoring democracy or public order."⁹⁰

The first instance of the Security Council authorizing a Member State to use force against another member state was U.N. Security Council Resolution 678, which was passed in reaction to Iraq's invasion of Kuwait in 1990.⁹¹ This authorization of military eviction and enforcement of sanctions was a significant step for the U.N. Security Council in which it "cross[ed] the conceptual Rubicon"⁹² by authorizing Member States to take direct military action against Iraq without any semblance of U.N. coordination over that action. Importantly that resolution authorized member states to use "all necessary means" to accomplish this goal – imbuing special significance on this phrase as indicating, in Security Council parlance, that military force was expressly authorized.⁹³ As Christine Gray notes, "Subsequent resolutions use either the phrase 'all necessary means' or 'all necessary measures'. There is no obvious significance in the distinction."⁹⁴

⁸⁷ See FRANCK, *supra* note 12, at 23-25.

⁸⁸ *Id.*

⁸⁹ See YORAM DINSTEIN, WAR AGGRESSION AND SELF DEFENSE 308 (2011).

⁹⁰ ANTONIO CASSESSE, INTERNATIONAL LAW 347 (2005).

⁹¹ S.C. Res. 678, U.N. Doc. S/RES/678 (1990).

⁹² See THAKUR, *supra* note 84, at 34.

⁹³ See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 328 n.5 (2008).

⁹⁴ *Id.*

On occasion, however, even when such language is absent, member states have based their use of force against another member state on the Security Council's "implied authorization."⁹⁵ The first attempt to rely on this theory was in 1993, when the United States and the United Kingdom established no-fly zones inside Iraqi territory.⁹⁶ Both the United States and United Kingdom argued that their military actions were consistent with U.N. Security Council resolution 688 – a resolution passed under Chapter VI (rather than Chapter VII). Despite the resolution's condemnation of "the repression of the Iraqi civilian population in many parts of Iraq,"⁹⁷ demand to end that repression, and insistence that Iraq permit humanitarian organizations access to those in need,⁹⁸ it did not expressly authorize the use of force. Although international criticism of this reliance on implied authorization was limited, due in part to the "power and influence of the United States and the unpopularity of Saddam Hussein,"⁹⁹ the idea of implied authorizations was far from being legitimated.

There have, nonetheless, been repeated instances of reliance on this theory since that time. For instance, the United States, the United Kingdom, and France relied on the theory of implied authorization as a basis for the use of force against Yugoslavia in 1999.¹⁰⁰ In that situation, the countries relied upon three Security Council resolutions (1160, 1199, and 1203) all of which were passed under Chapter VII of the U.N. Charter¹⁰¹ but none of which expressly authorized the use of military force.¹⁰² Another more controversial example is the U.S. reliance on Security Council resolutions 1441, 678, and 687 to justify intervention in Iraq in 2003.¹⁰³

Gray notes that the doctrine of implied authorization remains controversial and posits that reliance upon it by member states is problematic, as it could result in fewer resolutions passed under Chapter VII of the U.N. Charter because the Security Council will not wish to

⁹⁵ *Id.* at 366.

⁹⁶ *Id.* at 348-349.

⁹⁷ S.C. Res. 688, U.N. Doc. S/RES/688 (1991).

⁹⁸ *Id.*

⁹⁹ See MICHAEL BYERS, *WAR LAW* 40 (2005).

¹⁰⁰ See GRAY, *supra* note 93, at 366.

¹⁰¹ *Id.* at 352.

¹⁰² *Id.*

¹⁰³ See Ian Johnstone, *Implied Mandates*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 240-42 (Marc Weller ed., 2015) [hereinafter *OXFORD HANDBOOK*].

permit such a resolution to impliedly authorize the use of military force.¹⁰⁴ Others, however, have viewed reliance on implied authorization as a prudential device that the international system accepts out of necessity. Otherwise stated, “deliberate ambiguity can protect international law from permanent harm by cushioning it from the effects of deep political differences.”¹⁰⁵ As this article demonstrates, however, the situation in Mali represents an example of how implied authorization can emerge from its status as a tolerated nebulosity to a viable basis for the use of force by a member state with express Security Council approval.

IV. The France-Mali Status of Forces Agreement

The status of French forces in Mali is governed by a status of forces agreement between France and Mali, which was signed in Bamako on March 7, 2013, and at Koulouba on March 8, 2013 (the France-Mali SOFA).¹⁰⁶ In the exchange of letters, both countries note that they are “[g]ravelly concerned by the situation currently affecting the North of the territory of the Republic of Mali and anxious to respect [Mali’s] territorial integrity, bearing in mind the Charter of the United Nations and resolutions 2056 (2012), 2071 (2012) and 2085 (2012) of the Security Council, and the express request of the Malian Government[.]”¹⁰⁷ The agreement, therefore, enacted less than two months after the initial phase of the French intervention, sets forth the legal bases upon which the intervention rests and goes on to prescribe the

¹⁰⁴ See GRAY, *supra* note 93, at 366.

¹⁰⁵ See Johnstone, *supra* note 103, at 243.

¹⁰⁶ See Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force “Serval”, signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013 [Decree No. 2013-368 of 29 April 2013 Concerning the Publication of the Agreement in the Form of an Exchange of Letters between the Government of the French Republic and the Government of Mali determining the Status of Force “Serval”], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 30, 2013, p. 7426, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103> [hereinafter the France-Mali SOFA].

¹⁰⁷ *Id.* (author’s translation of “Gravement préoccupés par la situation qui affecte actuellement le Nord du territoire de la République du Mali et soucieux du respect de son intégrité territoriale, Ayant à l’esprit la Charte des Nations unies et les résolutions 2056 (2012), 2071 (2012) et 2085 (2012) du Conseil de sécurité, et la demande expresse du Gouvernement malien[.]”).

rules that will govern the conduct of military operations during the intervention.

Pursuant to this agreement, during the deployment of French troops in Mali, French troops are obligated to abide by the domestic law of Mali¹⁰⁸ but have a degree of immunity from prosecution by Malian authorities. Specifically, French troops in Mali are afforded the same privileges and immunities as those afforded to “experts on mission” under the U.N. Convention on Privileges and Immunities of 1946.¹⁰⁹ Such provisions are not uncommon in status of forces agreements and are a staple of the sorts of agreements associated with U.N. peacekeeping operations.¹¹⁰ Article VI, Section 22 of that Convention states that such personnel “performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions.”¹¹¹ This includes, “Immunity from personal arrest or detention and from seizure of their personal baggage.”¹¹² This type of immunity, however, is functional immunity (rather than full diplomatic immunity) and has limits.¹¹³ For instance, such functional immunity is only extended for

¹⁰⁸ *Id.* art. 1

¹⁰⁹ *Id.*

¹¹⁰ See Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT’L L. 103, 108-109 (2002) (“While military personnel are not covered by the 1946 Convention, they are usually granted immunities under Status of Forces agreements. In the cases of East Timor and Kosovo, where there is no host state, these guarantees are contained in agreements negotiated between the contributing states and the UN. Under the terms of Status of Forces or Military Technical Agreements, military forces in peacekeeping operations remain under the jurisdiction of the sending States, which retain the sole authority to waive immunity. In addition to the immunities granted to officials and experts under the Convention, individual agreements for Civilian Police [UNCIVPOL] are often negotiated between the sending State and the UN, which grant them additional immunity protections, up to and including absolute immunity.”).

¹¹¹ See Convention on the Privileges and Immunities of the United Nations art. VI, § 22, Feb. 13, 1946, 1 U.N.T.S. 15.

¹¹² *Id.*

¹¹³ See Veronica L. Maginnis, *Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOKLYN J. INT’L L. 989, 1013 (2003) (“Under the UN Convention there are four groups that receive immunity. The first group includes high level personnel, such as the Secretary-General and Assistant Secretaries-General, as well as representatives of Member States. These individuals receive diplomatic immunity. The second, third, and fourth categories include the organization itself, officials of the UN, and experts on mission. These three groups have functional immunity, rather than diplomatic immunity.”).

acts exercised in the performance of the relevant person's official duties. Potential exposure for French troops to Malian judicial process is still technically possible for acts that are not exercised in the performance of official duties.

Under the France-Mali SOFA, French military personnel are permitted to enter Mali without a visa, instead simply needing a military identity card.¹¹⁴ Under the agreement, French troops remain entirely under French command and are subject exclusively to French disciplinary authority;¹¹⁵ are permitted to travel without restriction throughout Mali (including through Malian airspace),¹¹⁶ and are permitted to maintain and carry the arms and munitions needed in execution of their mission.¹¹⁷ Both France and Mali mutually renounced causes of action for damage incurred to their personnel and equipment, with the exception of cases in which there was intentional damage by one of the parties or *faute lourde* (serious fault).¹¹⁸

Notably, the France-Mali SOFA also states that French troops will treat persons detained by French forces in accordance with both the law of armed conflict and international human rights law (“du droit international humanitaire et du droit international des droits de l’homme”),¹¹⁹ and it specifically refers to Additional Protocol II of the Geneva Conventions and the Convention Against Torture.¹²⁰ This is notable because Additional Protocol II of the Geneva Conventions expressly regulates non-international armed conflicts.¹²¹ Malian authorities are also obligated to treat detained persons in the same manner, and in cases where a person is transferred from French to Malian custody, Malian authorities may not carry out the death penalty or a punishment that is deemed cruel or inhumane even if such penalties are otherwise authorized under Malian law.¹²² Similarly, no person detained by French forces and transferred to Malian custody can be extradited to a third country without prior approval from French

¹¹⁴ See France-Mali SOFA, *supra* note 106, art. 2.

¹¹⁵ *Id.* art. 3.

¹¹⁶ *Id.* art. 5.

¹¹⁷ *Id.* art. 6.

¹¹⁸ *Id.* art. 9; see JASON BELL, SOPHIE BOYRON, & SIMON WHITAKER, PRINCIPLES OF FRENCH LAW 193 (1998) (defining *faute lourde* as serious fault).

¹¹⁹ See France-Mali SOFA, *supra* note 106, art. 10.

¹²⁰ *Id.*

¹²¹ See Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L L. STUD. 696, 705 (2013).

¹²² See France-Mali SOFA, *supra* note 106, art. 10.

authorities.¹²³ Likewise, the France-Mali SOFA expressly provides that the International Committee of the Red Cross (ICCR) and other human rights groups shall have access to such detained persons.¹²⁴ Under the agreement, therefore, the applicable legal regimes to govern the treatment of detainees are the rules relating to non-international armed conflict and international human rights law.

The France-Mali SOFA is, therefore, remarkable in a number of ways. It serves as a formal legal document that memorializes the countries' agreement that this intervention is permitted both pursuant to various U.N. Security Council resolutions and at the express invitation of the Malian government. It also provides French forces a wide range of permissible activity to facilitate military operations, while preserving Malian sovereignty through references to Malian law and compensation for damages occasioned, and through retaining the possibility for (albeit limited) assertions of Malian criminal jurisdiction. The agreement, thus, imbued the French intervention with a more cooperative character. Mali was not occupied; it was a partner with France against a shared threat. This framework helps legitimate the notion that French forces are present in Mali at the invitation of the Malian government and served to mute international legal objection to the French military intervention.

V. The Legal Bases for the Use of Force in Mali

French officials have asserted a number of legal bases to justify their military intervention into Mali. At the outset, vague references were made to international legal instruments, though no clear articulation of a solid legal basis for action was ever noted. The initial reference was

¹²³ *Id.* Media reports confirm that persons captured by French forces have been transferred to Malian authorities for extradition and deportation to third countries. *See, e.g., Le djihadiste Gilles Le Guen déféré devant la justice*, LE MONDE (May 17, 2013), http://www.lemonde.fr/afrique/article/2013/05/17/le-djihadiste-gilles-le-guen-defere-devant-la-justice_3298534_3212.html (“Le djihadiste français Gilles Le Guen, arrêté au Mali fin avril, était présenté vendredi 17 mai à un juge d’instruction en vue d’une mise en examen pour association de malfaiteurs en relation avec une entreprise terroriste.”); *see also* Press Release, Fed. Bureau of Investigation, Malian National Indicted For Murder Of U.S. Diplomat To Be Arraigned Today In Brooklyn Federal Court (Mar. 13, 2014) (noting, “a Malian citizen charged with the murder and attempted murder of United States Embassy personnel stationed in Niamey, Niger, in December 2000, will be arraigned today at 2:00 p.m. in the Eastern District of New York. Mohamed was extradited to the United States by the Malian government”).

¹²⁴ France-Mali SOFA, *supra* note 106, art. 10.

simply to the United Nations Charter as a whole: “France, at the request of the President of Mali, and with respect for the Charter of the United Nations, has undertaken to support the Malian army against the terrorist aggression that threatens all of West Africa.”¹²⁵ French officials, thereafter, cited Article 51 of the U.N. Charter as the basis for military action.¹²⁶ Later arguments referred back to U.N. Security Council resolution 2085 as a basis for the intervention.¹²⁷ In turn, the chapeau language of the status of forces agreement¹²⁸ cites to Security Council resolutions 2056, 2071, and 2085, and “the express request of the Malian Government.”¹²⁹ This practice of citing to myriad legal bases to justify state action – a shotgun approach – is relatively common. Sifting through the various bases given, one finds that some are of sufficiently greater value than others.

In this instance, reliance on self-defense under Article 51 is sufficiently meritless to eliminate the need for extensive discussion and does not, in any case, appear in the chapeau language of the France-Mali SOFA. On the other hand, the invitation by Malian authorities and the language of the U.N. Security Council resolutions relating to Mali do provide meritorious legal bases for French military action.

¹²⁵ See President François Hollande, President of the Republic of France, Déclaration du Président de la République à l'issue du Conseil restreint de défense (Jan. 12, 2013), available at <http://www.elysee.fr/declarations/article/declaration-du-president-de-la-republique-a-l-issue-du-conseil-restreint-de-defense/>.

¹²⁶ See THOMAS FLICHY, OPÉRATION SERVAL AU MALI: L'INTERVENTION FRANÇAISE DÉCRYPTÉE 54 (2013); see also *U.N.'s Ban hopes French intervention halts latest offensive in Mali*, REUTERS, Jan 14, 2013 (“French U.N. Ambassador Gerard Araud said Paris was acting under article 51 of the U.N. Charter, which discusses nations’ right to collective and individual self-defense.”) [hereinafter *U.N.'s Ban*]; see also M. Laurent Fabius, Minister of Foreign Affairs, Speech before the Senate of France, Paris, Fr., Mali/Government (Jan. 16 2013) (“France is acting in response to the Malian authorities’ request for help, in accordance with Article 51 of the UN Charter. Indeed, the UN Secretary-General welcomed our response to this sovereign request by Mali. At the Security Council, a large majority of member states lauded the swiftness of our response. Its appropriateness and legality are indisputable.”).

¹²⁷ See Bergamaschi & Diawara, *supra* note 12, at 143.

¹²⁸ See France-Mali SOFA, *supra* note 106.

¹²⁹ *Id.*

A. Intervention by Invitation

The practice of third states intervening militarily at the invitation (or purported invitation) of a government is not new.¹³⁰ In fact, France has intervened militarily based, in part, on invitations from host nation governments on multiple occasions.¹³¹ Notably, in 2002, France intervened in Côte d'Ivoire at the invitation of that government against rebels who were threatening to overcome it.¹³² The rebels, consisting mainly of renegade soldiers, sought to depose the sitting government headed by then-president Laurent Gbagbo.¹³³ The result was a complex civil war, which effectively split the government in half, dividing it between the rebels who controlled northern Côte d'Ivoire and the recognized government, which controlled the south. Almost immediately, however, French troops – with the agreement of the Ivorian government – were sent to Côte d'Ivoire to augment the French forces already on the ground and military operations began, such as the rescue of western hostages from Bouaké by French forces.¹³⁴

In that case, French authorities noted that the intervention was in order to protect French citizens.¹³⁵ In addition to French forces, ECOWAS forces were also deployed quickly, and roughly four months later, an agreement between the rebels and the government was reached. Thereafter, in February 2003, the U.N. Security Council passed Resolution 1464, which invoked Chapter VII of the U.N. Charter and “welcome[ed] the deployment of ECOWAS and French troops” in Côte d'Ivoire.¹³⁶ That same resolution then “authorizes Member States . . . together with the French forces supporting them to take the necessary

¹³⁰ See GRAY, *supra* note 93, at 84 (“Many states have relied on an invitation by a government to justify their use of force; they have claimed that their intervention was lawful because they were merely dealing with limited internal unrest or, at the other end of the spectrum, that they were helping the government respond to prior intervention by other states.”).

¹³¹ See Anna Gueye, *Gabon to Mali: History of French Interventions in Africa*, GLOBAL VOICES (Jan 18, 2013), <http://globalvoicesonline.org/2013/01/18/gabon-to-mali-history-of-french-military-interventions-in-africa/>.

¹³² See GRAY, *supra* note 93, at 334-336.

¹³³ See LANSANA GBERIE & PROSPER ADDO, CHALLENGES OF PEACE IMPLEMENTATION IN CÔTE D'IVOIRE 6 (Aug. 2004), available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=118328>.

¹³⁴ *Id.* at 15.

¹³⁵ See *La France et la Côte d'Ivoire*, FRANCE DIPLOMATIE (Jul. 31, 2014), <http://www.diplomatie.gouv.fr/fr/dossiers-pays/cote-d-ivoire/la-france-et-la-cote-d-ivoire/>.

¹³⁶ S.C. Res. 1464, U.N. Doc. S/RES/1464 (2003).

steps to guarantee the security and freedom of . . . their personnel and to ensure . . . the protection of civilians immediately threatened with physical violence.¹³⁷ Thus, French forces were only briefly on the ground in Côte d'Ivoire without express U.N. authorization and, as an intervening force, were not clearly supporting either side to the conflict.¹³⁸

In contrast, in the 2013 intervention in Mali, France was able to base its intervention, in part, on the express invitation of the Malian government to intervene militarily. In a letter sent to the Security Council on January 11, 2013, France stated:

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.¹³⁹

Immediately, the distinction between the Côte d'Ivoire and Malian interventions becomes clear in that the intervention in Mali is specifically to support the government against terrorist elements. Rather than protection of French citizens or the implementation of a peace process, France intervened in Mali for purposes of engaging in a counter-terrorism operation against non-state armed groups who opposed the Malian government.

This basis, however, has been the subject of challenge from various commentators. Bergamaschi and Diawara, notably, assert that the

¹³⁷ *Id.*

¹³⁸ See Fabienne Hara & Comfort Ero, *Ivory Coast on the Brink*, THE OBSERVER, Dec. 15, 2002 (“Paris is not keen to be seen to support Gbagbo, who officials privately see as arrogant and poorly advised, but neither can it endorse an armed insurgency. Ideally, France would like to hand responsibility for the crisis to a proposed ECOWAS peacekeeping force.”).

¹³⁹ Permanent Representative of France to the U.N., Letter dated Jan. 11, 2013 from the Permanent Representative of France to the Secretary-General, U.N. Doc. S/1013/17.

French intervention was ultimately unilateral in nature and question its legality, in part, because the inviting authority, President Diacounda Traoré, was “the head of an *interim* and not a democratically elected government” when he invited France to intervene.¹⁴⁰ In addition, the authors cite to Hadzi-Vidanovic of the European Court of Human Rights for the contention that “once the internal disturbances evolve into an internal armed conflict in which an organised rebel armed group controls a significant portion of a state’s territory . . . foreign states cannot intervene by the invitation of any side of such conflict.”¹⁴¹ Similarly, Dr. Theodore Christakis and Dr. Karine Bannelier, both professors at the University Grenoble-Alpes (France), have also posited that such an intervention is prohibited “when the objective of this intervention is to settle an exclusively internal political strife in favor of the established government which launched the invitation.”¹⁴²

Such opinions highlight a school of thought in international law that argues that states should not be permitted to aid another government’s military in order to suppress rebellion “when a civil war [is] taking place and control of the state’s territory was divided between warring parties.”¹⁴³ Professor Oscar Schachter notes, “[M]any legal scholars (and some U.N. resolutions, by implication) support the proposition that direct or indirect armed intervention on either side in a civil war is illegal. Under article 2(4) intervention constitutes a use of force ‘against the political independence’ of the state in question because it interferes with its people’s right to determine their own political destiny.”¹⁴⁴ Some commentators narrow the scale of this prohibition, positing that the nature of civil war required to trigger the prohibition is one in which the

¹⁴⁰ See Bergamaschi & Diawara, *supra* note 12, at 143-144.

¹⁴¹ *Id.* at 144

¹⁴² See Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It’s Legal but... Why? Part I*, EJIL: TALK! (Jan. 24, 2013), <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>. Both Christakis and Bannelier agree, in part II of that article, however, that “[e]xternal intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favor of the established government which launched the invitation.” Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It’s Legal but... Why? Part II: Consent and UNSC Authorisation*, EJIL: TALK! (Jan. 25, 2013), <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/>.

¹⁴³ See GRAY, *supra* note 93, at 81.

¹⁴⁴ See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 137 (1996).

opposing forces control territory, mirroring the requirements in Additional Protocol II, which set that threshold for its application.¹⁴⁵

An opposing view, however, sees the permissibility of intervention by invitation as far less restricted. To be sure, Georg Nolte notes that “State practice from the Holy Alliance (1815) to the Spanish Civil War (1936–39) is inconclusive as to whether governments had the right to invite foreign troops to help dealing with internal unrest. Thus, until the coming into force of the United Nations Charter, no clear pertinent rule of customary international law existed, despite a tendency in favour.”¹⁴⁶ Even so, the contemporary jurisprudence of the International Court of Justice (ICJ) has recognized the validity of military intervention if an invitation for such intervention is extended by a legitimate State authority. In that regard, while the ICJ has held that “no general right of intervention, in support of an opposition within another State, exists in contemporary international law,”¹⁴⁷ the court has accepted that such intervention by invitation on behalf of the State is allowable as a matter of contemporary international law.¹⁴⁸ Thus, commentators note that “[i]n stark contrast to opposition groups, there is generally no prohibition on assisting recognized governments”¹⁴⁹ and that, “[i]n general, governments have the capacity to consent on behalf of the state and opposition forces do not.”¹⁵⁰

With specific regard to Mali, Karine Bannelier asserts the validity of the Malian invitation and concomitant French consent.¹⁵¹

The government of President Traoré was indeed
internationally recognized as the only government

¹⁴⁵ See GRAY, *supra* note 93, at 81 n.70.

¹⁴⁶ See Georg Nolte, *Intervention by Invitation*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. (Jan. 2010), <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1702?rskey=UZxXqA&result=2&prd=EPIL>.

¹⁴⁷ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), ¶ 209.

¹⁴⁸ See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

¹⁴⁹ See Joseph Klinger, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law*, 55 HARV. INT’L L.J. 483, 487 (2014).

¹⁵⁰ See Gregory H. Fox, *Intervention by Invitation*, in OXFORD HANDBOOK, *supra* note 103, at 821.

¹⁵¹ See Karine Bannelier, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. OF INT’L L. 855 (2013).

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) 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. The events following the beginning of Operation Serval showed that both Traoré's government and his decision to invite the French troops enjoyed widespread popular support. And no state ever questioned the representativeness of the Malian authorities. It is therefore clear that the invitation was valid.¹⁵²

It must be recalled that, at the moment of the French intervention, non-state armed groups had seized major cities in northern Mali – including Gao, Kidal, and Timbuktu – and had bifurcated Mali between the south controlled by the government in Bamako and the northern areas, which they controlled and wished to form into their own state of Azawad.¹⁵³ The opposition, therefore, controlled significant territory and wished to carve out an independent state. These facts, under the more restrictive theory of intervention by invitation, would seem to trigger the prohibition on intervention.

Instead, however, subsequent U.N. statements have recognized its enduring legality. For instance, the U.N. Secretary General almost immediately expressed support for the intervention, noting roughly three days after French forces intervened that “[t]he secretary-general welcomes that bilateral partners are responding, at the request and with the consent of the government of Mali, to its call for assistance to counter the troubling push southward by armed and terrorist groups[.]”¹⁵⁴ The

¹⁵² *Id.*

¹⁵³ See Grossman, *supra* note 20, at 67.

¹⁵⁴ See *U.N.'s Ban*, *supra* note 126 (“The secretary-general welcomes that bilateral partners are responding, at the request and with the consent of the government of Mali, to its call for assistance to counter the troubling push southward by armed and terrorist groups[.]”).

legality of the French intervention by invitation was further underscored in April 2013, when the Security Council passed resolution 2100, which mandated the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). This resolution authorized French forces on Mali “to use all necessary means . . . to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General.” In addition, this resolution expressly approved of the French intervention at the invitation of the Malian government:

Welcoming the swift action by the French forces, *at the request of the transitional authorities of Mali*, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali and commending the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA)[.]¹⁵⁵

The U.N. Security Council, therefore, condoned the intervention by invitation in this instance. Bannelier posits that the lesson derived from this experience is that external intervention by invitation is generally permissible under international law so long as the purpose of the intervention 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.”¹⁵⁶ Accordingly, according to this view, the invitation by President Diacounda Traoré to France to intervene served as a valid basis for the use of force by French forces in the territory of Mali. This is true even though the opposition controlled a significant amount of territory in northern Mali. What possible international legal objections may still exist to invitation as a legal basis, therefore, are authoritatively overcome at least insofar as that invitation is for the military intervention of a third state to assist in a counter-terrorism effort.

Another area where the French intervention illuminates state practice in a somewhat unsettled area of international law is with regard to the classification of conflicts in situations in which a third state intervenes in an internal conflict by invitation of the sitting government. Sivakumaran

¹⁵⁵ S.C. Res. 2100, U.N. Doc. S/RES/2100 (2013).

¹⁵⁶ See Bannelier, *supra* note 151, at 855-874.

notes that there are two principal approaches to characterization of an internal conflict in situations in which an outside state has intervened.¹⁵⁷ The first – the theory of pairings – holds that an intervention by an outside state on the side of the government “does not transform the conflict into an international one because the fighting remains between a state and a non-state armed group.”¹⁵⁸ Dinstein supports this view.

If a non-international armed conflict is raging in Ruritania, and Atlantica assists the central Government of Ruritania in combatting those who rise in revolt against it, the domestic upheaval does not turn into an inter-State war. In such a case, two States (Ruritania and Atlantica) are entangled in military operations, but since they stand together against the Ruritanian insurgents, the internal nature of the conflict remains intact. Conversely, if Atlantica joins forces with the insurgents, supporting them against the central Government of Ruritania, this is no longer just a ‘civil war’: it is a fully fledged war in the sense of international law.¹⁵⁹

The second approach – the theory of “complete internationalization” – maintains that the intervention of an outside state renders the conflict international in character no matter which side the intervening state supports.¹⁶⁰ This approach has not generally received support by states but has been supported by some authoritative commentators and was also put forth as a proposal by the International Committee for the Red Cross (ICRC) in the 1970s.¹⁶¹

As noted, the France-Mali SOFA provides that French troops will treat persons detained by French forces in accordance with both the law of armed conflict and international human rights law,¹⁶² specifically referring to the Convention Against Torture and Additional Protocol II of the Geneva Conventions¹⁶³ – the protocol that expressly regulates non-

¹⁵⁷ See SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 222 (2012).

¹⁵⁸ *Id.* at 222-223.

¹⁵⁹ See DINSTEIN, *supra* note 89, at 6.

¹⁶⁰ See SIVAKUMARAN, *supra* note 157, at 223.

¹⁶¹ See ELIZABETH WILMSHURST, *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 7.2 (2011).

¹⁶² See France-Mali SOFA, *supra* note 106, art. 10.

¹⁶³ *Id.*

international armed conflicts.¹⁶⁴ The France-Mali SOFA, therefore, is an expression of state practice that such conflicts involving the military intervention by an outside state on the side of the government remain non-international in character.

B. The U.N. Security Council Resolutions and Implied Authorization for Intervention

Aside from the invitation by the Malian government, French authorities also based the legality of the intervention on the language of the various Security Council resolutions related to Mali. The first of these, U.N. Security Council Resolution 2056, passed on July 5, 2012, addressed the security situation in the Sahel generally and the situation in Mali specifically.¹⁶⁵ This resolution invoked Chapter VII and called upon member states to “to assist efforts to undertake reform and capacity building of the Malian security forces in order to reinforce democratic control of the armed forces, restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups [.]”¹⁶⁶ Throughout the language of resolution 2056, the focus is on the role of potential ECOWAS and African Union (AU) action rather than any potential European or Western military force.¹⁶⁷ It did not, however, expressly call on any member state to intervene, nor do the phrases “all necessary means” or “all necessary measures” appear in the language of the resolution.

The second of these, U.N. Security Council resolution 2071, was passed on October 12, 2012; it also invokes Chapter VII of the U.N. Charter and iterates the Security Council’s grave concern regarding the deteriorating security and humanitarian situation in northern Mali, as well as “the increasing entrenchment of terrorist elements including Al-Qaida in the Islamic Maghreb (AQIM), affiliated groups and other extremist groups, and its consequences for the countries of the Sahel and beyond[.]”¹⁶⁸ The resolution then goes on, as context, to note a letter from the transitional authorities of Mali “dated 18 September 2012

¹⁶⁴ See Radin, *supra* note 121, at 705.

¹⁶⁵ S.C. Res. 2056, U.N. Doc. S/RES/2056 (2012) (Peace and Security in Africa)

¹⁶⁶ *Id.* ¶ 9.

¹⁶⁷ *Id.*

¹⁶⁸ S.C. Res. 2071, U.N. Doc. S/RES/2071 (2012).

addressed to the Secretary-General, requesting the authorization of deployment through a Security Council resolution of an international military force to assist the Armed Forces of Mali acting under Chapter VII as provided by the United Nations Charter, to recover the occupied regions in the north of Mali.” Thereafter, among other provisions, the resolution calls upon member states to provide a wide range of military assistance to Mali.

[The resolution calls] upon, in this context, Member States, regional and international organizations, including the African Union and the European Union, to provide as soon as possible coordinated assistance, expertise, training and capacity-building support to the Armed and Security Forces of Mali, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by AQIM and affiliated groups[.]¹⁶⁹

As with the previous resolution, however, resolution 2071 does not expressly call on any member state to intervene, nor does it contain either of the usual phrases used for authorizing the use of military force.

The third key resolution, Security Council resolution 2085, was passed on December 20, 2012. It too invokes Chapter VII and calls on member states to “provide coordinated assistance” to Malian forces in order to “restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, [and] further invites them to regularly inform the Secretariat of their contributions[.]”¹⁷⁰ That same resolution called for “an African-led International Support Mission in Mali (AFISMA),” which was to be

¹⁶⁹ *Id.*

¹⁷⁰ S.C. Res. 2085, U.N. Doc. S/RES/2085(2012) (“Urges Member States, regional and international organizations to provide coordinated assistance, expertise, training, including on human rights and international humanitarian law, and capacity-building support to the Malian Defence and Security Forces, consistent with their domestic requirements, in order to restore the authority of the State of Mali over its entire national territory, to uphold the unity and territorial integrity of Mali and to reduce the threat posed by terrorist organizations and associated groups, further invites them to regularly inform the Secretariat of their contributions[.] “)

deployed “for an initial period of one year” and which was “[t]o 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.”¹⁷¹ Although resolution 2085 did authorize AFISMA to “take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali,” it had no language authorizing anyone other than AFISMA to do so.

A reading of these various Mali-related Security Council resolutions that adheres to orthodoxy could well give rise to the view that they did not permit intervention by a third state. After all, the usual language customarily used to authorize the use of force (such as the phrase “all necessary means”)¹⁷² is absent from all of the resolutions that preceded the intervention with the exception of resolution 2085 – and then such language was only with regard to AFISMA.

The French reliance on those resolutions, therefore, is clearly one of implied authorization – an assertion that the resolutions permit the use of force by France in spite of the fact that they lack the standard language that might permit it. In that regard, Bergamaschi and Diawara assert that the legal grounds for French intervention were lacking because resolution 2085 authorizes only an “African-led mission” to “support efforts by national authorities to recover the north,”¹⁷³ rather than a French military intervention. The press statement by the Security Council on the day of the French intervention, however, tacitly endorses the reliance upon the previous resolutions as bases for the use of force.¹⁷⁴

The members of the Security Council recall resolutions 2056 (2012), 2071 (2012) and 2085 (2012) adopted under Chapter VII of the Charter of the United Nations,

¹⁷¹ See Grossman, *supra* note 20, at 68.

¹⁷² See *UN Peace Operations and ‘All Necessary Means’*, ASIA PACIFIC CTR. FOR THE RESPONSIBILITY TO PROTECT (2013), http://www.r2pasiapacific.org/docs/R2P%20Ideas%20in%20Brief/UN_Peace_Operations_and_All_Necessary_Means.pdf.

¹⁷³ See Bergamaschi & Diawara, *supra* note 12, at 143.

¹⁷⁴ See Johnstone, *supra* note 103, at 243.

as well as the urgent need to counter the increasing terrorist threat in Mali.

The members of the Security Council reiterate their call to 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.¹⁷⁵

Christakis and Bannelier note, with regard to resolution 2085, in spite of it lacking any of the ordinary language used to authorize military force, that “both the UN Security Council and other international organizations clearly interpreted from the beginning this Resolution as authorizing the French intervention.”¹⁷⁶ And, in fact, one publication by the United Nations University (UNU) flatly states that Operation Serval and the French intervention was authorized by resolution 2085.¹⁷⁷ Thus, though somewhat obscured by the “shotgun” approach of listing out multiple legal bases, one may view the international response to the French intervention as indicating a degree of emerging consensus that the usual language, such as the phrases ‘all necessary means’ or ‘all necessary measures,’ is not always necessary to permit the use of force and that authorization for military action may, in certain circumstances, be inferred from other language in the text of U.N. Security Council resolutions. When such inferences are permitted may still be subject to debate, but an analysis of the international and U.N. reaction vis-à-vis the French intervention in Mali indicates that such inferences can be permissibly drawn when the use of force is for the purposes of assisting a government in a counter-terrorism effort against a non-state armed group.

VI. Conclusion

Commentators note that “Africa’s Sahel is fast becoming more salient for the outside world.”¹⁷⁸ As “the challenges of radical Islam,

¹⁷⁵ Security Council Press Statement, *supra* note 57.

¹⁷⁶ Christakis & Bannelier, *supra* note 142.

¹⁷⁷ See Nadin, *supra* note 81.

¹⁷⁸ John Campbell, Ralph Bunche, & J. Peter Pham, *Does Washington Have a Stake in the Sahel?*, COUNCIL ON FOREIGN RELATIONS (Jan. 14, 2014), <http://www.cfr.org/africa-sub-saharan/does-washington-have-stake-sahel/p32195>.

narcotics trafficking and other criminal networks, and growing environmental stress¹⁷⁹ continue to test the capacity of Sahelian governments, threats to regional security – and U.S. national security – will continue to increase. As this article has demonstrated, these new transnational pressures have served as catalysts for subtle transformations in international law, reflecting the international community’s need for effective solutions to evolving threats.

On that score, the French military intervention in Mali is a notable example of the successful use of military force by an outside country for purposes of counterterrorism. Aside from the various operational lessons to be drawn from this conflict, from a legal perspective, the intervention represents an interesting moment at which a subtle shift in international law can be discerned – one which sees, with regard to counter-terrorism operations, a tilt toward a more permissive attitude vis-à-vis the extraterritorial use of military force.

This evolution in international law seems to be occasioned, at least in part, by the revolutionary shifts in the capabilities of modern non-state armed groups, many of which now have new capabilities derived from new weapons and information technologies. As Yoram Schweitzer notes, “Throughout the world, technological advances are becoming increasingly available to the highest or most cunning bidder – military, civilian, or terrorist.”¹⁸⁰ These new capabilities permit non-state armed groups to effectively challenge legitimate state authorities (and, thus, the contemporary international system)¹⁸¹ in ways that are, since the dawn of the modern sovereign, unparalleled. To draw upon a prominent example, the group calling itself the Islamic State of Syria and Iraq (ISIS) has made such successful use of social media and modern information technology that it has been able to amass a terrorist force that is estimated by the U.S. Central Intelligence Agency to be roughly 31,000 strong – and to consist of many foreign recruits.¹⁸² A modern non-state

¹⁷⁹ *Id.*

¹⁸⁰ See Yoram Schweitzer, *Terrorism: The Next Five Years*, GLOBAL BRIEF, Spring/Summer 2015, at 5.

¹⁸¹ See J.W. Burton, SYSTEMS, STATES, DIPLOMACY, & RULES 28 (1968) (“In International Relations and Diplomatic History it has been customary to treat world society as though it consists of relations between the States within it. Two assumptions have been implied. The first is that States and relations between them along comprise world society[.]”)

¹⁸² *Battle for Iraq and Syria in maps*, BBC NEWS (Apr. 24, 2015), <http://www.bbc.com/news/world-middle-east-27838034>.

armed group may, therefore, recruit and regenerate its fighting forces by utilizing information technology, drawing in fighters from across the globe. This means that groups like ISIS may now amass a numerically challenging fighting force and, thereafter, regenerate that force at a pace equal or greater than the ability of countries in the region to degrade it. In such an international security context, capable states will need to be able to react quickly to intervene where fragile states are at risk of falling to terrorist groups and the forces of violent extremism. As technology becomes more accessible, this unsettling trend of increasingly empowered non-state armed groups will only continue – as will the threat to Western interests and global stability.¹⁸³ Analysis of the international community’s adaptive behavior vis-à-vis technologically empowered non-state armed groups is, therefore, important.

From an operational perspective, Sheehan and Porter note that Operation Serval “may be seen as a template for future counterterrorism engagements: a threat is perceived, it is quickly acted on, and objectives are clearly delineated.”¹⁸⁴ Acting quickly through the use of military force, however, is problematic, as such actions are constrained by the international legal framework articulated above. The legal template for the French intervention in Mali, therefore, is worthy of note to legal advisors and policymakers charged with the responsibility of confronting threats posed by non-state armed groups operating in the Sahel and elsewhere. The ability to effectively address such threats in a way that is both effective and legally sustainable is critical, as the primary counterterrorism challenge in the Sahel will be preventing offensives by non-state armed groups such as that which occurred in Mali.¹⁸⁵ Such a challenge is a daunting one, as – Operation Serval’s relative success notwithstanding – terrorist activity in the Sahel is only increasing.¹⁸⁶

Violent non-state actors and terrorist groups’ cross-border connections add a north-south arc of instability to the commonly understood one that stretches east-west across the Sahara. Boko Haram may be linking with AQIM which may be linking with Ansar al-Shari’a in Libya and also the Uqba ibn Nafi Brigade in Tunisia.

¹⁸³ See Schweitzer, *supra* note 180 (“[I]n the absence of successful containment, the continuing turmoil plaguing the Middle East, Africa, and parts of Asia will set the stage for growing violence that will increasingly spill over into the West.”).

¹⁸⁴ See Sheehan & Porter, *supra* note 10.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Militant groups in southern Libya have revived ties to northern Niger. Mokhtar Belmokhtar's al-Murabitun Brigade appears to be as adept at moving north and south as it is at moving east and west. The impact that these groups can have on their home countries means that not only is there a potential east-west instability axis, but there is a north-south one as well. Taken together, the vectors of instability and insecurity morph and multiply.¹⁸⁷

Future counter-terrorism operations in the Sahel are, therefore, likely – and the lessons learned from the French intervention in Mali must guide policymakers faced with similar future challenges in the region. Understanding the subtle shifts in international law vis-à-vis the use of force in counter-terrorism operations will be essential to formulating approaches for successful counterterrorism operations in the Sahel and elsewhere. Through understanding the success of the French approach, legal advisors who carefully analyze the international legal developments surrounding Operation Serval can help facilitate the rapid responses required in contemporary counter-terrorism operations.¹⁸⁸

With regard to the concept of intervention by invitation in an internal armed conflict, the French intervention in Mali demonstrates a unique circumstance in which the U.N. expressly, and even enthusiastically, approved of such a military operation, condoning France's reliance on an invitation from an embattled government as a permissible basis for military intervention. This is true even though the non-state armed groups seeking to topple the Malian government controlled significant territory. Arguments that such interventions are prohibited under international law, therefore, can now be authoritatively overcome – at least insofar as the intervention is to support a counter-terrorism effort against a non-state armed group or a violent extremist organization. Moreover, from a practical perspective, the French intervention demonstrates the importance of robust diplomatic engagement before (and concomitant with) military preparation and deployment – engagement which facilitated both the express invitation by the host country and the acquiescence of the U.N. Security Council.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

With regard to the concept of implied authorization for the use of force, the French intervention in Mali demonstrates an equally unique circumstance in which the U.N. Secretary General and post-hoc statements by the U.N. validate reliance on language in a Security Council resolution to infer authorization for the use of force. This is not to essentialize or overstate the importance of such U.N. statements, but as Oscar Schachter notes, while the judgments of U.N. political organs are not always legally binding, “they remain an important means for the international community to express its collective opinion of state claims.”¹⁸⁹ The standard phrases ‘all necessary means’ or ‘all necessary measures,’ therefore, can no longer be considered absolutely necessary prerequisites for state action. Further U.N. statements in the aftermath of the intervention – lauding the French military action and citing to the resolutions discussed above – demonstrate a degree of inference is permissible.

Moreover, looking at the France-Mali SOFA, the French intervention represents an example of state practice in which an intervention on behalf of a recognized government against a non-state armed group was deemed to retain its non-international character under international law, thus carrying implications for future interventions and conflict classification. That SOFA is also noteworthy in the degree to which Malian sovereignty is preserved in its provisions, underscoring, in turn, the degree to which the French intervention was far more of a partnership (rather than an occupation). Vidan Hadzi-Vidanovic posits that “[w]hile this approach preserves the Council’s ultimate authority for deciding on the intervention, it also gives a much more active role to the affected state, giving it (somewhat) greater control over the foreign intervention on its territory.”¹⁹⁰ Such elements made the French intervention far more palatable to both the international community and the U.N. institutions that render authoritative opinions on the legality of military actions.

These legal observations are of interest at an academic level as they provide some insight into how international law can develop in a changing international security environment and how the legal architecture in similar circumstances can be successfully constructed. The French intervention in Mali, therefore, is of heuristic value to international legal scholars and students of armed conflict. Study of the

¹⁸⁹ See Schachter, *supra* note 144, at 122.

¹⁹⁰ See Vidan, *supra* note 14.

conflict in Mali, however, is also of value to military lawyers and other legal advisors whose advice will inform future counter-terrorism responses, such as potential responses to ISIS and other non-state armed groups. Faced with these emerging threats, military commanders and policy makers will need a fulsome understanding of the current state of international law as it relates to the use of force against such groups so that decisive action can be taken where appropriate. As the analysis above demonstrates, the evolution of international law is inching toward a more permissive paradigm – providing capabilities and options that may not have existed previously or in other contexts. Effective use of these options – as was the case in Mali – may well be required to halt the ascendance of violent extremist organizations. Given the complexity of modern conflicts, the challenges that non-state armed groups continue to pose to the international legal system, and the legal developments occasioned by the impact of these phenomenal forces on the legal universe, the informed advice of observant international lawyers will be critical as countries make decisions about military intervention, the use of force, and counterterrorism measures. As it is said in Timbuktu, “The ink of a scholar is more precious than the blood of a martyr.”¹⁹¹

¹⁹¹ See Afua Hirsch, *Mali: Timbuktu's literary gems face Islamists and decay in fight for survival*, THE GUARDIAN, May 21, 2013, <http://www.theguardian.com/world/2013/may/20/mali-literary-treasures-battle-survival>.