

MALI: A LEGALLY JUSTIFIABLE INTERVENTION BY FRANCE?

AMY LAIRD*

I. INTRODUCTION

This note reviews the legal justifications that France provided after it intervened in the armed conflict that was taking place in Mali in January 2013. France provided three primary legal justifications in various communications directly after it intervened, being the request for assistance from the Interim President of the Republic of Mali, collective self-defence under Article 51 of the United Nations Charter and Security Council Resolution 2085.¹ In section II of this note I will provide a brief history and background on the armed conflict that was taking place in Mali in order to set the scene for section III. In section III, the justifications provided by France for intervening in Mali will be examined and analysed from an international law perspective in order to conclude whether or not those justifications were appropriate. In section IV, I will make my final conclusions on the justifications provided by France.

II. BACKGROUND TO THE INTERVENTION BY FRANCE

Mali gained independence in the 1960s and became a democracy in 1992 after democratic elections were held. The north of Mali² is the home of the native Tuareg people whose relations with the Mali central government have always been tense despite attempts at military and negotiated solutions. On 16 January 2012 the National Movement for the Liberation of Azawad (MNLA), a Tuareg-led rebel group, initiated armed combat with Mali government forces to liberate Azawad, and on 6 April 2012 declared it an independent State.³ The declaration of independence made by the MNLA was categorically rejected and held to be null and void by the international community.⁴ The MNLA seeking a secular independent north were initially

* LLB (Otago). Barrister and Solicitor, Duncan Cotterill, Christchurch, New Zealand.

1 Identical letters from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council S/2013/17 (11 January 2013); *Declarations officielles de politique étrangère* “Mali – Press Conference given by M Laurent Fabius, Minister of Foreign Affairs – excerpts” (press release, 14 January 2013).

2 Also referred to as Azawad in this note, which is the traditional name used by the native Tuareg people of the north of Mali.

3 Originally posted in French on the MNLA website, English translation available here: <<http://www.polgeonow.com/2012/04/declaration-of-independence-of-azawad.html>>.

4 SC Res 2056, S/RES/2056 (2012).

allied in an unusual alliance with Islamic terrorist groups,⁵ but after being unable to resolve their ideological differences by 17 July 2012, certain terrorist groups had taken over and the MNLA was no longer in control of its recently declared territory.⁶ The MNLA then proceeded to fight against its former allies to regain its territory but was unsuccessful.⁷ By December 2012, the MNLA had initiated peace negotiations with the Mali government in order to join forces against the terrorist groups and by 14 January 2013 were on certain terms “ready to help” French and Malian forces in the fight to remove the terrorist groups from the north of Mali.⁸

Taking a step back to 22 March 2012 when the MNLA and terrorist groups alliance was still functioning, this rebellion triggered a coup d'état when certain members of the Mali government armed forces, calling themselves the National Committee for Restoration of Democracy and State (CNRDR), forcibly seized power from the democratically elected Government.⁹ The CNRDR claimed the reason for the coup d'état was the incompetent handling of the operation to remove the MNLA and terrorist groups alliance from the north of Mali.¹⁰ The CNRDR declared that it would serve as the interim government until power could be returned to a new democratically elected government.¹¹ The confusion caused during the coup d'état assisted the MNLA and the terrorist groups to defeat the Malian armed forces on 6 April 2012 and obtain control of the north of Mali.¹² The international community¹³ condemned the coup d'état and Mali was suspended from the Economic Community of West African States (ECOWAS) and the African Union (AU) with the United States of America (United States), the World Bank and the African Development Bank suspending development funds in

5 In this note, terrorist organisations, terrorists, terrorist groups or terrorist elements refer to the terrorist organisations, Ansar Dine [AD], the Movement for Oneness and Jihad in West Africa [MUJAO] and Al Qaida in the Islamic Maghreb [AQIM]. These organisations are all included on the Al-Qaida Sanctions list [List] maintained by Security Council Committee pursuant to resolutions SC Res 1267 S/Res/1267 (1999) and SC Res 1989 S/Res/1989 (2011). AD was not initially included on the List but was added on 20 March 2013. MUJAO and AQIM are considered primarily foreign terrorist organisations in comparison to AD.

6 Adam Nossiter “Jihadists’ Fierce Justice Drives Thousands to Flee Mali” (17 July 2012) *The New York Times* <www.nytimes.com>.

7 Al Arabiya with Agencies “Tuareg Rebels ready to help French forces in Mali” (14 January 2013) *Al Arabiya News* <<http://english.alarabiya.net/articles/2013/01/14/260337.html>>.

8 Above n 7.

9 SC Res 2056, above n 4.

10 Above n 3.

11 “Renegade Mali soldiers say seize power, depose Toure” (22 March 2012) *Reuters* <<http://www.reuters.com/article/2012/03/22/ozatp-mali-coup-idAFJOE82L00620120322>>.

12 Cheick Dioura and Adama Diarra “Mali Rebels assault Gao, Northern Garrison” (31 March 2012) *Huffington Post* <http://www.huffingtonpost.com/2012/03/31/mali-rebels-assault_n_1393415.html>.

13 In this instance, the international community included the United Nations Security Council, the United States of America, the African Union, Economic Community of West African States [ECOWAS], the World Bank and France.

support of the stance taken by ECOWAS and the AU.¹⁴ ECOWAS appointed a mediator and an agreement was reached on 6 April 2012 to resolve the crisis whereby the National Assembly of Mali's Speaker Diounounda Traoré was appointed Acting President for the legitimate transitional government of Mali.¹⁵ Meanwhile the armed conflict continued unsuccessfully for the Malian government in its northern territory and by September 2012, the Government of Mali had requested a Security Council resolution authorising the deployment of an international military force in order to assist the armed forces of Mali to recover the occupied territory in its north.¹⁶ ECOWAS also requested a Security Council resolution authorising the deployment of a stabilisation force for Mali.¹⁷ On 12 October 2012 the Security Council determined under Security Council Resolution 2071 (Resolution 2071) "that the situation in Mali constitutes a threat to international peace and security [and] Acting under Chapter VII of the Charter of the United Nations" requested that within 45 days ECOWAS, the AU and the Government of Mali, among others, provide "detailed and actionable recommendations" for military intervention.¹⁸ While Resolution 2071 did not authorise the use of force, a further Security Council Resolution 2085 (Resolution 2085) adopted on 20 December 2012 did provide specific authorisation for "the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures," among other authorisations.¹⁹ The United Nations sanctioned intervention by AFISMA in Resolution 2085 was unlikely to occur before September 2013 due to logistical constraints and by 10 January 2013, the terrorist groups were advancing further into Mali to take advantage of this delay and gain further territory.²⁰ Due to the advancing terrorist groups and the delay that would occur before AFISMA could intervene to assist in the armed conflict, the Malian Government again referred the matter to both the Security Council and also France and asked them to intervene as a matter of urgency.²¹ France launched its military intervention in Mali on 11 January

14 Agencies "International condemnation for Mali coup" (23 March 2012) *Al Jazeera News* <<http://www.aljazeera.com/news/africa/2012/03/2012322234952301942.html>>; Bradley Klapper "US cuts off aid to Mali's government after coup" (26 March 2013) *Associated Press* <<http://news.yahoo.com/us-cuts-off-aid-malis-government-coup-174419428.html>>; "Is Mali heading for a split?" (11 December 2012) *Al Jazeera News* <<http://www.aljazeera.com/programmes/insidestory/2012/04/201242103543735302.html>>.

15 "Tuareg Rebels enter key Malian town" (1 April 2012) *Al Jazeera News* <<http://www.aljazeera.com/news/africa/2012/03/2012331101518829540.html>>; "Mali awaits next step after president, coup leader resign" (10 April 2012) *The Daily Star* <http://www.newsbcc.com/ethiopia/africa/mali_awaits_next_step_after_president_coup_leader_resign/90066/>.

16 SC Res 2071, S/RES/2071 (2012).

17 Above n 16.

18 Above n 16.

19 SC Res 2085, S/RES/2085 (2012).

20 Tiemoko Diallo "Mali Islamists capture strategic town, residents flee" (10 January 2013) *Reuters* <<http://www.reuters.com/article/2013/01/10/us-mali-rebels-idUSBRE90912Q20130110>>.

21 Letters from the Permanent Representative of France to the United Nations, above n 1; *Declarations officielles de politique étrangère*, above n 1.

2013 and immediately provided three fundamental legal justifications, being the request for assistance from the Interim President of the Republic of Mali, collective self-defence under Article 51 of the United Nations Charter and Security Council Resolution 2085.²²

III. FRENCH JUSTIFICATIONS FOR INTERVENTION AND THEIR LEGAL STATUS

A. Request for Assistance from Mali's Legitimate Government

It is a customary rule of international law that “no state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state.”²³ This rule was developed through General Assembly Resolutions including Resolution 375 (1949) on the Rights and Duties of States,²⁴ Resolution 2131 (1965) on the Inadmissibility of Intervention²⁵ and Resolution 2625 (1970) Declaration on Friendly Relations.²⁶ As a general rule, an intervention is legally justifiable if the sovereign State's consent is obtained.²⁷ Further, consent is a defence that will preclude the unlawfulness of an intervention provided that the intervention remains within the limits of a valid consent from the sovereign State.²⁸ However, in certain circumstances specific rules or principles of international law may preclude the justificatory effect of the consent or invitation provided by the sovereign State.²⁹ The following considerations are worth analysing to ensure the justification of intervention by invitation is appropriate.

First, an important restriction on the lawfulness of a State intervening in another State is that any assistance or interference is forbidden when a civil war is underway.³⁰ Early on in Mali, the conflict was internal in nature with the MNLA movement seeking independence for the north of Mali, however, whether this internal conflict came within this principle prohibiting external intervention in an internal civil war does not require further consideration because by the time France did intervene in Mali the conflict had transformed into a fight against terrorism. Two³¹ of the three terrorist groups operating in Mali were included on the Al-Qaida Sanctions List maintained by Security

22 Letters from the Permanent Representative of France to the United Nations, above n 1; *Declarations officielles de politique étrangère*, above n 1.

23 GA Res 2131 (1965), A/RES/2131 (XX).

24 GA Res 375 (1949), A/RES/375 (IV).

25 GA Res 2131, above n 23.

26 GA Res 2625 (1970), A/RES/2625 (XXV).

27 Christine Gray *International Law and the Use of Force* (3rd edition, Oxford University Press, 2008) at 67.

28 International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001, Supplement No 10 (A/56/10), chp.IV.E.1), Article 20.

29 Georg Nolte “Intervention by Invitation” in *Max Planck Encyclopedia of Public International Law* (2010, online ed) at [16].

30 Gray, above n 27, at 81.

31 MUJAO and AQIM.

Council Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) with the third group, Ansar Dine, being included on the List soon after the French intervention was initiated. The MNLA and the Mali Government both wanted the terrorist organisations removed from the north of Mali and further the MNLA were willing to assist to ensure this occurred. The French Government did not want to be part of an exclusively internal conflict and seemed aware of the distinction that was required as it always referenced terrorist groups when discussing its intervention in order to distinguish between issues with the local MNLA movement. The link with terrorist groups also seemed important to France for other reasons which included that it did not want its intervention associated with its colonial past and wanted it instead associated with the international goal of fighting terrorism.

A further consideration for analysis to ensure legitimacy for this justification is whether the *legitimate* government of Mali made the request for intervention. The Malian Government was overthrown in a coup d'état early on in the conflict, but despite this, by the time France intervened a legitimate transitional Government had been restored which was internationally recognised by the Security Council in its resolutions, other international organisations and States. The request by the legitimate transitional Government of Mali was made to the French Government for intervention and accordingly this legal justification provided by France is acceptable from an international law perspective.

An intervening State will often claim the protection of foreign nationals as a supplementary justification to strengthen their claim for intervention.³² Interestingly France has during this intervention made reference to the defence of its nationals in Mali, perhaps in the belief that it would further strengthen the legitimacy of its intervention by invitation justification.

B. Article 51 – Self-Defence

The French Government's statement and its subsequent clarifying statements make it clear that collective self-defence under Article 51 of the United Nations Charter was relied on to justify its use of force in Mali.

One of the noble purposes of the United Nations Charter is to maintain international peace and security whilst still recognising that in specific instances the use of force may be required and justifiable if undertaken in accordance with the provisions of the Charter. One of the specific provisions in the Charter that justifies the use force by a State is Article 51 being individual or collective self-defence. Article 51 provides:³³

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall

32 Gray, above n 27, at 88.

33 United Nations Charter [Charter], art 51.

be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

By way of brief background, the importance of self-defence in the 19th century was limited by the fact that international law previously recognised an inherent right to resort to war, and it was not until there developed a general prohibition on the use of force through Article 2(4) of the Charter that self-defence derived its real importance “in contemporary international law.”³⁴ Despite the diminished relevance of self-defence, there has always existed a right of self-defence under customary international law, although this perhaps was of greater political relevance at the time, this right of self-defence “arose out of the [fabled 1837] *Caroline* incident.”³⁵

Due now to the general prohibition on the use of force under the Charter, self-defence has become highly relevant and frequently applied in order to justify a State’s use of force against another State. The potential for the right of self-defence to be abused has been recognised and accordingly there is significant debate as to the scope of self-defence under Article 51 and as a rule of customary international law. In terms of the right of self-defence existing at both treaty level and as a rule of customary international law, the International Court of Justice (ICJ) in a now generally accepted statement provided:³⁶

Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary law. It rather demonstrates that in the field in question ... customary international law continues to exist alongside treaty law.

Therefore when reviewing the French justification of collective self-defence, both customary international law and the provisions of the Charter are relevant. But before continuing to review the French justification and whether it fits within the scope of collective self-defence, the precise requirements for collective self-defence first need to be established. Any

34 Christopher Greenwood “Self-Defence” in *Max Planck Encyclopedia of Public International Law* (2011, online ed) at [1]-[2].

35 Malcolm N Shaw *International Law* (6th edition, Cambridge University Press, Cambridge, 2008) at 1131.

36 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [*Nicaragua Case*] at 94.

contentious requirements in terms of the French justification can then be reviewed to determine whether the scope of collective self-defence covers this situation.

The requirements for collective self-defence are less controversial than interpreting the scope of each requirement, as the general requirements are more widely accepted. The issues surrounding self-defence do not relate to whether the right exists in international law, but the scope to which the right extends in order for the use of force to be justified. Article 51 does not draw a distinction between individual or collective self-defence, but subsequent practice and application by the ICJ has resulted in specific differences being established.³⁷ The *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* case³⁸ (*Nicaragua Case*) played a definitive role in setting out the requirements of the right of collective self-defence in customary international law.³⁹ The *Nicaragua Case* sets out three requirements which must be satisfied if collective self-defence is going to be used to justify the use of force by a State which has not itself been the subject of an armed attack.⁴⁰ For the first requirement the ICJ noted, "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack." Further, "[r]eliance on collective self-defence of course does not remove the need for this." Accordingly, a victim State that is entitled to take action by way of individual self-defence is required for collective self-defence to be justifiable.⁴¹ For the second requirement the ICJ noted, "[w]here collective self-defence is invoked, it is expected that the State for whose benefit the right is used will have declared itself to be the victim of an armed attack."⁴² For the third requirement the ICJ noted, "there is no rule permitting the exercise of collective self-defence in absence of a request by the State which regards itself as the victim of an armed attack."⁴³ Along with these customary international law requirements for collective self-defence, a further requirement of necessity and proportionality exists in customary international law for both collective and individual self-defence and this requirement originated from the abovementioned 1837 Caroline incident. Along with these customary international law requirements, there are the specific requirements contained in Article 51 which comprise of an armed attack against a member of the United Nations, reporting to the Security Council any measures taken in the exercise of the right of self-defence and ceasing the use of force in self-defence when the Security Council has taken measures necessary to maintain

37 Greenwood, above n 34, at [5].

38 *Nicaragua Case*, above n 36.

39 Malcolm D Evans *International Law* (3rd edition, Oxford University Press, Oxford, 2010) at 632.

40 Greenwood, above n 34, at [35].

41 *Nicaragua Case*, above n 36, at 103.

42 At 104.

43 At 105.

international peace and security.⁴⁴ Although each of these requirements is seemingly straightforward, they all have their own particular nuances and require careful analysis so as to determine their individual scope.

However before these collective self-defence requirements are analysed it is important to review the justification of self-defence where it logically begins, being the article in the Charter that prohibits the use of force in the first place, thus requiring a justification. Article 2(4) provides for the general prohibition on the use of force, and accordingly if the conditions under Article 2(4) are satisfied, any use of force by a State requires justification pursuant to the provisions of the Charter or by way of international law. Obviously where Article 2(4) does not apply to a situation, there will be other international rules and principles that require consideration, but for the moment they do not require review. Article 2(4) provides:⁴⁵

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 other manner inconsistent with the Purposes of the United Nations.

Importantly, the prohibition on the use of force under Article 2(4) only applies as between member States in that they shall refrain in their international relations from the use of force against the territorial integrity or political independence of any state.⁴⁶ Although the conflict in Mali was thought to be a direct consequence of the conflict in Libya ending, as it resulted in many heavily armed fighters moving into the north of Mali, the armed attacks were not attributable either directly or indirectly to another State and most importantly the use of force by the French and Malian governments was not against another State.⁴⁷ This conflict was taking place *within* Mali's borders in response to the terrorist attacks by the terrorist groups located there. The use of force by the French and Malian Governments was not affecting the territorial integrity or political independence of another State. From a review of the plain text of Article 2(4), it would seem that the French Government has erred in justifying its use of force under Article 51 as the provisions of the Charter are not directly relevant in this specific situation. This situation would seem more appropriately classified as an intervention by invitation of the Malian Government to help it remove the terrorist organisations operating within its territory as earlier discussed.

It was stated by France that the members of the Security Council expressed their understanding and support for the French intervention and further recognised that France was acting in perfect international legality.⁴⁸

⁴⁴ Charter, art 51.

⁴⁵ Charter, art 2(4).

⁴⁶ Charter, art 2(4).

⁴⁷ ACP-EU Joint Parliamentary Assembly *Declaration of the Co-Presidents of the ACP-EU Joint Parliamentary Assembly on the security situation in the north of Mali* (21 March 2012) <www.europarl.europa.eu/intcoop/acp/10_01/pdf/decl_mali_en.pdf>.

⁴⁸ Permanent Mission of France to the United Nations in New York "Mali – Remarks to the Press by Mr Gerard Araud, Permanent Representative of France to the United Nations" (14 January 2013) <<http://www.franceonu.org/france-at-the-united-nations/press-room/speaking-to-the-media/remarks-to-the-press/article/14-january-2013-mali-remarks-to->>.

If this statement meant that the Security Council accepted an Article 51 justification for a conflict essentially outside the Charter's scope, it would raise a number of questions. Included in those questions would be whether this is the beginning of a fundamental shift in the application of the Charter to now include not just relations between member States, but also internal conflict situations. I do not however believe that this is the case for two reasons. First, although the French Government's statements to the general media and public at large may have included the justification of self-defence, this justification was not provided to the Secretary-General and President of the Security Council. Rather, France only referred to the following:⁴⁹

I should like to inform you that France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traore. 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. I therefore wish to inform you that the 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. I will of course continue to keep you informed, as appropriate.

My Government would like to take this opportunity to underline that the evolving situation justifies the accelerated implementation of Security Council resolution 2085 (2012) in order to resolve all aspects of the Malian crisis, both political and military.

Therefore, it is unlikely that the French stated acceptance of its justifications included overt acceptance of the justification of self-defence under Article 51. Secondly, in other situations where terrorist attacks have resulted in Article 51 being utilised to justify the use of force, the use of force by the victim State always took place on another State's territory, not within the victim State's territory. For example, the United States' use of force after the 11 September 2001 terrorist attacks by Al Qaida took place in Afghanistan. The controversial question in that situation was whether Article 51 self-defence legalised action taken in self-defence against terrorist organisations located in another State's territory. Security Council Resolutions 1368 and 1373⁵⁰ and the almost universal support for the United States definitely raised this question to the forefront.⁵¹ But this is distinct from the question which is being asked in this fact situation, which is whether the terrorist attacks allowed for Article 51 self-defence to be utilised in Mali, an essentially internal conflict situation. The ICJ in its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵² found that there could be no right of self-defence under Article 51 as the terrorist attacks originated from within Israel's territory and not outside it. In that case, the appropriate law

49 Letters from the Permanent Representative of France to the United Nations, above n 1; Declarations officielles de politique étrangère, above n 1.

50 SC Res 1368, S/RES/1368 (2001) and SC Res 1373, S/RES/1373 (2001).

51 Gray, above n 27, at 198-199.

52 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

to be applied was found to be that of occupation. The obvious deduction here is that Article 51 self-defence will not be extended to apply to the Mali terrorist situation and instead the law surrounding internal conflicts is more relevant for analysis in terms of the international response. This analysis is not however required for the questions being considered in this note.

It is interesting that the French Government provided this additional justification to the general media and public at large, but not to the Security Council. Was this an oversight by the French Government or was there perhaps an underlying political motivation for providing this extra, albeit legally incorrect, justification? Whatever the reason, what can be concluded is that the legal justification of Article 51 collective self-defence that was provided by France was unsuitable in relation to its intervention in Mali and perhaps was only utilised for political purposes.

C. All the United Nations Resolutions – Security Council Resolution 2085

The third legal justification provided by France was all of the United Nations resolutions, which in further statements was clarified as more specifically Resolution 2085 which authorised “all necessary measures” being the standard wording used by the Security Council when authorising the use of force. A review of two specific items is required before we can consider the acceptability or otherwise of this justification.

1. Constitutional Basis for Security Council Intervention

The first item to review is the Security Council decision to authorise the use of force in Mali despite it being an essentially internal conflict. The Security Council under Article 24(1) of the Charter has “primary responsibility for the maintenance of international peace and security” and under Article 24(2) of the Charter “shall act in accordance with the Purposes and Principles of the United Nations” with its enforcement powers being set out in Chapter VII (Articles 39 - 51) of the Charter. The purposes and principles of the Charter include:⁵³

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The important role played by the Security Council is supported by the Charter requiring members of the UN to carry out the decisions of the Security Council.⁵⁴ Arguably, before the Security Council can authorise the use of force it first has to determine under Article 39 of the Charter that there exists “any threat to the peace, breach of the peace, or act of aggression” with

53 Charter, art 1(1).

54 Charter, art 25.

a transboundary effect.⁵⁵ The transboundary effect is required because despite Security Council enforcement powers under Chapter VII not being prejudiced by Article 2(7) of the Charter, which prohibits the UN from intervening “in matters which are essentially within the domestic jurisdiction of any state,” Article 39 under Chapter VII is not considered an enforcement power and accordingly a determination under Article 39 must include a transboundary effect.⁵⁶ Of the determinations available to the Security Council under Article 39, a threat to the peace is the broadest concept allowing for a wide range of circumstances to fall within this category.⁵⁷ Generally the Security Council will in the preamble of its resolutions set out the circumstances that it considers constitute a threat to the peace, as at the end of the preamble, it then determines that the situation constitutes a threat to the peace and that it can accordingly act under Chapter VII of the Charter.⁵⁸ When authorising the use of force under Resolution 2085, the Security Council in its preamble referred to, among other things:⁵⁹

[The] entrenchment of terrorist groups and criminal networks in the north of Mali continue to pose a serious and urgent threat to the population throughout Mali, and to the stability in the Sahel region, the wider African region and the international community as a whole ... insecurity and the significant ongoing humanitarian crises in the Sahel region ... as well as the continued proliferation of weapons from within and outside the region that threaten peace, security and stability of States in the region ... [the] abuses of all human rights in the north of Mali by armed rebels, terrorists and other extremist groups.

The Security Council then concluded in Resolution 2085 that the situation in Mali constituted “a threat to international peace and security.”⁶⁰ None of the above preamble items are contentious in terms of previous Security Council resolutions that have resulted in a determination of a threat to the peace. In terms of general Security Council practice of late, a noticeable feature is the increased attention by the Security Council towards regional aspects of international peace and security, in that a conflict or crisis in one State can be a threat to the peace and security in that region which in turn constitutes a threat to international peace and security.⁶¹ This is the exact type of regional threat contemplated by the Security Council in Mali with refugees fleeing into neighbouring countries and the potential for fighting to spill over Mali’s borders and further destabilise the West African region

55 Charter, art 39.

56 Frederic L Kirgis Jr “The Security Council’s First Fifty Years” (1995) 89 Am J Int’l L 506 at 529; Michael Selkirk “Judge, Jury and Executioner? Analysing the Nature of the Security Council’s Authority under Article 39 of the UN Charter” (2000-2003) 9 Auckland U L Rev 1101 at 1116-1117.

57 Karel Wellens “The UN Security Council and New Threats to the Peace: Back to the Future” (2003) 8 J Conflict & Sec L 15 at 19.

58 Inger Osterdahl *Threat to the Peace and the interpretation by the Security Council of Article 39* (Lustus Forlag, Uppsala, 1998) at 69 and 81 as cited in Wellens, above n 57, at 21.

59 SC Res 2085, above n 19.

60 SC Res 2085, above n 19.

61 Wellens, above n 57, at 32-33.

and consequently international peace and security.⁶² In terms of the references to terrorism in Resolution 2085, the Security Council has previously declared that “acts of international terrorism constitute one of the most serious threats to international peace and security”⁶³ and are also contrary to the purposes and principles of the Charter.⁶⁴ In line with earlier Security Council practice when referring to human rights abuses, Resolution 2085 references human rights violations in the preamble without specifically referring to them as a threat, although they are an influencing factor for the determination of a threat to the peace.⁶⁵ So, in terms of the previous Security Council practice discussed directly above, the Article 39 requirement for a threat to the peace can clearly be met in the Mali fact situation. Once the Security Council has determined a threat to the peace, there is no further requirement for the remaining options under Article 39, being a breach of the peace or act of aggression, to be considered or determined. Due to the broad concept of a threat to the peace, this is the most utilised provision by the Security Council and again Resolution 2085 is aligned with Security Council general practice in this regard. Once a threat to the peace has been determined, this then allows the Security Council to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.”⁶⁶ Measures that may be employed under Article 41 of the Charter are measures not involving the use of force. Where these measures under Article 41 “would be inadequate or have proved to be inadequate” then under Article 42 of the Charter the Security Council may take such action as may be necessary to maintain or restore international peace and security.⁶⁷

So, in terms of the constitutional basis for Security Council authorised intervention, it can be concluded that the Security Council was acting appropriately under the Charter and also consistently in terms of its prior practice. A threat to the peace under Article 39 covers a broad range of circumstances that the Mali conflict clearly falls within therefore allowing the Security Council to authorise enforcement measures as it has done so under Resolution 2085. This then leads into the second item requiring review, whether the French Government’s use of force was authorised by the provisions of Resolution 2085.

2. Was the French Government’s Use of Force Authorised by Security Council Resolution 2085

As discussed above, France stated that it was relying on Resolution 2085 to authorise its use of force. In my view the relevant provisions of Resolution 2085 are:⁶⁸

62 “UN worried about Malian spill over” (28 January 2013) UPI <www.upi.com>.

63 SC Res 1377, S/RES/1377 (2001).

64 Wellens, above n 57, at 43.

65 At 44.

66 Charter, art 39.

67 Charter, art 42.

68 SC Res 2085, above n 19.

...

7. *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 ... and to reduce the threat posed by terrorist organizations and associated groups;

...

9. *Decides* to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall 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 to carry out the following tasks:

...

(b) To support 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;

...

11. *Emphasizes* that military planning will need to be further refined before commencement of the offensive operation and *requests* that the Secretary-General, in close coordination with Mali, ECOWAS, the African Union, the neighbouring countries of Mali, other countries in the region and all other interested bilateral partners and international organizations, continue to support the planning and preparations for deployment of AFISMA;

...

14. *Urges* Member States, regional and international organizations to provide coordinated support to AFISMA, including military training, provision of equipment, intelligence, logistical support and any necessary assistance in efforts to reduce the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups in accordance with paragraph 9 (b), in close coordination with AFISMA and the Malian authorities.

Clearly, Resolution 2085 authorises the use of force in Mali in clause 9 when it authorises the deployment of AFISMA “which shall take all necessary measures.” This specific provision does not however directly authorise the use of force by France, as it requires an African-led deployment to support Malian authorities. There are however other relevant excerpts from the above quoted Resolution 2085 that provide some assistance towards legitimising the French Government’s justification under Resolution 2085. These excerpts include “Member States ... to provide coordinated assistance ... to the Malian Defence and Security Forces ... in order ... to reduce the threat posed by terrorist organizations” and “Member States ... to provide ... any necessary assistance in efforts to reduce the threat posed by terrorist organizations”.⁶⁹ The French Government was always careful to ensure that its intervention was framed as “supporting the Malian army in the face of the terrorist aggression” and assisting in “preparing [for] the deployment of an African intervention force to enable Mali to regain her territorial integrity.”⁷⁰ The advancement

69 SC Res 2085, above n 19.

70 Déclarations officielles de politique étrangère, above n 1.

into Mali by the terrorists was deliberately and strategically stepped up after the adoption of Resolution 2085 as it then became clear that the authorised AFISMA force was going to be delayed at least nine months due to logistical constraints. Clearly, a member State did need to take action due to the rapidly deteriorating situation in Mali. But whether Security Council Resolution 2085 authorised the use of force by a member State that was not African-led, as advanced by France, is far from certain and given that in all reality France was potentially more than just assisting the Malian forces, the interpretation of Resolution 2085 becomes very important.

There is a large amount of academic work centred on the functions of the Security Council due to its importance at an international level, but the issue of the hermeneutics of its Resolutions has not attracted the same amount of scholarly interest and thus the correct approach to take when interpreting Security Council resolutions remains unclear.⁷¹ Any interpretation of a Security Council resolution would need to be completed with the principles and purposes of the Charter in mind, namely international peace and security.⁷² Further, due to the Security Council having the ability to issue resolutions, it also has the power to provide comment or authoritative interpretation on its resolutions.⁷³ Given that the Security Council has the ability to provide clarity on its resolutions and their interpretation, it completed two important actions post Resolution 2085. First, a press statement the day before the French Government initiated its operation in Mali on 10 January 2013 emphasising the “urgent need to counter the increasing terrorist threat in Mali” and a reiteration of a “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 the terrorist organisations.”⁷⁴ Despite this press release being non-binding due to Article 25 of the Charter not applying to it, it is clearly still influential given the source of the press release. Secondly, on 25 April 2013 a further unanimously adopted Resolution provided in the preamble that the Security Council welcomed “the swift action by the French forces, at the request of the transitional authorities of Mali.”⁷⁵ Given that the Security Council would be unlikely to welcome any action in conflict with a prior resolution, it can more than likely be concluded that the French Government’s legal justification of Resolution 2085 authorising its use of force in Mali was acceptable.

71 Efthymios Papastavridis “Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis” (2007) 56 *Int’l & Comp LQ* 83 at 117.

72 At 118.

73 At 91.

74 Security Council “Security Council Press Statement on Mali” SC/10878 (press release, 10 January 2013).

75 SC Res 2100, S/RES/2100 (2013).

IV. CONCLUSION

When France intervened in Mali, the situation within the country was of deep concern, particularly as foreign terrorist organisations with no direct or indirect State backing were advancing further into Mali. The Mali Government was in no position to counter the terrorist elements and had to request assistance. The regional force, AFISMA, was delayed and ECOWAS and the AU had also requested assistance. This was a clear situation requiring an intervention and France assumed this responsibility.

What can be concluded after reviewing the legal justifications provided by France is that two of its justifications, namely intervention by invitation and Resolution 2085 were acceptable and one justification, ie Article 51 collective self-defence was not. What is interesting is that France sought to provide three legal justifications when only one justification was required. Further, France specifically avoided a humanitarian or human rights justification despite this type of breach being referenced in Resolution 2085. Perhaps the fact that this type of justification is normally utilised when it is a State committing these breaches meant that France did not think it was an appropriate legal justification, or perhaps this justification was too controversial due to the Malian Government also having been accused of committing human rights violations. In any event, France did provide three legal justifications and with each further justification, it seemed as though France was trying to cover all possible bases without being certain exactly which justification was the most appropriate. It is likely that the reason for this approach can be answered with a review of the highly nuanced world of politics and political motivations within which France operates. Despite these political motivations not being the subject of this note, perhaps the speed with which the terrorist organisations started advancing south in Mali caught the international community by surprise so that the French Government did not have time to analyse the most appropriate legal justification from a political standpoint and instead took an approach of providing numerous justifications, which they could separately rely on in different political situations. The provision of three justifications by France may not have been useful in terms of certainty for international law but, what is certain is that the French Government's intervention into Mali was legally justifiable under international law.

