

THE QUESTION OF THE LEGITIMACY IN INTERNATIONAL LAW OF THE OPERATION Serval IN MALI

Abstract

Globally, in the last decades, there has been an overall decline in violence, despite the stabilization of the number of conflicts at a relatively high level. Data show an increase in intra-state conflicts vis à vis inter-state conflicts. Furthermore it is remarkable that among the internal ones, internationalized conflicts, namely civil wars in which troops from third states took part, are the most deadly, with more than a thousand deaths. Although they remain less common than purely internal conflicts, in 2011 there were more internationalized intra-state conflicts than had been recorded since 1946. These considerations, together with the increasing impact of terrorism and organized crime that led the International Community to deepen its commitment in the so-called Global War on Terror, raised the ultimate question about the legality of external interventions, especially in case of conflicts below the threshold of non-international armed conflicts. Thus, the Malian crisis in 2012 and its subsequent French intervention offered me an opportunity to underpin this analysis.

This work comprises two chapters. In the first one, a short chronology of the events occurred between 2012 and 2013 is outlined. The second chapter is instead concerned mainly with finding a legal basis for French intervention. I examined the justifications put forward by the French Government in support of its military action, noting that only the request for military assistance made by the legitimate Government of Mali was likely to sustain it. So I went on investigating practice and doctrine to determine whether or not there is a rule of general international law that recognises intervention by invitation. Finally, I made an attempt to assess the consistency of French military intervention with the practice and doctrine previously analysed, considering its widespread allegation of legitimacy.

Hostilities started on the 17th of January, when a Tuareg movement known as the Mouvement National pour la Libération de l'Azawad (MNLA) initiated a series of attacks against the towns of Ménaka, Aguelhok and Tessalit, defeating the Malian Army. Corruption of the government as well as fragility of an alleged model African democracy soon became clear. Therefore on March 22, a mutiny by disaffected soldiers from the units defeated by the armed groups in the north, resulted in a military coup d'état. A military junta, the Comité National pour le Redressement de la Démocratie et la Restauration de l'Etat, led by Captain Amadou Sanogo, took power, suspended the Constitution and dissolved the Government institutions. Meanwhile rebels gained new positions in the north of the country and MNLA easily overran Government forces proclaiming an independent State of Azawad on April the 6th. Shortly thereafter, tensions pertaining to ideological and programmatic approaches emerged among the armed groups in the north and, by the 18th of November, the Islamist brigades of Ansar Dine and MUJAO drove MNLA out of the main towns of Gao, Timbuktu and Kidal.

The political and institutional crisis, as well as the humanitarian crisis, generated serious growing concern among the International Community. According to Amnesty International, this tragic situation revealed to be the darkest one in the history of Mali, in terms of protection of human rights. ECOWAS and the African Union immediately condemned the putsch, prompting military

forces to return power to a civilian government. At the same time the rebels' declaration of independence was found null and void. The presence of armed and terrorist groups, whose criminal activities continued to destabilize the Sahel region, brought about Security Council Resolution 2056, which authorized the deployment of an African-led force to support the Malian Army in restoring territorial integrity and national unity, provided that ECOWAS and the African Union specified means, methods and objectives of the envisaged mission.

While the situation in the north became more and more difficult to tackle, the need for democratic institutions along with continued demands for the restoration of the legitimate power expressed by ECOWAS, persuaded interim Prime Minister Diarra to form a new government of national unity in August. Under the threat of expulsion from ECOWAS, Diarra went through the international call for further transition away from the military coup and for the return to democratic rule. The new government consisted of a cabinet of 31 ministers, including five who remained in connection with the coup and Captain Sanogo. It was a crucial decision in order to restore relations with the United Nations, which then adopted Resolution 2071.

Pursuant to the requirements of the Security Council, ECOWAS and the African Union in close coordination with international partners and the so-called *core countries*, adopted a common *Strategic Concept*, which clearly qualified the objectives and the scope of the African-led support mission to Mali. Security Council subsequently endorsed their *Strategic Concept* and then adopted Resolution 2085, authorizing the deployment of AFISMA. However, jihadists had already crossed the south of Mali and were heading for Bamako, doing well out of the delay in the establishment of the international mission along with the delay in its expected effectiveness. Consequently, the Malian President Mr. Traoré decided to ask France for military assistance. In a few days 4000 French soldiers were placed and managed to liberate the North. Meanwhile the United Nations were preparing the intervention of an international peace mission that would join force with the French Army. So on April the 25th, the Security Council ratified Resolution 2100, on one hand supporting Operation Serval, and on the other establishing a multidimensional integrated mission, to which AFISMA would transfer its powers.

This short chronology of events was useful to mark the context in which French military operations were conducted, *i.e.* the swift advance of Islamist militias upon the Capital. Transalpine authorities referred to three main justifications to support the legality of their intervention: the exercise of the 'natural right' of collective self-defence; the presence of an implied authorization in the relevant resolutions of the Security Council, the response to a request for military assistance made by the legitimate government of Mali.

As to the mention of article 51 of the Charter of the United Nations concerning the right of individual or collective self-defence, it seems irrelevant to the subject of French intervention, not because responding in self-defence against non-state actors is not deemed eligible, rather because it is difficult to admit that self-defence may be exercised against non-state actors operating within the territory of the State, mingling with the local population, and whose activities are not directed by any foreign State. Thus, military activities conducted by MUJAO, AQIM and Ansar Dine, strategically infiltrated into Malian society, cannot be traced to the notion of armed attack implied in article 51, and this is the reason why it could not operate as a circumstance precluding wrongfulness.

The second justification, based on an implicit authorization resulting from resolutions of the Security Council, is even less convincing. In fact the inadmissibility of implicit authorization is largely maintained due to the absence of the constitutive elements of customary law. The Malian case does not differ substantially from the consolidated practice. As a matter of fact Resolution 2085 authorizes the use of "all necessary means", including force, only in relation to the African-led mission. Some authors derived the presence of an implicit authorization in this resolution, on the basis of a Council Press Release which praised French intervention, considering that it may be regarded as an act of authentic interpretation. Yet a simple statement to the press has neither formal nor substantive requirements of such an official act.

Among the arguments put forward by France in support of its military intervention, only consent of the State in whose territory the military operations would take place is suitable. Indeed States practice shows a common agreement on the existence of a rule of general international law allowing intervention on request in the event of internal disturbances, tensions and sporadic violence, namely conflict situations which fall below the threshold of non-international armed conflicts, as defined by article 3, common to the Geneva Conventions and the Second Additional Protocol of 1977.

From an initial outright ban of military intervention by States, as provided in subsequent resolutions of General Assembly (the Resolution on Rights and Duties of States of 1949, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty 1965, the Declaration on Friendly Relations of 1970), the International Community moved quite swiftly to a recognition of the legitimacy of direct military assistance in the territory of another State with permission or invitation of the latter. Such a position is expressed in General Assembly Resolution 3314 on the Definition of Aggression (1974), in Resolution 387 (1976) of the Security Council concerning the aggression of South Africa against Angola, and finally in the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981). The legality of intervention by invitation has further been specified in the Wiesbaden Resolution of IDI (1975) and in the judgment of *Nicaragua Case*, passed by the International Court of Justice, which respectively referred to the intensity of the conflict in which a third State intervenes, as well as to the entities entitled to apply for assistance.

IDI resolution established the principle of non-intervention in civil wars. Nevertheless it implicitly admitted intervention in all situations falling below the threshold of non-international armed conflicts. Such an interpretation is supported by the fact that the Second Additional Protocol to the Geneva Conventions, endorsed two years after IDI resolution, reiterated what had already been ruled by article 3, common to the Conventions, concerning the definition of an internal armed conflict. Only it added that an intra-state armed conflict exists when dissident and organized armed forces, which are under responsible command, carry out sustained and concerted military operations, exercising tight control over part of the State territory itself. With regard to the *Nicaragua v. United States Case* it is worth noting that ICJ, while recognizing the validity of invitation in order to legitimize intervention, rejected that invitation, *i.e.* consent, was expressed by other actors than government, such as its opponents.

In *Case Concerning Armed Activities on the Territory of Congo*, the ICJ utterly followed the same approach. To the extent that the principle of intervention on request, though confirmed by practice, resulted for the first time, from what was left unsaid in the 1975 resolution of Wiesbaden, it is

legitimate to question, by virtue of a different international context now characterized by the fight against terrorism, whether intervention should be deemed permissible even when the purpose of invitation is curbing the threat of terrorism, regardless of whether the threshold of an armed conflict has already been crossed. States practice shows that actions of third states, motivated by the fight against terrorism, have never been challenged only when they aimed at tackling individual acts of terrorism. As recognized by the Criminal Court for the Former Yugoslavia, in the case *Prosecutor v. Boskoski and Tarculovski*, where terrorist activities reach the intensity of non-international armed conflicts, relevant rules of international humanitarian law shall be applied, therefore, external intervention would be inadmissible. From this point of view, the French intervention in Mali, intended to combatting AQIM, MUJAO and Ansar Dine will not make an exception.

As far as the prevailing doctrine is concerned, the spectrum of positions on intervention by invitation is quite extensive and covers all possible solutions. It goes from authors like M. Bennouna, who denies the eligibility of direct military support at all, to those who recognize the legitimacy of intervention at the invitation of government to counter terrorist activities as well (this position is embraced by many authors like G. Nolte or K. Bannelier and T. Christakis), to those ones as Y. Distein, who are likely to acknowledge military assistance with prior consent also in the case of non-international armed conflicts. Despite this vagueness, a certain common ground is recognizable insofar as the authors recognize the legality of such measures in cases of minor incidents or, as Bannelier and Christakis put it, in particular to combat acts of terrorism. What remains controversial and intensely debated is the legitimacy of such assistance in situations where there is a strong opposition to the government, comparable to a non-international armed conflict, whereby the denial of legality results from principles and norms that limit the exercise of such a right, for instance the principle of non-intervention and self-determination.

Having accurately assessed practice and doctrine, it can therefore be concluded that the Operation Serval, carried out at the request of Malian Transition Authorities and fully complying with the resolutions of the Security Council, which set apart the political process and the fight against terrorism, proved to be consistent with the established practice of States in this field. The French intervention did not interfere *de facto* with the MNLA's claims, being exclusively directed at hindering terrorist threat. To sum up, Resolution 2100 endorsing French intervention, and constituting itself a robust mission of the United Nations, following the request of the Malian authorities, does bear out the thesis that I asserted: French military assistance at the request of Mali was licit, since it operated in a situation below the threshold of an international armed conflict and aimed at countering terrorist activities brought about by the armed brigades of AQIM, MUJAO and Ansar Dine, whose advance towards the south of Mali, not only did it put at stake the country but also did menace the entire Sahel region for the potential foundation of an Islamic caliphate, making of Mali a key logistics hub for the illicit trafficking business through desert routes.