

French Interventionism in the Age of R2P: A Critical Examination of the Case of Mali*

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Lead Article

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* This article was presented at McGill Graduate Conference, McGill University, Montreal CA, May 2015.

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I. INTRODUCTION

In the past two decades the world has witnessed an increasing number of humanitarian interventions with a military component, whereby a country unilaterally or through a coalition of states intervenes in another country for humanitarian purposes. Such interventions have spawned contentious debate as to the humanitarian bona fides of military action, the possibility that humanitarian considerations may be invoked as a pretext for interventions that have strategic purposes and, at the most general level, the implications of new doctrines permitting non-consensual interventions in an international order based on state sovereignty. From American-led and Security Council-sanctioned intervention in Libya to the Russian intervention in the Crimea, humanitarian arguments for military action have given rise to a new set of challenges to concepts of legality and legitimacy in international affairs. The real concern with regards to the unilateral interventions is the legality and the legitimacy of such interventions under international law.

Responsibility to Protect¹ (R2P) has become one of the major axes of recent developments in international law concerning the use of force. Not only does it encompass the duty and responsibility of the international community to protect against the violation of human rights, it goes further by justifying military

¹ See Gareth Evans, *THE RESPONSIBILITY TO PROTECT, ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL*, 31-50 (2008); Thomas Weiss, *MILITARY-CIVILIAN INTERACTION, HUMANITARIAN CRISES AND THE RESPONSIBILITY TO PROTECT*, 21-25 (Debra J. Gerner et al. eds., 2d ed. 2005); Monica Serrano & Thomas Weiss, *THE INTERNATIONAL POLITICS OF HUMAN RIGHTS RALLYING TO THE CAUSE OF R2P*, 1-25 (Monica Serrano & Thomas Weiss eds., 2014); Melissa Labone, *HUMAN RIGHTS AND HUMANITARIAN NORMS, STRATEGIC FRAMING, AND INTERVENTION, LESSON FOR THE RESPONSIBILITY TO PROTECT* (2012).

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interventions in the name of humanitarian law.² The report of the ICISS³ and the United Nations Outcome Document of 2005 outlined the legal basis for embracing R2P.³ Pursuant to these documents, interventions based on R2P, must satisfy a number of conditions and criteria in order to fulfill the requirements of international law.

The Malian case is one of the recent examples in which French military forces acted in the name of humanitarian intervention during Operation Serval. This intervention was trumpeted as a humanitarian intervention in the sense that it saved the lives of innocent Malian people in an internal conflict. Initially, the French government justified this operation on the grounds of resolutions 2071⁴ and 2085.⁵ Both resolutions condemned the violence in Mali, but neither expressly authorized the French government to use military forces in Mali; they only mentioned the use of African military forces.⁶ Second, the French government asserted that there had been consent and that the intervention would have not happened but for the invitation of the Malian interim government. As a third justification, the French government invoked the concept of collective self-defense based on Article 51 of the UN Charter. Ultimately, the French Secretary of State, Laurent Fabius,

²See Thomas H. Lee, *The Laws of War and the Responsibility to Protect Civilians: a Reinterpretation*, 55 HARV. INT'L L. J. 252, 252-254 (2014); Lou Pingeot & Wolfgang Obenland, IN WHOSE NAME: A CRITICAL VIEW ON THE RESPONSIBILITY TO PROTECT, GLOBAL POLICY FORUM 1-6 (2014), https://www.globalpolicy.org/images/pdfs/images/pdfs/In_whose_name_web.pdf.

³ See THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, (Evans et al. eds., 2001) [hereinafter ICISS Report], <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

⁴ S.C. Res. 2071, U.N. SCOR, S/RES/2071 (Oct. 12, 2012) [hereinafter S.C. Res. 2071]; 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter 2005 World Summit Outcome].

⁵ S.C. Res. 2085, U.N. SCOR, S/RES/2085 (Dec. 20, 2012) [hereinafter S.C. Res. 2085]; 2005 World Summit Outcome, *supra* note 4.

⁶ See Patrick Goudin, *France- Mali, Checklist Pour Une Intervention*, ETUDES STRATEGIQUES (Jan. 15, 2013), <http://etudesgeostrategiques.com/2013/01/15/france-mali-check-list-pour-une-intervention> (discussing the details of the French military intervention and providing a check list for this intervention pursuant to the French law); Beligh Nabli, *Mali: L'operation Servale Est Elle Legale?*, LE MONDE (Jan. 14, 2013), http://www.lemonde.fr/afrique/article/2013/01/14/mali-l-operation-serval-est-elle-legale_1816877_3212.html.

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referenced the duty of France and the international community to intervene in Mali. This duty derives from the norm of the Responsibility to Protect.⁷

This paper will analyze the arguments for the legality of the French intervention in Mali during Operation Serval, which spanned across a number of different international legal doctrines, and will show that the operation likely violated the rules of international law despite the many justifications advanced by France. In particular, the attempt by France to ground the legality of the intervention in the doctrine of the Responsibility to Protect (hereinafter R2P) will be the critical focus of the argument developed in this article. While France insisted that it was acting consistent with R2P to address the duty of the international community, including the United Nations, to protect civilians in Mali, the mere invocation of the humanitarian welfare of the civilian population alone is not sufficient to ground the legality of an operation under R2P.⁸ This article will analyze the justificatory framework provided by the R2P doctrine and demonstrate that French arguments from humanitarianism failed to satisfy the threshold conditions for the legitimate invocation of R2P.

Lastly, this paper will explore whether international practice—including unilateral and multilateral interventions over the last decade that have referenced R2P—has resulted in any adaptation or variation of the requirements of the R2P doctrine. In Part I, I analyze the three initial arguments used by France to justify this intervention on the basis of (i) United Nations Security Council resolutions, (ii) consent of the Malian government; and (iii) collective self-defense. In Part II, this paper will survey the scholarship regarding the concept of R2P at large and its place in the international arena. In Part III, this paper will turn to the French argument for the legality of Operation Serval grounded in R2P to analyze whether the requirements of the doctrine were satisfied and offer a critical examination of the French deployment of the principle. Finally, I will explore the impact and implication of the use of R2P in contemporary international law, in light of the apparent plasticity of the doctrine when invoked by major powers.

⁷ See Laurent Fabius, *Mali, Press Conference Given by M. Laurent Fabius, Minister of Foreign Affairs*, FRANCE DIPLOMATIE (Jan. 14, 2013), <http://www.diplomatie.gouv.fr/en/country-files/mali-224/events-2627/article/mali-press-conference-given-by>; *Bulletin d'Actualités*, FRANCE DIPLOMATIE (Jan. 14, 2013), <http://basedoc.diplomatie.gouv.fr/exl-doc/FranceDiplomatie/PDF/bafr2013-01-14.pdf>.

⁸ See David Petrusek, *Misinterpreting Mali, The Uses and Abuses of R2P*, CENTER FOR INTERNATIONAL POLICY STUDIES (Feb. 11, 2013), <http://cips.uottawa.ca/misinterpreting-mali-the-uses-and-abuses-of-r2p>.

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II. ANALYSIS OF THE FRENCH ARGUMENTS FOR THE MILITARY INTERVENTION IN MALI

Faced with domestic and international criticism, the French government justified the legality of Operation Serval on three grounds. The first was that the use of military force accorded with the resolutions of the Security Council. The second ground was the invitation by the interim president of Mali to intervene. The third ground was based in the notion of collective self-defense and the idea that the French government had a duty to intervene in Mali. As I will discuss in this section, none of these arguments fulfill the requirements of customary international law.

A. SUMMARY OF OPERATION SERVAL

In January 2013, the French military initiated Operation Serval⁹ in Mali, Sub-Saharan Africa.¹⁰ After months of armed conflict between the forces of the Malian government and the Tuareg National Movement for the Liberation of Azawad (NMLA), the forces of Captain Sonog toppled Malian President Amadou Toure on March 21, 2012. According to many sources, the major political and military forces in northern Mali were a hodgepodge of militia groups, suspected of being involved with Al-Qaeda, who had been based in northern Mali since early 2012.¹¹

After Toure's ouster, Dioncoundra Traore was sworn in as interim president on April 12, 2012, but the country remained in an unstable condition. French military forces entered into the armed conflict after attacks in Bamako resulted in casualties and presented a threat to the interim government. Faced with this escalation of violence, the French military, which had been ready to intervene for some months, commenced an incursion in Mali.¹² The result of this successful military operation was the overthrow of the rebel forces and the confirmation of

⁹ See Isaline Bergamaschi & Mahamadou Diawara, *The French Military Intervention in Mali: Not Exactly FrancAfrique But Definitely Post-colonial*, in PEACE OPERATIONS IN THE FRANCOPHONE WORLD, GLOBAL GOVERNANCE MEETS POST-COLONIALISM, 139-41 (Bruno Charbonneau & Toney Chafer eds., 2014); Amy Laird, Commentary, *Mali: a Legally Justifiable Intervention by France?* N. Z. Y. B. INT'L L. 123, 123-26 (2012).

¹⁰ See Goudin, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

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President Traore's authority. The French forces were able to chase all military armed groups acting against the Malian government.¹³

B. U.N. SECURITY COUNCIL RESOLUTIONS

1. *Resolutions 2071 and 2085 of the United Nations Security Council*

The French government attempted to justify its military intervention with Security Council Resolutions.¹⁴ However these resolutions alone do not form a sufficient legal foundation for the French intervention. Resolution 2071, adopted on December 5th 2012, references the armed forces in Sahel and the presence of military groups in Mali. According to the Resolution's introduction, the Malian army is responsible for the protection and the security of its people and all military interventions must be Malian-led.¹⁵

Paragraph 6 of the Resolution states that the Security Council is ready to respond to the request of the "Transitional Authorities of Mali" for international military assistance in recovering the occupied regions in the north of the country.¹⁶ Moreover, the Resolution specifies in paragraph 7 that the Secretary General will provide military and security planners to assist ECOWAS and the African Union in close connection with Mali and neighboring countries.¹⁷ Where the body of the

¹³ See David J. Francis, *THE REGIONAL IMPACT OF THE ARMED CONFLICT AND FRENCH INTERVENTION IN MALI*, NORWEGIAN PEACEBUILDING RESOURCE CENTER 5 (2013), http://www.peacebuilding.no/var/ezflow_site/storage/original/application/f18726c3338e39049bd4d554d4a22c36.pdf ("Worthy of note is that President Hollande had earlier refused to intervene in support of the beleaguered President Bozize of the Central Africa Republic (CAR) in December 2012. The apparent U-turn on Mali was because of the threat posed by that country and how this resonates with the French domestic audience, i.e. the threat of the emergence of a terrorist state and its impact on France.").

¹⁴ See Resolution 2071, *supra* note 4; Resolution 2085, *supra* note 5.

¹⁵ See Resolution 2071, *supra* note 4. The Security Council unanimously adopted Resolution 2071, presented by France and co-sponsored by Morocco, Togo, South Africa, India, Germany and the United Kingdom.

¹⁶ *Id.* at ¶ 6.

¹⁷ *Id.* at ¶ 7. ("... immediately provide military and security planners to assist ECOWAS and the African Union, in close consultation with Mali, the neighbouring countries of Mali, countries of the region and all other interested bilateral partners and international organizations, in the joint planning efforts to respond to the

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Resolution mentions the military intervention, it is loosely referenced and it is accompanied by the cooperation with other African countries. In paragraph 9, the Resolution requests that the Member States provide assistance, expertise and training to Malian forces, consistent with their respective domestic laws. Furthermore, the same paragraph emphasizes that the goal of such an action would be to restore the authority of Malian forces. The Resolution limits military assistance to the reinforcement of Malian forces so that they can regain the control of their territory.¹⁸ In fact, French forces intervened unilaterally in Mali. Not having acted to reinforce Malian forces, nor having been led by them, France intervened outside the scope of this resolution and may not rely on it.

Resolution 2085, adopted on December 20, 2012, reiterated the same guidelines found in Resolution 2071. Before the adoption of this Resolution, the French Ambassador to the United Nations, Gerard Arnaud, delivered a speech on December 10th, 2012 supporting any future military action by the Security Council.¹⁹ This second Resolution, strongly condemning the violation of human rights in Mali, initiated a deployment of an African-led international support mission to Mali (known as AFISMA) for an initial period of one year. AFISMA was to take all necessary measures to restore safety and security in compliance with international humanitarian law.²⁰

The deployment of the AFISMA forces, mentioned in paragraph 9, was to be for the following purposes, *inter alia*: 1) to contribute to the rebuilding of the capacity of the Malian Defense and Security Forces, in coordination with other international forces, 2) to support Malian authorities in recovering the areas in the northern region under terrorist control, 3) to support the Malian authorities in their primary responsibility to protect the population, and 4) to support the Malian authorities in facilitation of humanitarian assistance.²¹ Pursuant to paragraph 11 of

request of the Transitional authorities of Mali for such an international military force. . . .”).

¹⁸ *Id.* at ¶ 9.

¹⁹ Gerard Arnaud, French Ambassador to the UN, The Speech of Mr. Arnaud (Dec. 10, 2012), *available at* <http://www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/security-council/article/10-december-2012-security-council> (stating that the operation to liberate northern Mali must assure the security of countries in the sub-Saharan region).

²⁰ See Resolution 2085 *supra* note 5.

²¹ *Id.* ¶ 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

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the Resolution, the UN Secretary General must continue to support planning and preparation for the deployment of AFISMA.²²

Regarding the duties of the international community, paragraph 13 called upon Member States to contribute troops to AFISMA in order to fulfill its mandate.²³ Moreover, paragraph 18 of the Resolution stated that any support provided by the UN, regional and subregional organizations, or Member States must be consistent with international humanitarian and refugee law.²⁴

In sum, the text of Resolution 2085 refers explicitly to the deployment of the AFISMA military forces and makes no mention of the deployment of French forces.²⁵ The use of military forces by Member States is limited to furthering cooperation with African forces.²⁶

Furthermore, one of the arguments in favor of the legality of this intervention was the publication of a press release by the Security Council on January 10th, 2013.²⁷ In this text, Member States insisted on the rapid deployment of military forces in Mali.²⁸ However, the press release had no effect on the

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...”).

²² *Id.*, at ¶ 11.

²³ *See id.*, at ¶ 13.

²⁴ *Id.*, at ¶ 18.

²⁵ *See Laird, supra* note 9, at 134-36 (discussing that paragraph 9 of the Resolution 2085 does not authorize the French intervention; it only requires an African led deployment).

²⁶ Nabli, *supra* note 6 (stating that France had a duty to intervene in order to save human lives in Mali and adding that the French government did not follow Resolution 2085); *see also id.*, at 134-36 (specifying that Resolution 2085 referred extensively to the deployment of military forces by the Member States).

²⁷ Press Release, Security Council, Security Council Press Statement on Mali SC/10878 (Jan. 10, 2013), *available at* <http://www.un.org/press/en/2013/sc10878.doc.htm>.

²⁸ *Id.* at ¶ 5 (“The members of the Security Council express their determination to pursue the full implementation of its resolutions on Mali, in particular resolution 2085 (2012) in all its dimensions. In this context, they call for a rapid deployment of the African-led International Support Mission in Mali (AFISMA).”).

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disposition of the Security Council Resolutions, and the press release taken in its own terms insisted in particular on the deployment of African forces.²⁹

2. *Legality of French Intervention Based on the Spirit of the U.N. Resolutions*

Some argue that the French military intervention was legal because it followed the general objectives of the UN Resolutions. This argument is unsatisfactory. The mere fact that the French military action happened to be in harmony with the goals of the aforementioned Security Council Resolutions cannot justify the actions of the French government.³⁰ Raphael Van Steenberghe forwards the position that although these resolutions did not open the door for a French intervention, the French intervention was in compliance their objectives.³¹ It is true that the objective of the Resolution was to prevent rebel groups from taking over the Malian capital and to prevent further massacres. Nonetheless, allowing a military intervention to be based on the general spirit of a Resolution rather than its texts could open the door to seemingly any violation of international law, conscripting the Security Council Resolutions as an almost universal pretext for future actions. The consequences of such a methodology would be to invite a subjective interpretation of the United Nation's Resolutions without contemplating the intended specific scope of the resolution.³²

3. *Resolution 2100 as Retroactive Approval*

²⁹ Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, LEIDEN J. INT'L L. 26, 855-874 (2013) (mentioning that the French government did not claim to intervene based on the Security Council resolutions, however they argued that the intervention furthered the objectives of Resolution 2085).

³⁰ See Raphael Van Steenberghe, *Les Interventions Francaises et Africaines au Mali au Nom de la Lute Armee Contre le Terrorisme*, REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 285 (2014) (Fr.) (stating that the resolutions did not mention France or the French government and believing that only the African forces were authorized to intervene based on this Resolution).

³¹ *Id.*

³² *Id.* at 286 (stating that even though the resolution did not allow French forces to intervene in Mali, the intervention was justified because the objectives of the resolutions were attained, and referring to the approval of the African countries by citing to the press release of the African Union Security and Peace Council who approved the French intervention). This press release is available at <http://www.peaceau.org/uploads/cps-com-350-mali-14-01-2013.pdf>.

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After Operation Serval was completed, the UN Security Council in April 15, 2013 passed Resolution 2100 approving the French intervention in Mali. This Resolution, adopted nearly three months after the intervention, is the first UN document discussing this intervention.³³ The preamble of the Resolution praises the swift French action taken by the request of the Malian government.³⁴ Paragraph 18 of the Resolution authorizes the deployment of French military forces for the duration of the mandate of The United Nations Multidimensional Integrated Stabilization Mission in Mali³⁵ (MINUSMA). MINUSMA is a United Nations force charged with the reestablishment of government authority and stability in northern Mali. Resolution 2100 was approved after the military intervention was nearly completed, that is, it was adopted after the fact. The use of this Resolution cannot serve as a sufficient justification under international law.³⁶ While it is true that Resolution 2100 welcomed France's action, this resolution cannot be construed as an instrument sanctioning the violation of international law. Doing so would allow countries to violate international law first and later seek the assent of the United Nations for their wrongdoings.³⁷

The use of Resolution 2100 may be objected to on a number of grounds. There is no basis for a retroactive approval of a violation of international law. It is structurally impossible for the Security Council to pass a resolution retroactively validating a previous military action. For instance, in the case of Iraq, the Security Council passed various resolutions following the 2004 invasion. The Security Council in 2006 unanimously approved Resolution 1723, which *inter alia* recognized the authority of multinational forces.³⁸ Additionally, Resolution 1790, adopted in 2007, extended the mandate of multinational forces in Iraq.³⁹ Both these resolutions expressed approval the action of multinational forces but they could not

³³ S.C. Res. 2100, U.N. SCOR, S/RES/2100 (Apr. 25, 2013); *see also* Bannelier & Christakis, *supra* note 29, at 869.

³⁴ *See* S.C. Res. 2100, U.N. SCOR, S/RES/2100 (Apr. 25, 2013).

³⁵ *Id.* at ¶ 18; *see also* U.N. S.C. Rep. of Security Council Mission to Mali, S/2014/173, (Mar. 11, 2014).

³⁶ Laird, *supra* note 9 (speaking in favor of the intervention based on the idea that Resolution 2100 of April 2013 was seen as a green light by the members of the international community).

³⁷ *See* Bannelier & Christakis, *supra* note 29, at 869 (calling Resolutions 2085 and 2100 as “blessing and authorization” to intervene in Mali).

³⁸ S.C. Res. 1723, U.N. SCOR, S/RES/1723 (Nov. 28, 2006).

³⁹ S.C. Res. 1790, U.N. SCOR, S/RES/1790 (Dec. 18, 2007).

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be interpreted as approving the violation of international law by the United States and the United Kingdom.

Also, even if Resolution 2100 does not mention any violation of international law by France, its silence should not be construed as consent. France is one of the permanent members of the UN Security Council and is able to veto any resolution before the Security Council. Using to the veto power, a permanent member may block a resolution at the Security Council. It is inconceivable that France would be presented with a resolution condemning its action and not use the veto power. Thus, any resolutions contrary to the French position would not pass the scrutiny of the Security Council.

Lastly, the main role of the UN in Mali was the peacekeeping mission. In Resolution 2100, the UN approved both the peacekeeping mission and the action of the French government in order to stabilize the political situation of the sub Saharan region. The subsequent peacekeeping goal of the UN should not be interpreted as a free pass for any violation of international law, and cannot be used to cure any preceding violations.

Because it contained no specific mention of France, the resolutions of the UN Security Council did not provide any legal grounds for justifying the military operation in Mali. From the language of these Security Council instruments, it is clear that the Security Council did not intend to approve unilateral French military intervention.

C. INTERVENTION BY INVITATION: CONSENT

The second legal ground for the French intervention in Mali was that the interim government of President Traore consented.⁴⁰ This argument lacks foundation.

The consent of a state may serve as authorization for a foreign military operation within the territory of the inviting state. It functions as an acceptance of

⁴⁰ See Fabius, *supra* note 7; see also generally Mali, *Statement by M. François Hollande, President of France, Following The Select Defense Council Meeting*, DIPLOMATIE FRANCE (Jan. 12, 2013), <http://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html#Chapitre>.

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the military intervention. While it is possible for a government to consent, this may effect complex and controversial results.⁴¹

In a situation of internal war, a request for intervention must come either from the legitimate government or the effective government.⁴²

1. Consent by a Legitimate Government Versus a Government with Effective Control

The question of legitimacy of intervention arises when the legitimacy of the inviting party is itself in question.⁴³ The legitimacy of a state can materialize through its formal recognition by other states. Therefore, in this view, the “state’s consent lies at the core of the international system”.⁴⁴

In the Malian situation, the intervention was requested by the interim president, whose legitimacy was disputed by different factions and groups.⁴⁵ The interim government tried to seek help from France after the coup d’état. However, since the government of President Traore was not recognized internationally as a legitimate government, the argument of consent is untenable.⁴⁶ Apart from France and small number of African countries, there is no other evidence of an external recognition of Traore.

Another element to consider in evaluating consent is whether the government has dominion over the territory it purports to control and can fulfill the governmental function there.⁴⁷

⁴¹ See Christine Gray, *INTERNATIONAL LAW AND THE USE OF FORCE* 81 (2008); Olivier Corten, *THE LAW AGAINST WAR, THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW*, 411 (Christopher Sutcliffe trans., 2010).

⁴² Gray, *supra* note 41, at 98.

⁴³ Corten *supra* note 41, at 752 (citing to Resolution 2131 of the United Nations General Assembly which specifically condemned any third state interference or intervention in a civil war taking place within the territory of another state).

⁴⁴ See Christopher Le Mon, *Unilateral Intervention by Invitation in Civil War: The Effective Control Test Tested*, 35 N.Y.U. J. INT’L & POL. 741, 744 (2003).

⁴⁵ See Bergamaschi & Diawara, *supra* note 9, at 139-42.

⁴⁶ See Bannelier & Chrsitakis, *supra* note 29, at 866 (stating that the government of President Traore was internationally recognized rather than the three Islamist groups in northern Mali).

⁴⁷ See Le Mon *supra* note 44, at 745.

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Regarding the criterion of effective control, the Malian interim government struggled to control the northern part of the country. Furthermore, the unstable situation in the Malian capital, Bamako, where numerous groups were protesting in the streets on a daily basis and fear of a possible coup by captain Amadou Sanogo gripped the population, belies the effective control of the Malian government.⁴⁸ The interim government had no control whatsoever over a considerable portion of Malian territory. The presence of numerous rebel groups in northern Mali was another indication of a lack of effective control on the part of the interim government.

2. *Consent in an Internal Conflict*

The issue of consent by a government engaged in civil war has always been subject to doctrinal debates among major international law scholars.⁴⁹ For Christine Gray, the right to use force at the invitation of another government is acceptable only if the domestic unrest, occasioning the invitation, does not rise to the level of civil war.⁵⁰ According to a number of authors, there is a general principle of non-intervention in the internal conflicts of another country.⁵¹ Military intervention in an internal conflict with rebels may complicate the legality of intervention by invitation.⁵²

In the case of international recognition of the inviting government by other countries, the intervention will be deemed valid.⁵³ This has been a consistent

⁴⁸ See Bannelier & Christakis *supra* note 29, at 865; Bergamaschi & Diawara *supra* note 9, at 142; J.P. Remy, *Le Pouvoir Malien Sauve des Putschistes par les Militaires Français*, LE MONDE (Jan. 14, 2013), http://www.lemonde.fr/afrique/article/2013/01/14/le-pouvoir-malien-sauve-des-putschistes-par-l-engagement-francais_1816704_3212.html.

⁴⁹ See Corten, *supra* note 41, at 411.

⁵⁰ Christine Gray, *supra* note 41, at 85. (stating that the right of third state to use force at the invitation of a government to maintain order is traditionally accepted if “the domestic unrest falls below the threshold of civil war”).

⁵¹ See Karine Bannelier & Theodore Christakis, *Volonti Non Fit Injuria? Les Effets du Consentment a L'intervention Militaire*, 50 ANNUAIR FRANCAIS DE DROIT INTERNATIONAL [A.F.D.R.] 102, 102-05 (2004) (Fr.).

⁵² See Corten, *supra* note 42, at 276.

⁵³ *Id.*; see also Le Mon, *supra* note 44, at 745 (stating that contrary to customary international law which recognizes the possibility for intervention in the case of belligerence, modern international law regarding invitation necessitates that the inviting party have external international legitimacy).

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practice by numerous countries under international law.⁵⁴ The precedent of ICJ in the case of the *Military and Paramilitary Activity in Nicaragua* provides that intervention based on the request of a rebel group violates international law.⁵⁵ The ICJ concluded that there was insufficient state practice to overrule the customary international law prohibiting intervention on the side of a nonstate party.⁵⁶ However, if the besieged central government were to request help in a case where rebels had attacked the country, then an intervention pursuant to this invitation would be legitimate. If an intervention were requested by the rebels in this hypothetical then it would be a clear violation of international law.⁵⁷

With respect to interventions for the purpose of fighting rebel groups in another country, legal scholarship is divided. Although this is a violation of the principle of self-determination, some argue that outside military intervention for humanitarian or peacekeeping purposes does not *per se* violate international law.⁵⁸ Therefore, the intervention to fight rebels must be limited to peacekeeping and humanitarian intervention.⁵⁹

Scholars such as Olivier Corten opine that pursuant to the state practice since the 1950s, even when intervention is consented to by an uncontested government, it should not be a means of settling an internal conflict.⁶⁰

There is no doubt about the presence of military groups and an internal conflict in Mali.⁶¹ The various forces and rebels in the north had been fighting with

⁵⁴ See Corten *supra* note 42, at 280.

⁵⁵ See Bannelier & Christakis, *supra* note 51, at 104-07 (referring substantially to the work of Prof. Roberto Ago, who believed that if a state acquiesces to a violation of the international law, the said consent creates an accord and an acceptance between both states).

⁵⁶ Le Mon, *supra* note 44, at 749 (distinguishing the situation of belligerency and specifying that the aid to rebels nonstate is legal under customary international law if there is a situation of belligerency).

⁵⁷ *Id.*

⁵⁸ Corten, *supra* note 41, at 294.

⁵⁹ *Id.* at 295 (speaking extensively about the French intervention in Chad in 1970s and mentioning that the French logistical support to Chad was not intended for the fight against rebels).

⁶⁰ See *id.* at 309.

⁶¹ The French government contended that one of the reasons for intervening was to fight against terrorism. Moreover, the fight against terrorism does not extend the argument of the fight for humanitarian or peacekeeping purposes under

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the central government for months before the French intervention. The rebel groups in northern Mali sought to take over and declare their independence. After their attack in Konna on January 9, 2013, the rebels and the Ansar Eldine group repeatedly threatened to attack Bamako and the Sevare airport.⁶² The fall of numerous cities in Mali, such as Tessalit and Konna was the evidence of the ongoing struggle for power in Mali.⁶³ The presence of internal conflict automatically casts doubt on the legality of military operation in the country.

3. *Consent Pursuant to Resolutions 2071 and 2085*

Some authors reject any deficiency of consent by citing to Resolutions 2071 and 2085 of the Security Council.⁶⁴ The adoption of these resolutions is not evidence of the Traore government's legitimacy.⁶⁵ For instance, in the case of Sudan, the Security Council has issued a number of resolutions regarding the internal conflict. In these resolutions the Security Council addresses both Sudan and South Sudan, without expressly legitimizing the forces of South Sudan.⁶⁶ This shows that the naming of a country or government in a Security Council resolution does not necessarily legitimize that entity. The Security Council has never expressly recognized the Malian interim government as legitimate.⁶⁷ Moreover, some commentators have argued that since no one objected to the French intervention, it is fair to consider that the interim government was a legitimate one under international law.⁶⁸ This argument is flawed, because the absence of contestation cannot create any external recognition of a state.

international law. The Ansar Eldine groups were not subject to the designation of terrorism until April 2013, after the French intervention.

⁶² See Laird, *supra* note 9, at 126.

⁶³ See Remy, *supra* note 48.

⁶⁴ See Van Steenberghe *supra* note 30, at 278 (mentioning that the Malian interim president's letter to French president satisfies the requirement of the consent under international law and rejecting any objection regarding the validity of such consent).

⁶⁵ *Id.*

⁶⁶ See S.C. Res. 2046, U.N. SCOR, S/RES/2046 (May 2, 2012).

⁶⁷ See Laird, *supra* note 9, at 127 ("The Malian government was overthrown in coup d'etat early on in the conflict, but despite this, by the time France intervened a legitimate transitional Government had been restored which was internationally recognized by the Security Council in its resolutions").

⁶⁸ See Van Steenberghe, *supra* note 30, at 278.

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Therefore, the argument of the legality an intervention based on the intervention by invitation is not satisfied in the case of Operation Serval.

D. COLLECTIVE SELF-DEFENSE: UNITED NATIONS CHARTER, ARTICLE 51

The third argument used by France was based on collective self-defense.⁶⁹ Since the beginning of hostilities, French Secretary of State Laurent Fabius maintained since the beginning of hostilities that the intervention was an act of collective self-defense under Article 51 of the United Nations Charter.⁷⁰ He went on to emphasize that any terrorist group in Africa was a threat to French interests and French nationals.

1. *Scope of Self-Defense under Article 51*

The use, extent and scope of self-defense are subject to various doctrinal debates and disagreements.⁷¹ Prior to the adoption of the UN Charter, customary international law regulated self-defense. Although Article 51 of the United Nations charter provides the legal framework for self-defense, the practice of this doctrine remains problematic and inconsistent.⁷² Article 51 is an exception to the general rule of Article 2(4) of the United Nations Charter and should be narrowly construed.

More narrowly, collective self-defense concerns when a third party may intervene militarily in order to help the victims of an armed attack. The right of self-defense is founded on the idea of redressing the peace.⁷³ The scholarship on this point has diverged on the basis of the right to collective self-defense, criticizing the seeming contradiction of a collective action undertaken unilaterally.⁷⁴

It is still unclear whether Article 51 of the United Nations Charter recognizes the right of collective self-defense. The ICJ had the opportunity, albeit in brief and widely disagreed with, to discuss the collective right of self-defense in the case of Military and Paramilitary Action in Nicaragua.⁷⁵ According to the

⁶⁹ See Nabli, *supra* note 7.

⁷⁰ See Fabius, *supra* note 7.

⁷¹ See Gray, *supra* note 42, at 114.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See D.W. Bowett, SELF-DEFENSE IN INTERNATIONAL LAW 200 (1958) (referring to Hans Kelsen who mentioned the contradiction of the use of the expression unilateral intervention and collective self-defense).

⁷⁵ Military and Paramilitary Activity in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, 176-81 (June 27).

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holding of the Court, there must first be an armed attack, which is defined more broadly than a frontier attack. Second, the state which has suffered the armed attack must declare that it has been the victim of the attack. Third, there can be no self-defense if the victim state does not request help. Lastly, the court requires that there be a reporting of the armed attack to the UN Security Council pursuant to Article 51 of the UN Charter.⁷⁶

2. *Use of Self-Defense when there has been an Action by the Security Council*

Broadly, one of the main issues remains the validity of intervention based on self-defense where the Security Council has already taken any action to resolve the question. Scholars such as Olivier Corten contend the right of self-defense cannot be exercised once the Security Council has taken certain measures. This prevents self-defense from being used in a unilateral manner and is based on the past and current precedents of international law.⁷⁷

Article 51 of the UN Charter reads *inter alia* that “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”. Scholars have interpreted this to mean that the act of self-defense is permitted until there is an action by the Security Council.⁷⁸

As discussed previously, there was no armed attack in Mali, therefore the first prong of the test for self-defense was not satisfied. Mali was not being attacked by external military forces but was instead on the brink of civil war. The presence of rebels inside Malian territory is not an external attack and does not permit the exercise of self-defense according to the ICJ’s holding in Nicaragua holding.⁷⁹

⁷⁶ See Gray, *supra* note 42, at 172.

⁷⁷ Corten, *supra* note 42, at 411 (stating a detailed history of the use of self-defense by different countries).

⁷⁸ Thomas K. Plofchan, *Article 51: Limits on Self Defense*, 13 MICH. J. INT’L L. 336, 338-340 (1991) (mentioning that any action taken by the Security Council whether authorizing the use of force or actions short of use of force is indicative of the Security Council’s judgment); see also Melvina Halberstam, *The Right to Self-defense once the Security Council Takes Action*, 17 MICH. J. INT’L L. 229, 229-230 (1995) (concluding that a more plausible interpretation of article 51 is that a State retains the right of self-defense until the Security Council has taken the measure that have succeed in restoring the international peace and security).

⁷⁹ Van Steenberghe, *supra* note 30, at 287.

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Second, the Security Council had begun taking action regarding Mali as soon as the French government commenced diplomatic negotiations in 2012. The two aforementioned Security Council resolutions addressed the situation in Mali directly and the impact of the rebel presence on the region. The resolutions discussed the deployment of African-led military forces and further actions to be taken by the United Nations. Because the Security Council had taken action in this instance, any further military intervention on the part of France should have been suspended. Both Resolutions 2071 and 2085 are adequate and sufficient to fulfill the conditions of Article 51, terminating the right of self-defense. Once the Security Council has taken such measures, any further military action in self-defense on the part of an individual nation would be a violation of international law.⁸⁰

Lastly, some scholars have argued that the application of the self-defense doctrine extends to situations where there is an armed attack inside the territory of an innocent state. Thus, this would apply to a terrorist attack such as the one in Mali preceding the military intervention.⁸¹ This argument is also flawed.

The French government did not use any humanitarian-based arguments at the outset of this intervention. Rather they began by stating that Operation Serval did not violate any provision of international law, therefore it was justified. With France's seeming contempt for international law drawing criticism from every quarter, R2P presented an attractive out. The next section will address the doctrine of R2P and its implications in contemporary international law.

III. R2P AND CONTEMPORARY INTERNATIONAL LAW

A. COLLECTIVE SELF-DEFENSE: UNITED NATIONS CHARTER, ARTICLE 51

1. *Creation of ICISS Report*

The doctrine of R2P is the product of the work of a number of international and humanitarian law scholars.⁸² It owes its genesis principally to the work of

⁸⁰ Laird, *supra* note 9, at 127 (stating that France erred by claiming the use of Article 51 because self-defense was not relevant in this case and concluding that a justification based on Article 51 was not suitable and “perhaps was only utilized for political purpose” (emphasis added)).

⁸¹ Karine Battelier & Theodore Christakis, *French Military Intervention in Mali is Legal but... Why? Part I*, EJIL: TALK!: BLOG OF THE EUR. J. INT'L L. (Jan. 24, 2013), <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>.

⁸² Weiss, *supra* note 1, at 21-25.

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Bernard Kouchner, Mario Bettati and Francis Deng.⁸³ Following the events in Somalia and Bosnia, NATO intervened militarily in the former Yugoslavia for humanitarian purposes. The Security Council did not intervene. Ultimately, the NATO military action altered the terrain and ensured that the Kosovar population be protected from Serb military action.⁸⁴ A new principle of international law arose as a result, the Responsibility to Protect. A historic moment in the emergence of R2P was the speech of Kofi Annan, then Secretary General of the United Nations, at the 2000 Millennium Report. In the speech he said:⁸⁵

“I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica to gross and systematic violations of human rights that offend every precept of our common humanity? We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.”⁸⁶

After Annan issued this invitation to governments to resolve the conflict between the necessity of humanitarian interventions and sovereignty, the International Commission on Intervention and State Sovereignty (ICISS) was created under the auspices of the Canadian government. Its mission was to achieve an international consensus on humanitarian intervention, which led to the production of a report on the Responsibility to Protect.⁸⁷ The creation of this commission (ICISS) was a response to the lack of action by the international community regarding the crisis in Kosovo.

Gareth Evans, an Australian lawyer and legal scholar, and Mohamed Sahnoun, former Ambassador of Algeria, were appointed as the co-chairs of ICISS.

⁸³ See Bernard Kouchner & Mario Bettati, *LE DEVOIR D'INGÉRENCE: PEUT-ON LES LAISSER MOURIR?* (Denoel ed., 1987) (Fr.).

⁸⁴ Weiss, *supra* note 1, at 22.

⁸⁵ See Evans, *supra* note 1, at 31-33 (discussing the history of the terminology of Responsibility to Protect and stating that the expression of “Responsibility to Protect” was used for the first time in 1840).

⁸⁶ Kofi Annan, *WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY* 48 (2001), http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf.

⁸⁷ See ICISS Report, *supra* note 3; Evans *supra* note 1, at 38-43.

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Evans and Sahnoun were the principle authors of the ICISS report, which gave birth to R2P. The core question during the genesis of the report was determining the relationship between the notions of sovereignty and responsibility.

The ICISS report is grounded in the following two propositions: 1) the state has the primary responsibility to protect its population, and so sovereignty in R2P is a responsibility rather than a right; 2) if the state fails to provide appropriate protection to its population while the population is suffering serious harm, and the state is unwilling or unable to avert the harm, then the international community has a duty to intervene.⁸⁸ In accordance with the report, R2P encompasses three major components: the responsibility to prevent, (i.e. preventing any potential causes of internal conflict or other crisis); the responsibility to react (responding militarily or otherwise to situations involving violation of human rights) and responsibility to rebuild (providing full assistance to the population after military intervention).⁸⁹ The same report prescribes the point at which military action is to commence.⁹⁰

2. Requirements for Military Action according to the ICISS Report

The ICISS report states a number of requirements for the application of R2P. The first step consists of the determination of the “just threshold” stage and the seriousness of harm suffered by the population to be protected. The “just threshold” requires that there be a serious and imminent harm to human beings or humanity which is likely to create a situation dangerous to human rights, such as large scale loss of life or ethnic cleansing.⁹¹ In order to satisfy the just threshold, the commission gives some examples of conscience-shocking situations, such as actions defined in the 1948 Genocide Convention, various examples of ethnic cleansing, crimes against humanity violating the law of war, mass starvation, civil war, or natural and environmental catastrophes.

The second step is titled “right intention”. Right intention requires that the intervention be intended either to halt or avert human suffering. According to the report, there are a number of ways to fulfill this requirement. The criterion is satisfied if the military action takes place on a multilateral rather than unilateral basis. The report specifies that the overthrow of a particular regime is not “right intention”.⁹² Another way to ensure “right intention” would be to determine whether the military intervention is supported by the people where the intervention

⁸⁸ See ICISS Report, *supra* note 3, at xi.

⁸⁹ See *id.* at xiii.

⁹⁰ *Id.*

⁹¹ See ICISS Report, *supra* note 3, at 32-33; Evans, *supra* note 1, at 142-45.

⁹² See ICISS Report, *supra* note 3, at 36.

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is to occur. Lastly, the opinion of other countries in the region must be taken into account in considering “right intention”.⁹³

Third, intervention must be the last resort. The report specifies that there must be an exhaustion of all diplomatic and non-military avenues.⁹⁴ Negotiation is heavily emphasized in the report and there must be a good faith attempt to avert the conflict before any application of military force. The report states that the action under the responsibility to react is only justified when the responsibility to prevent has been satisfied. Failure to proceed to carry out the negotiations will bar any military intervention.

Fourth, the intervention must be proportionate in scale and duration. This proportionality requirement subjects the military intervention to the rules of international humanitarian law. The operation must involve a reasonable prospect of success. The report stresses that there cannot be an escalation into a large conflict following an intervention for a limited purpose.⁹⁵

The ICISS report specifies that the United Nations Security Council be the only authority carrying out such action. Furthermore, the ICISS provides that military interventions must have a clear objective and a reasonable prospect.⁹⁶

Although the ICISS report raises the possibility of a right of intervention by member states in the case of inaction by the Security Council, it is not clear whether ICISS endorses any direct intervention by states.⁹⁷ Accordingly, the ICISS report mentions the lack of consensus on the question of military intervention in the absence of UN Security Council authorization. ICISS expects that in the case of Security Council inaction a state or a coalition of states will intervene for the protection of human rights. However such intervention presents the risk of further damages and possible violations of international law.⁹⁸ Furthermore, the report mentions that a successful intervention not prosecuted by the Security Council would call into question the capabilities and legitimacy of the UN’s power.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 37.

⁹⁶ *Id.*; *see also* Evans, *supra* note 1, at 144-45.

⁹⁷ *See* ICISS Report *supra* note 3, at 70.

⁹⁸ *Id.* at 54-55; *see also* Pingeot & Obenland, *supra* note 2, at 14.

⁹⁹ *See* ICISS Report *supra* note 3, at 54-55.

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After the September 11th terrorist attacks, some proponents of this doctrine pushed for its inclusion in a UN report.¹⁰⁰ In the spring of 2005, Kofi Annan in his UN General Assembly speech asked for the states to “embrace the ‘responsibility to protect’ as a basis for collective action against genocide, ethnic cleansing and crimes against humanity, and agree to act on this responsibility, recognizing that this responsibility lies first and foremost with each individual State, whose duty it is to protect its population.”¹⁰¹ The negotiations following Annan’s speech resulted in the Millennium+5 Summit in whose the Outcome Document member states agreed to adhere to the principle of R2P, rather than the principles Annan proposed in 2001.¹⁰² This document represents a compromise between countries opposed and those in favor of R2P.

3. R2P in the Outcome Document of 2005

The Outcome Document of 2005 states the new rule of R2P, with some minor revisions from the ICISS report. This new document requires 1) that there be a mandate by the United Nations Security Council for any military action, and 2) the scope of R2P is limited to only four out of the five original cases defined by ICISS.¹⁰³ Paragraph 138 of this document is considered quintessential to the concept of R2P. Under this paragraph, each individual state has the responsibility to protect its population from genocide, war crimes, and ethnic cleansing, and crimes against humanity.¹⁰⁴ This paragraph did not include cases of natural disaster and the definition of “large scale loss of life” described in the ICISS has been narrowed as well. Moreover, R2P requires that the greater international community encourage and help states to exercise their own responsibilities and to support the UN in establishing early warning capability for timely response.¹⁰⁵

¹⁰⁰ U.N. Secretary-General, *In Larger Freedom: Toward Development Security and Human Rights for All: Rep. of the Secretary-General*, ¶¶ 2-5, U.N. Doc. A/59/2005 (Mar. 21, 2005); see also Evans, *supra* note 12, at 46.

¹⁰¹ U.N. Secretary-General, *In Larger Freedom: Toward Development Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 7, U.N. Doc. A/59/2005 (Mar. 21, 2005).

¹⁰² See 2005 World Summit Outcome, *supra* note 4.

¹⁰³ See *id.* at 32.

¹⁰⁴ *Id.* at 30.

¹⁰⁵ *Id.*; see also Evans, *supra* note 2, at 48.

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The United Nations General Assembly follow-up report of 2009 was intended to implement R2P in concept.¹⁰⁶ The report stated that under paragraph 138, R2P now contains the following three pillars:

- 1) The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
- 2) The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
- 3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

Moreover, Secretary General Ban Ki-moon, Annan's successor, has published an annual report on R2P every year since 2009 and has urged States to implement the doctrine.¹⁰⁷ Also, the United Nations has instituted a Special Adviser for Responsibility to Protect, whose mission is to "lead[] the conceptual, political, institutional and operational development of the Responsibility to Protect."¹⁰⁸

B. ARGUMENTS FOR AND AGAINST R2P

The conception, creation, and the inclusion of R2P into the international law arena has led to considerable debate between proponents and opponents of R2P.

1. *Proponents of R2P*

¹⁰⁶ U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/36/677 (Jan 12, 2009).

¹⁰⁷ *Id.*; see also Pingeot & Obenland, *supra* note 2, at 17 (stating that Ban Ki-moon urges each state and society to adopt the principles of R2P immediately).

¹⁰⁸ See U.N. S.C. Letter dated August 31, 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/721 (Dec. 7, 2007).

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Proponents of R2P have gone as far as to argue that R2P should be the primary avenue for all humanitarian intervention and¹⁰⁹ according to some authors, R2P is already the foundation for both multilateral and unilateral military force intervention in the modern era.¹¹⁰ Gareth Evans, the original author of the ICISS report, refutes the proposition that R2P is solely a means of unilateral intervention and details this misunderstanding about R2P.¹¹¹ First, he argues that R2P is not limited to humanitarian intervention but has a broader dimension, including preventive actions such as preemptive deployment of humanitarian forces, and the responsibility to rebuild. Second, he argues R2P does not necessarily sanction the use of military force. In order to use coercive measures, there must be an extreme situation satisfying a “just threshold.” Third, he argues the humanitarian aims of R2P need not be limited to weak and friendless countries but can be applied to any state. In his view, even the most powerful countries on earth can be subject to military force; in this way, R2P has a potentially universal dimension. Lastly, he argues R2P’s scope of intervention is limited and does not include all kinds of intervention. Accordingly, R2P should not be widely used for all kinds of human rights violation, to avoid dilution of its usefulness, and should be limited to major violations of human rights.¹¹²

2. *Opponents of R2P*

Some authors, such as Anne Orford, have questioned the nexus between “the authority to protect” and “the capacity to protect” in the doctrine of R2P.¹¹³ She argues that the doctrine of the Responsibility to Protect represents a shift from the concept of sovereignty to the idea of protection. She argues that the legitimacy of authority to intervene in R2P is determined by reference to the notion of

¹⁰⁹ See Gareth Evans & Ramesh Thakur, *In Defence of the Responsibility to Protect*, in *RESPONSIBILITY TO PROTECT: NORMS, LAWS AND THE USE OF FORCE IN INTERNATIONAL POLITICS* 86, 86-87 (Gareth Evans & Ramesh Thakur eds., 2011).

¹¹⁰ Lee *supra* note 2, at 276 (believing that the doctrine of R2P justifies any military intervention based on the concept of self-defense).

¹¹¹ See Evans, *supra* note 1, at 58 (believing that some critics oppose the idea of R2P because they are opposed to “imperialism”, “neo-imperialism or neo-colonialism” and they consider any external intervention as such).

¹¹² *Id.* at 56-68.

¹¹³ Anne Orford, *Lawful Authority and the Responsibility to Protect*, in *LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS* 248 (Richard Falk et al. eds., 2012) (“If we turn to that history, we can see that the invocation of *de facto* authority based on the capacity to protect can lead to dramatically different political projects justified in the name of protection.”).

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protection rather than the notion of self-determination. For Anne Orford, the fact that the authority to protect derives its legitimacy from the principle of protection undermines the concept of authority as a right. She refers extensively to the work of Thomas Hobbes and states that the concept of authority is enmeshed with the idea of a sovereign state and its attending power.¹¹⁴ In the absence of a sovereign community, such as an international order, there cannot be any authority to provide protection.¹¹⁵

Using a more radical line of thought, scholars such as Alex De Waal criticize the notion of “*droit d’ingerence*”¹¹⁶ and identify a symmetry between humanitarian doctrine and imperial occupation. De Waal adds that “an attempt for a humanitarian doctrine is a charter for imperial occupation, there may be cases in which the imperial rule is the lesser of two evils, perhaps to end genocide or to end slavery, but philanthropic imperialism is imperial nonetheless.”¹¹⁷

Moreover, some authors believe that R2P adopts a moral discourse that moves the debate toward a subjective standard of right and wrong.¹¹⁸ Lou Pingeot and Wolfgang Obenland have criticized the doctrine of R2P as broad and unclear,

¹¹⁴ *Id.* at 249.

¹¹⁵ Anne Orford, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 137 (2011) (discussing that proponents of R2P consider that the protection can be guaranteed where there exists an authority capable of distinguishing between friends and enemies, and believing that there is a little discussion about legal limits of the R2P).

¹¹⁶ Right to intervene.

¹¹⁷ Alex de Waal, *No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the "Responsibility to Protect" in Wartime*, HARVARD INT’L REV., (Mar. 21, 2007) <http://hir.harvard.edu/no-such-thing-as-humanitarian-intervention?page=0> (discussing the problems created with the humanitarian intervention such as in Somalia and what went wrong there, and mentioning that the Security Council authorization that France obtained in order to attack Rwanda during the operation Turquoise was a “political act, aimed at securing a territorial foothold for the defeated genocide regime”); see also Asli U Bali, *The Changing Landscape of Nuclear Non Proliferation*, in LEGALITY AND LEGITIMACY IN THE GLOBAL ORDER 291, 299 (Richard Falk et al. eds., 2012) (“[T]he emergent norm of the ‘the responsibility to protect’ is not exactly analogous to an embrace of the broader notion of a right of humanitarian intervention independent of UN authorization”).

¹¹⁸ Pingeot & Obenland, *supra* note 2, at 36. (discussing that the proponents of R2P believe that the moral consideration can command what law forbids).

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raising the possibility of multiple interpretations informed by a complex political dimensions and accompanied by little oversight.¹¹⁹

3. *Responsibility while Protecting (RwP)*

Some member-states have gone further and proposed a higher degree of accountability and liability for those involved in R2P. For example, Brazil's ambassador to the UN has suggested that there be a Responsibility While Protecting (RwP).¹²⁰ This concept observes that military interventions often result in human loss and substantial material costs. Because there is a growing concern about the use and misuse of R2P in a way other than protecting civilians, RwP requires that intervening nations hold themselves to a high standard of diligence and responsibility in any military intervention.¹²¹

RwP should be considered the best means for holding accountable those states who engage in R2P.¹²² RwP was intended to offer a new method of negotiation before any intervention takes place. In this methodology, the international community has a role as a mediator and negotiator for the purpose of R2P. Under RwP, the international community must be 1) rigorous in its efforts to exhaust all available peaceful means; 2) the use of force must always be authorized by the Security Council; 3) the use of force must be limited; 4) the use of force must produce minimal violence and instability; and 5) the action must be proportionate and limited to the objective established by the Security Council.¹²³

C. RELATIONSHIP BETWEEN R2P AND INTERNATIONAL LAW

¹¹⁹ *Id.* at 37 (stating that the powers capable of carrying the military arm are also the powers that cannot be held accountable).

¹²⁰ U.N. General Assembly, Follow-Up to The Outcome of the Millennium Summit, Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

¹²¹ *See id.*

¹²² *See* Monica Hertz, *R2P and Brazil*, in *THE INTERNATIONAL POLITICS OF HUMAN RIGHTS, RALLYING TO THE R2P CAUSE?* 107, 122 (Monica Serrano & Thomas G. Weiss eds. 2014) (stating that RwP may protect R2P from its "destructive forces" by offering the possibility to negotiate).

¹²³ *See* U.N. General Assembly, Follow-Up to The Outcome of the Millennium Summit, Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, *supra* note 120.

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After the Outcome Document of 2005, which detailed the various aspects of R2P, several scholars questioned the relationship between R2P and international law.¹²⁴ There is still a debate regarding whether or not R2P is binding international law¹²⁵ with some authors arguing that as a new legal norm it operates with binding force.¹²⁶

Under customary international law, in order for an emergent norm to become binding, there must be state practice and *opinio juris*. However, according to majority opinion, lack of sufficient precedent and *opinio juris* in international law regarding this concept prevents the establishment of R2P as a binding norm under customary international law.¹²⁷ Contrary to binding authority, international law can be a “soft law” without dispositive force unless incorporated within a norm having binding force. That is, unless R2P is incorporated into an instrument with binding authority, such as a treaty, R2P must be considered non-binding. Therefore, if a Security Council resolution incorporates R2P, R2P will then become binding.

In order to assess the force and weight of R2P, a distinction must be drawn between state’s action in the interest of their own citizens versus state action on behalf of another country.¹²⁸ For Alex J. Bellamy and Ruben Reike, there is a

¹²⁴ See Lee, *supra* note 2, at 277 (stating that R2P has been called a “concept,” a “principle,” a “norm,” an “initiative,” a “policy agenda” and a “framework” (quoting respectively Carsten Stahn, Lloyd Axworthy & Allan Rock, and Alex J. Bellamy)).

¹²⁵ Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 AM. J. INT’L L. 99, 101 (2007) (stating that none of the documents, originating R2P, can be considered as binding under international law).

¹²⁶ Alex J. Bellamy, Sara E. Davies & Luke Glanville, *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 5 (Alex J. Bellamy et al. eds., 2011) (stating that for those who claim R2P is a new legal norm, this norm provides legitimation of coercive interference in the affairs of any state unwilling to protect their populations).

¹²⁷ See Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 484 (2010) (“An additional problem in characterizing the responsibility to protect as an emerging norm of customary international law arises with regard to the constitutive elements of customary international law”).

¹²⁸ Alex Bellamy & Ruben Reike, *The Responsibility to Protect and International Law*, in *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 81, 83 (Alex J. Bellamy et al eds., 2011).

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distinction between the foundational pillars of R2P and the doctrine's normative implications. The first pillar, national responsibility, provides that the state has a duty to protect its own population from genocide, war crimes, and any other violation of human rights. This is rooted in the concept of *jus cogens*. Accordingly, the primary responsibility of the state towards its citizens is a legal duty, set out in paragraph 139 of the Outcome Document 2005.¹²⁹

The second pillar expounds on the responsibility of the international community as a whole to take measures to assist states in need of humanitarian intervention. Bellamy and Reike refer to the precedent set forth in the ICJ case, *Bosnia v. Serbia*¹³⁰, a case that recognized an emerging legal duty to prevent genocide.¹³¹ Pursuant to this precedent and the practice of international law, there is a legal duty on the part of the international community to ensure that states uphold their legal obligation to protect their populations in the case of major violation of human rights. This responsibility in the second pillar includes helping states to practice R2P and providing them the necessary capacity to do so.¹³²

The third pillar of R2P concerns the duty of the international community to take action in situations where a state is unable to protect its population from the violation of human rights. However, it is unclear whether R2P expressly prescribes such a duty. It is recognized under international law that member states must respond decisively to genocide and mass atrocities occurring within other member states' territory. Nevertheless, no provisions in R2P's foundational documents suggest a legal duty on the part of the international community to intervene in cases where a state is violating or failing to avert any violation of *jus cogens*.¹³³

¹²⁹ See *id.* at 83 (citing to John Bolton's position on this topic, former United States Ambassador to UN, who stated that the first pillar of R2P created a legal obligation and the second pillar a moral or political obligation).

¹³⁰ Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. Rep. 43, (Feb. 26, 2007).

¹³¹ See Bellamy & Reike, *supra* note 128, at 87-98.

¹³² *Id.*

¹³³ See Ekkenhard Strauss, *A Bird in the Hand is Worth Two in the Bush*, in *THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW* 25, 52 (Alex Bellamy et al. eds., 2011) ("Apart from the lack of any evidence on the responsibility to protect, the different nature of international human rights and humanitarian law has to be taken into account while interpreting the outcome document...the latter intends to introduce standards of state behavior between individual that could lead to individual criminal responsibility in cases of 'graves breaches.'").

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Therefore, the third pillar of R2P cannot unequivocally be said to create such a responsibility or legal duty on the part of the international community.¹³⁴

Regarding the question of military intervention and R2P, Bellamy questions whether the principle imposes a legal duty for the UN Security Council to take coercive measures.¹³⁵

The legal posture of R2P can be fairly characterized as nothing more than soft law without any binding force in international arena. It does not fulfill the requirements of customary international law.

Customary international law did not offer any valid grounds for the French intervention in Mali. R2P is a new norm under international law, used frequently as one of the avenues for humanitarian intervention and so was perhaps the justification of last resort for the legality of Operation Serval.¹³⁶ The following section will examine in depth into the application of R2P to the French intervention.

IV. ANALYSIS OF THE USE OF R2P IN THE MALIAN CASE

The invocation of R2P in justifying the military intervention by the French government in Mali raises more questions about R2P than it answers.¹³⁷ The French authorities made the case for the necessity of humanitarian intervention in order to prevent the violation of human rights and protect the Malian people from mass

¹³⁴ Bellamy & Reike, *supra* note 128, at 96.

¹³⁵ *Id.* (discussing the different legal natures of the commitments in R2P and stating that the responsibility of the international community are mostly moral and political and therefore not legal).

¹³⁶ See Joseph A. McMahon, *The Responsibility to Protect: Questions and Answers?* (Sept. 2, 2013) (manuscript at 19), available at SSRN: <http://ssrn.com/abstract=2344942> (believing that there is a correct use of R2P in the case of Mali).

¹³⁷ See Pingeot & Obenland, *supra* note 2, at 20 (mentioning that Mali is one of the recent examples where there was a use of R2P based on humanitarian reasons); Francesco Francioni & Christine Bakkar, *Responsibility to Protect, Humanitarian Intervention and Human rights: Lesson from Libya to Mali*, TRANSWORLD 5 (Apr. 8, 2013), <http://www.transworld-fp7.eu/?p=1138> (stating that there is a shift in the attitude of some European countries such as France to intervene militarily in Libya and Mali, and considering this activism to be “motivated by special national interest and former colonial ties”); David Petrasek, *supra* note 8.

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atrocities and internal conflict. However, the use of R2P as justification is out of step with the sort of actions that R2P was intended to countenance.

A. THE LEGITIMACY OF THE APPLICATION OF R2P

According to the criteria established by the ICISS report and Outcome Document of 2005, the first pillar of R2P imposes a duty by the state to intervene in the case of a violation of *jus cogens*.¹³⁸ It is undisputed that terrorist groups and other rebels of MNLA (National Movement for Liberation of Azawad) were engaged in a violent regional melee impacting the Malian population, resulting in numerous violations of human rights. Nonetheless, in the Malian case, there was no evidence of war crimes, genocide, ethnic cleansing or any other atrocities rising to the level of a *jus cogens* violation.¹³⁹ To construe *jus cogens* so broadly as to include the Malian situation would likely result in skepticism toward R2P on the whole.

Resolution 2085 condemned vigorously any violation of human rights by rebel groups in Mali without qualifying these violations as *jus cogens* violations. There was no mention of genocide or ethnic cleansing in the UN Resolutions. Under the principles of R2P, the state has to protect its population and if it fails to do so, then it falls to the international community to provide such protection.

The reader might find it interesting to compare the French interventions in Mali and Libya. In Libya, France attempted to justify their action and the use of military force based on R2P¹⁴⁰ but their justification was not credible despite the Security Council's authorization. Resolution 1973 of the Security Council stated that its goal was to protect Libyan civilians; however, this resolution was instead used as an instrument of regime change. It must be emphasized that the military intervention in Libya was prosecuted by NATO forces, a clear overstepping of the limited Security Council mandate.¹⁴¹ Resolution 1973 mandated that the national

¹³⁸ See ICISS Report, *supra* note 3.

¹³⁹ See *Population at Risk*, GLOBAL CENTER FOR RESPONSIBILITY TO PROTECT (Apr. 15, 2013), <http://www.globalr2p.org/regions/mali> (mentioning that the MNLA and the armed Islamist groups committed various human rights abuses such as “torture”, “extrajudicial killings”, “sexual violence” and “the recruitment of child soldiers”).

¹⁴⁰ See Pingeot & Obenland, *supra* note 2, at 4.

¹⁴¹ See McMahon *supra* note 136, (manuscript at 17) (stating that the Resolution 1973 was approved with the abstention of five members of the Security Council which casts doubt on the legitimacy of such action); see also Lee, *supra* note 2, at 278.

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or regional Libyan forces take all necessary measures to save civilians.¹⁴² One of the instigators of the military intervention in Libya was former French president Nicolas Sarkozy, who had had clear designs on action in Libya since the beginning of his presidency in 2007.¹⁴³

Similarly, the French government during Operation Unicorn used the same argument to intervene in Cote d'Ivoire.¹⁴⁴ During this operation, the UN and French forces sought to topple Laurent Gbagbo, then the Ivorian president. In the same method as Operation Serval, the UN was informed first and then French forces launched their attack. In fact, both the forces of Laurent Gbagbo and his French selected successor, Alexander Ouattara were guilty of human rights violations, but only Gbagbo was ousted.¹⁴⁵

B. THE REQUIREMENTS OF ICISS REPORT AND OUTCOME DOCUMENT OF 2005

According to the ICISS report, any military interventions based on R2P must satisfy a set of criteria. One of these conditions is the just threshold. The mere fact that the rebel groups were preparing to attack the Malian capital does not satisfy the just threshold because the internal conflict and the struggle for power do not constitute threshold harm for the purpose of application of R2P.

Secondly, the "right intention" is also missing in the Malian case. Though the reasons behind the French intervention remain unclear, the situation did not rise to the level of right intention because there was no violation of any human rights in the sense intended by the ICISS report or Outcome Document.

Francois Hollande after taking office in 2012 stated his intention to commence a new policy towards African countries by putting an end to the practice known as *francafrique*.¹⁴⁶ *Francafrique* represents in concept the neocolonial relationship between France and major central African countries such as Cote

¹⁴² See S.C. Res. 1973, ¶ 4, U.N. SCOR, S/RES/1973 (March 17, 2011).

¹⁴³ Francis, *supra* note 13, at 5 (mentioning that one of the reasons for the non-intervention of France in Central African Republic was the fact Francois Hollande had tried to depart from the French *Francafrique* policies).

¹⁴⁴ See Serrano & Weiss, *supra* note 1, at 13-17.

¹⁴⁵ See Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect*, INT'L AFF. 87:4 825, 829-831 (2011).

¹⁴⁶ Francois Hollande, *Le Temps de Francafrique est Revolu*, LE MONDE (Oct. 12, 2012), http://www.lemonde.fr/afrique/article/2012/10/12/hollande-exprime-sa-grande-confiance-dans-le-senegal-et-l-afrique_1774886_3212.html.

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d'Ivoire, Mali, Chad, Somalia and Central African Republic. One of the reasons can be traced back to the toppling of Moamar Ghadafi in Libya following the NATO campaign in 2012, which lead to instability in northern Mali. Second, France still had a significant financial interest in Mali. French firms were heavily present in public construction, transportation of commodities and in trade of information technologies. According to some sources, Mali and south Sahel contain numerous oil reserves and some authors considered this as a motivation for intervention in Mali.¹⁴⁷ Also, France may have acted in Mali in order to stabilize the geopolitical situation in Nigeria. The French government is heavily involved in Nigeria and Areva (a French Holding) is one of the primary sources of atomic energy in the country.¹⁴⁸

Moreover, the public debt of Mali amounted to about 3.19 Billion dollars in 2012 and the French government was its main creditor, holding roughly 25 percent of it. In 1994, Mali had to pass a structural plan in order to readjust its public debt and following this restructuring, Mali was constrain to sell some portions of its agricultural land to France.¹⁴⁹

In terms of military cooperation, Malian President Amadou Toure refused to allow French military bases to be relocated to Mali. The French government was looking to establish a new military base in order to fulfill security needs in central Africa, and this was quite a source of conflict between Mali and the French government. Toure's predecessors had also refused to acquiesce to the French request, which would have reestablished France's major military headquarters in central Africa.¹⁵⁰ These elements cast doubt on the validity and extent of France's "right intention".

¹⁴⁷ See Jemal Oumar, *Des Accords énergétiques au Mali Pourraient Renforcer la Région du Sahel*, ALL AFRICA (Aug. 19, 2013), <http://fr.allafrica.com/stories/201308200389.html>.

¹⁴⁸ *Id.*

¹⁴⁹ See Ali El Hadj Tahar, *Mali: Ingerence Humanitaire ou Nouveau Sahelistan?* MONDIALISATION.CA (Feb. 8, 2013), <http://www.mondialisation.ca/mali-ingerence-humanitaire-ou-nouveau-sahelistan-troisieme-partie/5322837> (giving a detailed statistic about the public debt of Mali and different economic incentives that the French government might had in this attack).

¹⁵⁰ See Pape Semba Kane, *Mali: The Forgotten War*, AL JAZEERA (Sept. 6, 2014), <http://www.aljazeera.com/indepth/opinion/2014/09/mali-forgotten-war-20149691511333443.html> (stating that three different Malian president resisted the French request for a military base and mentioning that the most France obtained was a 1985 military assistance and cooperation accord).

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Thirdly, Operation Serval was far from a necessary last resort in the effort to stabilize the situation in Mali. France had many options to secure stability without use of force such as diplomatic negotiation. As seen in Resolution 2085, the Security Council considered an African led force as the only force necessary for the Malian conflict.

The ICISS report and Outcome Document of 2005 state that military intervention under R2P must begin with a UN authorization and a mandate from Security Council. The Security Council was consulted and issued two resolutions in this case. But none of these resolutions, as discussed above, allowed for a unilateral military intervention.

This intervention was a successful one in that it furthered France's humanitarian ambition. However, an invocation of R2P in the absence of Security Council authorization is outside of the mandate of the UN Charter. The ICISS report and the Outcome Document do not consider the possibility of an intervention when the Security Council is silent. The use of force by a Member State in such a situation would be a dilution of the authority and stature of the Security Council. Moreover, since the inception of R2P, there has been a dearth of UN Security Council resolutions regarding the use of R2P. This lack of precedential authority may encourage the violation of international law based the misapplication of R2P. The use of R2P in this context threatens to legitimize any intervention by a superpower, such as France under the banner of humanitarian intervention.

Following this analysis, it is disputed that there was any need for the application of R2P in Mali. Although the Security Council had characterized the situation in Mali as a direct threat to international peace, there was no Resolution on the subject of military intervention by any non-African-led force. Although some scholars pointed to the situation in Mali as an example of a just use of R2P, they did not engage in a proper analysis for its application.¹⁵¹

Lastly, the other components of R2P, which include the duty to prevent and duty to rebuild, were not applied in the Malian case.¹⁵² French military forces did not take any action to prevent the internal conflict through diplomatic actions or negotiations. They have made no actions to rebuild. Thus, none of the other components of R2P were fulfilled.

¹⁵¹ See *McMacon, supra* note 136, (manuscript at 18).

¹⁵² See *Weiss, supra* note 1, at 21-25.

V. CONCLUSION: IMPLICATIONS OF THE USE OF R2P IN MALI

The military intervention based on R2P in Mali was undertaken in violation of international law notwithstanding the four independent legal rationales advanced by the French government in defense of the operation. Indeed, Operation Serval is a recent example in a long pattern of previous French interventions in the southern African continent, including in the Central African Republic, Chad, Somalia and Cote d'Ivoire. Despite the post-colonial context, the French appetite for intervening in Francophone African countries has remained pronounced, whether on the grounds of humanitarianism or in the service of a security strategy of stabilization centered on French interests and preferences in the region. What was novel about the operation in Mali was not the fact of intervention but the emergence of a specific justificatory strategy, grounded in R2P, that offered a potential new framework for French interventionism.

After the events of 2012 in Mali, France invoked R2P as a final argument for intervention when several other, more conventional claims were difficult to sustain. As discussed in this article, the other justifications advanced by France were based on Security Council resolutions, the doctrine of consent and the principle of collective self-defense, but in each case the argument presented by the French failed to fulfill basic requirements of international law. Against this backdrop and in light of the increasing reliance on R2P as a basis for legitimating intervention by the U.S. and other great powers, it is perhaps unsurprising that the French would offer a fourth rationale for their intervention grounded in humanitarianism. Yet, as with the other arguments proffered, the R2P rationale articulated by the French also failed to meet the basis requirements of the doctrine. In particular, as this article has shown, none of the requirements of Outcome Document of 2005 or the ICISS report were satisfied in the French intervention. There was no compelling basis for invoking R2P, since the threshold requirement of evidence that *jus cogens* violations had occurred in one of the areas of defined R2P crimes (genocide, crimes against humanity, ethnic cleansing or war crimes) was never met. Furthermore, the internal conflict or the presence of the rebels in the capital did not trigger the threshold requirement of just cause for the purposes of R2P. France did not enjoy the right authority for intervening within the meaning of R2P.

Having established that France did not satisfy the criteria for resort to an R2P based military intervention, the question still remains how to constrain the uses of R2P as a justificatory basis for such interventionism. The danger of broad use of R2P that leads to a new permissive license for military interventions on humanitarian grounds—despite a failure to satisfy the requirements of the R2P framework—is evidently real and a source of significant concern for the countries

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of the Global South. The original drafters and proponents of R2P did not mean to create a concept that would lower the threshold for nonconsensual uses of force and provide a new authority for military interventions serving strategic purposes. Yet concerns that this might become the effect of the R2P doctrine were voiced by its opponents from the outset.¹⁵³ By creating a doctrine that conceptually links humanitarian crises to military interventions, critics of R2P feared that international law suddenly offered an end run around sovereignty and the norm of non-intervention that required little more than the advancing of moral arguments by a would-be intervener. The Malian case suggests the real risks that the practical implementation of R2P, especially in cases of unilateral intervention, may produce the very risks these critics warned against.

What proposals like Responsibility While Protecting capture is that international law must require that the core rules of legal accountability be applied to countries violating R2P and also to those invoking the doctrine appropriately but then exceeding its limitations. For instance, if R2P is used and leads to the violation of human rights, then the country applying R2P must be liable under the rules of international law. In short, R2P as a principle may only serve to advance humanitarian goals consistent with international legality if it is limited to a framework under the supervision of the UN with any and all violations of the doctrinal requirements of R2P subjected to scrutiny must under the applicable rules of international humanitarian law.

¹⁵³ Waal, *supra* note 117.