

**Which role for hybrid entities involved in multi-parties NIACs?  
Applying the ICRC's support-based approach  
to the armed conflict in Mali**

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1. *Introduction*

Over the last few years, especially in the context of non-international armed conflicts (NIACs), 'hybrid' actors have increasingly come on stage fighting alongside more traditional ones and thus adding further complexity to the analysis of the situation. In light of the interdependent relationship between the qualification of the parties to a conflict and the classification of the latter,<sup>1</sup> it has thus become key for international humanitarian law (IHL) to assess the role those new actors play in situations that have been recently defined as 'complex conflict scenarios'.<sup>2</sup>

One interesting perspective on the relationship between different actors that fight on the same side in a situation of armed conflict is offered by the so-called 'support-based approach' developed by Tristan Ferraro

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<sup>1</sup> See ICRC, 'Commentary to art. 3', in *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016), A Clapham, 'The Concept of International Armed Conflict', in A Clapham, P Gaeta, M Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 3, L Moir, 'The Concept of Non-International Armed Conflict', in A Clapham, P Gaeta, M Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 391 and M Milanovic, 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts' in A Clapham, P Gaeta, M Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 27.

<sup>2</sup> Among others, see Milanovic (n 1), N Zamir, *Classification of Conflicts in International Humanitarian Law* (E Elgar 2017) and K Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018).



and later endorsed by the International Committee of the Red Cross (ICRC). The approach was initially put forward in relation to cases of support provided by multinational troops deployed under the aegis of an international organisation (IO) to States involved in a territorial NIAC against an armed group (AG), and later expanded to cover any hypothesis of a State or 'supranational organisation' supporting the party to a pre-existing NIAC.<sup>3</sup>

This contribution aims at evaluating the relevance and potential obstacles of the application of that test to scenarios that, although not explicitly included in the ICRC approach, seems suitable to be analysed through those lenses: namely, relationships of support between parties to a pre-existing NIAC and emerging 'hybrid' entities that deploy multinational forces in contexts that, if compared with the classic case of the United Nations (UN), are much less structured and systematised. To that aim, I use the armed conflict in Mali as a case study, and specifically focus on the role played therein by the Joint Force of the G5-Sahel (JF), a coalition of multinational forces created within the framework of the G5 Sahel (G5), a regional cooperation body instituted in 2014 by five members of the Sahel region (Burkina Faso, Chad, Mali, Mauritania and Niger).<sup>4</sup>

Although it is possible to think of other equally interesting situations involving coalitions of multinational forces, the case of Mali lends itself better to an analysis of the relationships of support existing among different entities. On top of a territorial NIAC between the Government and several AGs,<sup>5</sup> the country is indeed currently displaying one of the most intricate nets of interaction among different actors that are all in a

<sup>3</sup> T Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) *Intl Rev Red Cross* 561 and T Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' (2015) *Intl Rev Red Cross* 1227.

<sup>4</sup> See *Finding the Right Role for the G5 Sahel Joint Force* (12 December 2017) Africa Report No 258, 1.

<sup>5</sup> See the classification of the conflict in Mali made by the Geneva Academy's Rule of Law in Armed Conflict (RULAC) Project <[www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse4accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse4accord)>. See also R van Steenberghe, 'Les interventions française et africaine au Mali au nom de la lutte armée contre le terrorisme' (2014) *Revue Générale de Droit International Public* 273 and B Charbonneau, 'Intervention in Mali: Building Peace between Peacekeeping and Counterterrorism' (2017) *J of Contemporary African Studies* 415.



way or another involved in operations against AGs within Malian territory.<sup>6</sup>

Within that context, I test the hypothesis that the G5 *in itself*, through the conduct of its JF,<sup>7</sup> could be considered party to the conflict in Mali in light of the relationships of support it has with the United Nations Stabilisation Mission in Mali (MINUSMA). To do so, I start from the premise that MINUSMA is currently party to the NIAC in Mali;<sup>8</sup> in order to be able to focus on its relationship with the JF, I bracket for the sake of argument the preliminary question over the way in which it has become party to that conflict in the first place.<sup>9</sup> The reader is free to apply the support-based approach to its conduct – MINUSMA has indeed

<sup>6</sup> The level of multi-layered interaction between different actors in Mali has been defined as a ‘security traffic jam’ and a ‘security and institutional bottleneck’ by the International Crisis Group, respectively in *Open Letter to the UN Security Council on Peacekeeping in Mali* (24 April 2017) <[www.crisisgroup.org/africa/west-africa/mali/open-letter-un-security-council-peacekeeping-mali](http://www.crisisgroup.org/africa/west-africa/mali/open-letter-un-security-council-peacekeeping-mali)> and in *Finding the Right Role* (n 5), 9. See also AM Amoroso, ‘Mali: The Overlap and Combination of Separatist, Jihadist and Intercommunal Conflicts’, in A Bellal (ed), *The War Report – Armed Conflicts in 2018* (Geneva Academy of International Humanitarian Law and Human Rights 2019) 102.

<sup>7</sup> In addition or in alternative to its troop contributing countries (TCCs). See R Kolb, G Porretto, S Vit , *L’application du droit international humanitaire et des droits de l’homme aux organisations internationales – Forces de paix et administrations civiles transitoires* (Bruylant 2005), Ferraro, ‘The Applicability’ (n 3), TD Gill, ‘Legal Aspects of the Transfer of Authority in UN Peace Operations’ (2011) Netherlands YB Intl L 37 and TD Gill, D Fleck, VH Boothby, A Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (CUP 2017). The hypothesis that the G5 could be considered as a party to the conflict would not discharge single TCCs from their responsibility under common art. 1 to the Geneva Conventions: see R Geiss, ‘The Obligation to Respect and to Ensure Respect for the Conventions’, in A Clapham, P Gaeta, M Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 111 and ICRC, ‘Commentary to art 1’, in *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016) para 133 ff.

<sup>8</sup> See RULAC (n 5). On the relationship of support existing between MINUSMA and France, see UNSC Res 2423 (28 June 2018) UN Doc S/RES/2423 (2018) para 53.

<sup>9</sup> On the possibility that a UN operation such as MINUSMA becomes party to a conflict, and the consequences stemming therefrom, see O Engdahl, ‘Multinational Peace Operations Forces Involved in Armed Conflict: Who are the Parties?’, in M Larsen, G Cooper, G Nystuen (eds) *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (CUP 2012) 233, E Nalin, *L’applicabilit  del diritto internazionale umanitario alle operazioni di peace-keeping delle Nazioni Unite* (Editoriale Scientifica 2018) and Gill, Fleck, Boothby, Vanheusden (n 7).

been providing support to the Government in the context of that conflict –<sup>10</sup> or argue that the level of intensity of its engagement in any case allows to reach the conclusion that it has become party to the conflict.<sup>11</sup>

Before starting, a methodological caveat needs to be put forward. In line with the ICRC's approach, this contribution works under the assumption that the applicability of IHL to a situation depends on matters of fact rather than on the mandate of a given operation.<sup>12</sup> This notwithstanding, since many of the features and activities foreseen for the JF have not yet been developed, reliance on abstract elements contained in the mandates of the relevant actors will at times be unavoidable. This methodological hurdle is however not meant to challenge the fundamental separation between the assessment of the conduct of actors on the ground and issues related to their authorisation to use force.<sup>13</sup>

## 2. *The ICRC's support-based approach*

The ICRC's support-based approach is aimed at testing the possibility that a third entity becomes party to a pre-existing conflict through the support it provides to a party thereof. As explicitly claimed by Ferraro, the rationale is that of applying IHL to specific actions which form an integral part of the pre-existing conflict and cannot thus be dissociated from the latter.<sup>14</sup> Indeed, even though the approach specifically applies to conducts that would not, if considered alone, reach the required threshold of intensity for the existence of a NIAC, the third entity's

<sup>10</sup> See RULAC (n 5) and Amoroso (n 6).

<sup>11</sup> On the same reasoning concerning other UN-led multinational operations, see Nalin (n 9), Y Arai-Takahashi, 'The Intervention Brigade within the MONUSCO. The Legal Challenges of Applicability and Application of IHL' (2015) 15 *QIL*-Questions Intl L 5 and B Maganza, 'Escalation of Violence in Bangui: Has MINUSCA Become Party to a Conflict in the CAR and What That Would Mean' *Opinio Juris* (16 April 2018) <[opiniojuris.org/2018/04/16/escalation-of-violence-in-bangui-has-minusca-become-party-to-a-conflict-in-car-and-what-would-that-mean/](http://opiniojuris.org/2018/04/16/escalation-of-violence-in-bangui-has-minusca-become-party-to-a-conflict-in-car-and-what-would-that-mean/)>.

<sup>12</sup> See Ferraro, 'The Applicability' (n 3) 573 ff and ICRC, 'Commentary' (n 1) para 411.

<sup>13</sup> See Arai-Takahashi (n 11), Gill, Fleck, Boothby, Vanheusden (n 7), and D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 32.

<sup>14</sup> See *Proceedings of the ASIL Annual Meeting*, 'The Effectiveness of International Law' (2014) 150, 159.



action needs to be linked to the pre-existing conflict: it has to be undertaken within that context and significantly contribute to the military operations taking place therein.

More specifically, the approach is applicable when the following conditions are present:

1. there is a pre-existing NIAC taking place on the territory where the third power intervenes;
2. actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict;
3. the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC
4. the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict.<sup>15</sup>

Most of the critiques moved to the approach take issue with its re-interpretation of the criterion of intensity for the existence of a NIAC.<sup>16</sup> Arguments put forward in that respect generally mirror the fear that excessively lowering the intensity threshold risks leading to a too swift application of an IHL paradigm to situations that should be covered by other legal frameworks such as human rights law (HRL).<sup>17</sup>

Although such concern is certainly worth of attention, my approach to the problem of a blanket IHL application starts from a different angle. If the general level of intensity has already been reached by the pre-existing conflict, it is in my opinion not unreasonable to avoid checking again the same requirement. Nevertheless, it is important to bear in mind that, along with intensity, the other criterion for the existence of a NIAC is

<sup>15</sup> Ferraro, 'The ICRC's' (n 3) 1231.

<sup>16</sup> See International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-A (2 October 1995); *The Prosecutor v Dusko Tadic, Opinion and Judgment*, IT-94-1-T (7 May 1997); and, later, *The Prosecutor v Fatmir Limaj, Judgment*, IT-03-66-T (30 November 2005), *The Prosecutor v Ramush Haradinaj, Idriz Balaj and Labi Ibrahimaj, Judgment*, IT-04-84-T (3 April 2008) and *The Prosecutor v Ljube Boškovski and Johan Tarčulovski, Judgment*, IT-04-82-T (10 July 2008). See also ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (Opinion Paper, March 2008) and Moir (n 1).

<sup>17</sup> See *Proceedings of the ASIL Annual Meeting* (n 14) 156 ff, as well as Zamir (n 2) 88 ff.



that of organisation of the parties.<sup>18</sup> It is therefore submitted that limiting oneself to the assessment of whether replacing the criteria of intensity with that of support unduly lowers the required threshold of NIACs leads one to forget the other end of the spectrum and skip the intricate question of whether an entity can be considered as party to a conflict in the first place.

The way to make sure that we are not too ‘trigger happy’<sup>19</sup> in the application of IHL lies in my opinion more in a strict assessment of the possibility for the supporting entity of being considered party to a conflict, coupled with an attentive scrutiny of the relevant type of support, than in a renewed focus on the intensity of hostilities. The importance of the organisational aspect is actually acknowledged by Ferraro; however, given his focus on cases of multinational operations spearheaded by well-structured IOs, he claims that such forces ‘inherently fulfil’ the requirement.<sup>20</sup> I on the contrary advance that, in particular when dealing with forces deployed under a framework that is less straightforward, an explicit further requirement shall be added to the support-based approach: that the intervening power is endowed with the characteristics that make it possible to consider it *as such* as party to a conflict.

### 3. *Can the G5-Sahel, through its Joint Force, be considered as party to a conflict?*

The reasons why it is crucial to assess whether an entity is able to be considered party to a conflict are twofold. On the one hand, the entity needs to display certain features that enable it to be seen as a collective subject that is *in itself* engaged in hostilities. On the other hand, it also needs to be able – at least in the abstract –<sup>21</sup> to comply with the basic customary IHL obligations that stem from the status of party to the conflict.<sup>22</sup>

<sup>18</sup> See ICRC (n 1) para 445-446.

<sup>19</sup> The expression is used by Mona Khalil in *Proceedings of the ASIL Annual Meeting* (n 14) 158.

<sup>20</sup> Ferraro, ‘The Applicability’ (n 3) 577.

<sup>21</sup> For a discussion of the practical difficulties related to the implementation of these obligations, see Kolb, Porretto, Vité (n 7).

<sup>22</sup> See JM Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005) Rules 139 and 142.



In the field of IHL, indications on the features that an entity needs to have to be considered party to a conflict have generally been developed on a sectorial, *ad hoc* basis, depending on the nature of the entity in question.

As regards the specific case of multinational forces deployed under the aegis of an IO, discussions normally take for granted the presence of an organised structure and focus instead on the existence of control over the conduct of the troops. While art. 7 of the International Law Commission's Draft Articles on the Responsibility of International Organizations deals with effective control,<sup>23</sup> there is an ongoing debate on whether a notion that was developed to address the issue of attribution for the sake of determination of responsibility is suitable for the different question of the status of party to the conflict under IHL.<sup>24</sup>

Besides these controversies over the correct control test, it is important to equally take into account other indicators that more explicitly address the question of the entity's organisational capacity. Although those criteria have been primarily developed with respect to AGs, they seem particularly relevant in case of 'hybrid' entities that lack a self-evident centralised structure. Important functional aspects that need to be taken into account pertain to the entity's internal architecture (its collective character and command structure, its organisation and coordination, and its capacity to comply with IHL) as well as to the concrete operations that it is able to perform (through its ability to recruit and train fighters, to set up headquarters, and to launch operations bringing together different units).<sup>25</sup>

That the G5, through its JF, fulfils those criteria is all but given in the context of our case study. To the contrary, we need to first ask whether, based on its structure and features, the G5 can in the abstract be

<sup>23</sup> See *Draft Articles on the Responsibility of International Organizations* (2011) II YB Intl L Commission art 7.

<sup>24</sup> See ICRC, 'Commentary to art. 2', in *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016) para 250-252, Engdahl (n 9) and V Todeschini, 'Il controllo sulle forze multinazionali nelle operazioni di pace: attribuzione della condotta e identificazione delle parti belligeranti', in A Spagnolo, S Saluzzo (eds), *La responsabilità degli stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento* (Ledizioni 2017) 277. On 'operational command and control', see Ferraro, 'The Applicability' (n 3) 593 and Gill (n 7) 46 ff.

<sup>25</sup> In addition to the above-mentioned jurisprudence of the ICTY (n 16) see S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) and T Rodenhauer, *Organizing Rebellion* (OUP 2018).



considered as party to a conflict. Later on, through an assessment of the concrete operations in which the JF is involved, it will be possible to take a position on whether it is already – or it is likely to be soon – involved in the armed conflict in Mali.

As anticipated, the G5 is a regional institutional mechanism aimed at promoting security through, among other means, peace-enforcement actions.<sup>26</sup> Since 2017, it is equipped with a coalition of multinational forces, known as the JF.<sup>27</sup> The deployment of the Force was authorised by the African Union,<sup>28</sup> and the UN Security Council (SC) mandated MINUSMA to support it.<sup>29</sup> In 2018, acting under SC authorisation,<sup>30</sup> the G5, the European Union (EU) and the UN signed a technical agreement for the provision of operational and logistical support to the JF through MINUSMA.<sup>31</sup>

The G5's architectural features – such as the fact that its constituting document entrusts it with legal personality and capacity to stand in judgment –<sup>32</sup> can undoubtedly be seen as indicators of the possibility of considering it as a single entity for the purpose of the identification of the parties to a conflict. Moreover, the inclusion of a compliance framework to ensure that the JF respects IHL and HRL within the technical agreement signed with the EU and the UN<sup>33</sup> can arguably be considered proof of the willingness – if not of the capacity – of the entity to comply with the basic obligations of a party to the conflict. However, the incontestable fact that the G5 has a permanent institutional structure cannot be used to

<sup>26</sup> Convention on the Creation of the G5 Sahel (Nouakchott, 19 December 2014) <[www.g5sahel.org/images/convention.pdf](http://www.g5sahel.org/images/convention.pdf)>.

<sup>27</sup> G5 Secretariat Res 00-01/2017 (6 February 2017) <[www.g5sahel.org/images/Docs/Résolutions\\_force\\_conjointe\\_\\_05\\_02\\_20171.pdf](http://www.g5sahel.org/images/Docs/Résolutions_force_conjointe__05_02_20171.pdf)>.

<sup>28</sup> AU Peace and Security Council Decision, PSC/PR/COMM(DCLXXIX) (13 April 2017).

<sup>29</sup> UNSC Res 2359 (21 June 2017) UN Doc S/RES/2359 (2017) para 5.

<sup>30</sup> UNSC Res 2391 (8 December 2017) UN Doc S/RES/2391 (2017) para 13.

<sup>31</sup> See EU Commission Communiqué by the co-chairs on the International High-level Conference on the Sahel (23 February 2018) <[europa.eu/rapid/press-release\\_STATEMENT-18-1166\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-1166_en.htm)> and UNSC Press Statement on the G5 Sahel (23 May 2018) <[www.un.org/press/en/2018/sc13353.doc.htm](http://www.un.org/press/en/2018/sc13353.doc.htm)>.

<sup>32</sup> See Convention on the Creation of the G5 Sahel (n 26) art 2.

<sup>33</sup> See EU Commission Communiqué and UNSC Press Statement (n 31), as well as UNSG 'Report on the Joint Force of the Group of Five for the Sahel' UN Doc S/2018/1006 (12 November 2018) para 26 ff.



automatically infer that it has the capacity to become party to a conflict under IHL without taking into account the structure of its armed forces.

Turning to the analysis of the JF, its Operational Plan (OP) includes two phases. The first covers border-security and frontier-patrolling operations undertaken in continuity with what was already being done bilaterally by the G5's troop contributing countries (TCCs) prior to the creation of the JF, in cooperation with the French operation Barkhane. Those operations therefore take place in parallel to but not in connection with MINUSMA's activities in the context of the NIAC taking place in Mali.<sup>34</sup> The second phase envisages instead the transformation of the JF into a fully-fledged operational force mandated with the neutralisation of AGs; however, no detailed information are available as regards, for example, the scale and scope or the command structure of the operation.<sup>35</sup> At the time of writing, the Force is only partly operational: although some of the operations taking place in connection with operation Barkhane are allegedly conducted under centralised JF's command,<sup>36</sup> the institutional structure related to the second phase of the OP, whose launch is still pending, is missing. Due to several reasons – among which continued delays in the secondment of troops from TCCs, funding issues and an attack perpetrated against its headquarters in 2018 – the JF has not yet reached the targets it has been given on paper.<sup>37</sup>

The main observation that stems from the above is that, as things stand today, the reason why the G5 cannot in itself be considered party to a conflict is linked to the current operationalisation of the JF rather than to its own structure. The situation might indeed be subject to change in the

<sup>34</sup> See UNSG 'Report on the Joint Force of the Group of Five for the Sahel S/2017/869 (16 October 2017) para 21.

<sup>35</sup> *ibid* 22.

<sup>36</sup> See G5 Press Statement released on 26 July 2018 <[www.g5sahel.org/index.php/13-actualite-des-pays-g5/1344-la-force-conjointe-du-g5-sahel-trois-operations-marquent-un-tournant-decisif-dans-l-operationnalisation-de-la-force](http://www.g5sahel.org/index.php/13-actualite-des-pays-g5/1344-la-force-conjointe-du-g5-sahel-trois-operations-marquent-un-tournant-decisif-dans-l-operationnalisation-de-la-force)>. Information on the ongoing operations is available on the JF's Facebook page <[www.facebook.com/354147941850768/posts/354628645136031/](https://www.facebook.com/354147941850768/posts/354628645136031/)>.

<sup>37</sup> See UNSG Report (n 34) and UNSG Report (n 33). For details, see JG Cooke, 'Understanding the G5 Sahel Joint Force: Fighting Terror, Building Regional Security?' (Center for Strategic and International Studies, 15 November 2017) <[www.csis.org/analysis/understanding-g5-sahel-joint-force-fighting-terror-building-regional-security](http://www.csis.org/analysis/understanding-g5-sahel-joint-force-fighting-terror-building-regional-security)> and D Sow, 'Force Conjointe du G5 Sahel: Perspective stratégique sur l'appropriation sécuritaire par les Etats Sahéliens' (Diploweb.com, 20 May 2018) <[www.diploweb.com/IMG/pdf/2018-sow-force-conjointe-du-g5-sahel-diploweb.com.pdf](http://www.diploweb.com/IMG/pdf/2018-sow-force-conjointe-du-g5-sahel-diploweb.com.pdf)>.

future if the second phase of the OP is implemented and the structure of the JF arranged accordingly. Whether or not this is going to happen depends in great part on the relationship the JF has with other actors, and on the type of support that is mutually exchanged within them. It is thus to those relationships of support that the analysis now turns.

#### 4. *Relationships of support between the actors involved in Mali*

In light of the possibility of a future complete operationalisation of the JF, it is worth assessing whether, in that case, the activities undertaken by or envisaged for the JF could make the G5 party to the NIAC in Mali through the relationships of support it has with parties to the pre-existing NIAC.<sup>38</sup>

In that respect as well, notwithstanding the envisaged cooperation structure,<sup>39</sup> the JF's relationship with MINUSMA is currently stuck at an embryonal phase. Pending the development of phase 2 of the OP, instead of *providing support* to pre-existing parties to the conflict, the JF is actually *being supported* by MINUSMA in order to reach its full operational capacity.<sup>40</sup>

One could be thus tempted to claim that the support-based approach is not the right tool to read the relationship between MINUSMA and the JF. In the analysis that follows I on the contrary take a step back and adopt a different perspective to claim that, with some adjustments, the ICRC's approach can prove relevant in addressing complex situations such as the Malian one. First of all, the realisation that the relationship of support appears at the moment reversed (with MINUSMA supporting the JF rather than the other way round) makes it worth considering the possibility of applying the support-based approach *a contrario* – ie, to twist the ends of the equation and consider that actions undertaken by the party to an existing conflict in support of a third entity can make the latter a party thereto. Furthermore, it is submitted that the support-based approach could prove

<sup>38</sup> As regards the hostilities directly opposing the JF to some of the AGs that are parties to the NIAC in Mali, it has been concluded that the low intensity and number of armed confrontations does not reach the threshold of a NIAC: see RULAC (n 6).

<sup>39</sup> See UNSC Res 2359 (n 29) para 5, UNSG Report (n 34) para 52 ff and UNSG Report (n 33).

<sup>40</sup> See UNSG Report (n 34) and UNSG Report (n 33).



relevant in the analysis of the intricate connections between different actors if it is applied to relationships of mutual *do ut des* rather than of unilateral support.

4.1. *A reversed relationship: MINUSMA's support to the JF*

Considering the hypothesis that a new actor could be involved in an ongoing conflict due to the support it receives from a party thereto entails an inversion of the terms of the relationship of the ICRC's approach, but arguably not a change in its substance. Provided that the type of support is strong enough to amount to a joint use of force, or at least to coordination and pooling of resources aimed at fighting a common enemy and improving each party's performance,<sup>41</sup> such a relationship would fulfil the same objective of *de facto* making the parties' respective actions complementary vis-à-vis a common goal and enemy. As in the traditional case, it thus becomes necessary to examine the specific support being provided from one entity to the other in order to verify whether it fits the ICRC's test.

When the SC authorised MINUSMA to support the JF, it provided that those activities could only be undertaken with respect to units of the JF operating on Malian territory, under the conditions set forth by MINUSMA, at the discretion of its line of command and within the operation's mandate and strategic priorities.<sup>42</sup> This wording makes clear that not only the support provided to the JF has to be linked to the UN mission's broader stabilisation effort – in other words, to the ongoing NIAC taking place in Mali – but also that MINUSMA is the entity in control of such relationship. Hence, pending future factual developments, it seems reasonable to consider the way support is conceived in the mandate as an indicator of the fulfilment of the requirements of both nexus and official policy. The latter requirement is specifically aimed at avoiding that situations in which action is taking place outside the entity's control and line of command trigger the applicability of IHL.<sup>43</sup> such episodes would indeed, if anything, demonstrate the lack of collective authority necessary to consider the entity as a party to the conflict.

<sup>41</sup> Ferraro, 'The ICRC's' (n 3) 1233.

<sup>42</sup> UNSC Res 2391 (n 30) para 13.

<sup>43</sup> See Ferraro, 'The Applicability' (n 3) 587.

Despite the apparent fulfilment of those requirements, an assessment of the type of support characterising the relationship between the JF and MINUSMA reveals that activities are mainly aimed at enabling the JF to build up its military capacity rather than at having a direct impact on the adversary's ability to carry out military operations.<sup>44</sup> To begin with, activities envisaged in the mandate do not seem to fit the definition of support given by the ICRC.<sup>45</sup> Moreover, the actual structure that MINUSMA put in place to provide support to the JF so far exclusively covered logistical operations<sup>46</sup> that were not directly linked to the collective conduct of hostilities and could not thus fall within the category of conducts that qualify for the application of the support-based approach.<sup>47</sup>

Hence, even approaching the situation from a reversed perspective, the type of support currently provided by MINUSMA to the JF does not seem to reach the threshold required for the application of the ICRC's approach. While the latter requires a close link between the supporting action and the harm caused by specific military operations,<sup>48</sup> the causal relationship is interrupted in the case at stake: MINUSMA's support is given in order for the JF to be able to reach the capacity to conduct operations *only in a second moment*. Such conclusion seems grounded in the very type of support designed under the mandate rather than in the modalities of its provision: even the future operationalisation of a recently established joint logistical liaison and coordination cell<sup>49</sup> would not change the situation, for it would go in the direction of capacity-building rather than support in the conduct of hostilities.

The situation would on the contrary change if MINUSMA started to provide a different kind of support to the JF – acting under a different mandate or simply trespassing what is provided in the current one. Interestingly, things would have probably been different had the SC chosen to follow a different path with the last renewal of MINUSMA's mandate in

<sup>44</sup> See ICRC (n 1) para 446.

<sup>45</sup> See UNSC Res 2391 (n 30) para 13.

<sup>46</sup> See UNSG Report (n 33) para 44 ff.

<sup>47</sup> At best, they could be seen as general war-sustaining activities entailing a form of indirect involvement in hostilities that has no effect under IHL: see Ferraro, 'The Applicability' (n 3) 585 ff.

<sup>48</sup> *ibid.*

<sup>49</sup> UNSG Report (n 33) para 44.



2018.<sup>50</sup> Among the options recommended by the SG, there was the provision of a new mandate including military escorts and targeted operational support to specific units of the JF: arguably, support of that kind would have qualified for the application of the ICRC's approach.<sup>51</sup>

#### *4.2. Mutual support and complementarity*

In addition to a reversed application of the support-based approach, it is submitted that the relationship between the JF and MINUSMA is also worth analysing as a mutual rather than unilateral one.

From that perspective, MINUSMA's current support to the JF is not given for free. To begin with, it is linked, at least on paper, to an exchange of intelligence between the G5 and the UN.<sup>52</sup> Although such relationship is reportedly for the moment quite unidirectional, and involves single TCCs rather than the JF itself,<sup>53</sup> it is worth noting that actions not of a kinetic nature such as intelligence activities undertaken to the benefit of a party to the conflict could amount to support of a kind that meets the threshold for the application of the ICRC's approach.<sup>54</sup> Moreover, the support provided to the JF is also based on the acknowledgment that the latter's border-patrol activities already facilitate the discharge of MINUSMA's mandate.<sup>55</sup> Observed from that angle, the situation might lead to conclude that while MINUSMA's explicit support to the JF seems not to reach the threshold of the support-based approach, the actual (but less advertised) support provided by the latter to the UN could sooner or later qualify in that respect, as the adverse impact on the enemy would then result from a conjunction of the acts undertaken by different parties.

Furthermore, adopting a longer timeframe of analysis, one realises that MINUSMA is supposed to provide only temporary support to the JF in an

<sup>50</sup> See UNSC Res 2423 (28 June 2018) UN Doc S/RES/2423 (2018).

<sup>51</sup> See UNSG Report (n 34) para 43 ff, 53 ff.

<sup>52</sup> UNSC Res 2359 (n 29) para 5.

<sup>53</sup> See UNSG Report (n 34) para 68, as well as Oxford Research Group, 'The Military Intervention in Mali and Beyond: An Interview with Bruno Charbonneau' (28 March 2019) <[www.oxfordresearchgroup.org.uk/blog/the-french-intervention-in-mali-an-interview-with-bruno-charbonneau?fbclid=IwAR25cUiFQRzD2dTRNgldhagDk8hEQRWpT1\\_a0R1izv3fL7Eau30-EmV1zbk](http://www.oxfordresearchgroup.org.uk/blog/the-french-intervention-in-mali-an-interview-with-bruno-charbonneau?fbclid=IwAR25cUiFQRzD2dTRNgldhagDk8hEQRWpT1_a0R1izv3fL7Eau30-EmV1zbk)>.

<sup>54</sup> Ferraro, 'The Applicability' (n 3) 585 and Ferraro, 'The ICRC's' (n 3) 1231.

<sup>55</sup> See UNSC Res 2391 (n 30) and UNSC Res 2423 (n 50), as well as UNSG Report (n 34).

initial phase, in order for it to be able to reach its full operational capacity at a later stage.<sup>56</sup> Therefore, although the mere existence of an agreement designed to enhance cooperation with respect to the pre-existing conflict cannot be taken automatically as a proof of the existence of the required support and nexus,<sup>57</sup> it is in our case quite clear that the preparatory work in terms of cooperation and coordination is geared towards the future marshalling of military resources to the aim of fighting a common enemy in the context of the pre-existing armed conflict.<sup>58</sup>

The complementary and mutually beneficial nature of the relationship between the JF and MINUSMA has been underlined by the UN in several occasions<sup>59</sup> and is also acknowledged by France.<sup>60</sup> In the words of the SG, the ultimate goal is that the JF becomes a 'regional counter-terrorism brigade operating under unified command':<sup>61</sup> this would entail a repartition of tasks between the two entities, in a framework where the JF would be conducting counter-terrorism operations and MINUSMA could focus on its stabilisation mandate.<sup>62</sup> The latter scenario would neatly fit the ICRC's test, ultimately amounting to what is defined as unilateral military action undertaken with the purpose of weakening the military resources of a party to the conflict for the benefit or on behalf of the adversary.<sup>63</sup>

##### 5. *The Impact on conflict classification*

Before concluding, it is important to address the question of the impact that a G5's potential future status as party to the conflict would have on the classification and the number of armed conflict(s) taking place in Mali.

As regards the qualification of the conflict, according to the ICRC's approach, the traditional rule according to which it is the nature of the

<sup>56</sup> See UNSG Report (n 34) para 14.

<sup>57</sup> Ferraro, 'The Applicability' (n 3) 587.

<sup>58</sup> Ferraro, 'The ICRC's' (n 3) 1233 ff.

<sup>59</sup> UNSG Report (n 34) para 21, 82. See also UNSC Res 2423 (n 50), preamble, where the SC referred to MINUSMA and the JF as 'mutually beneficial'.

<sup>60</sup> See the page dedicated to the JF on the website of the French Permanent Representation at the UN <onu.delegfrance.org/Force-conjointe-du-G5-Sahel-10429>.

<sup>61</sup> UNSG Report (n 33) para 34.

<sup>62</sup> See International Crisis Group, *Finding the Right Role* (n 4), Cooke (n 37) and Oxford Research Group (n 53).

<sup>63</sup> Ferraro, 'The ICRC's' (n 3) 1234.



bilateral relationships between the parties that determines the nature of the conflict applies:<sup>64</sup> as the conflict in Mali originates as a NIAC between the territorial State and AGs, as long as the supporting entities intervene against the latter the conflict remains a NIAC because of the non-state nature of the opposing parties.<sup>65</sup> Although our case study does not in principle require the assessment of the different hypothesis of a third entity's intervention against a State, some of the arguments and criteria that have been developed in the context of the debate over cases of 'internationalisation' offer interesting perspectives for our discussion of the support-based approach.<sup>66</sup>

In particular, the discussion of complex conflict situations recently developed in Mačák directly addresses the question of whether in the case of intervention of a third entity in a pre-existing conflict we are in presence of one single conflict or many 'micro-conflicts'.<sup>67</sup>

Following the ICRC's approach, a situation in which several parties are involved should be analysed through each and every bilateral relationship to the aim of tracing as many separate conflicts.<sup>68</sup> On the contrary, Mačák brings our attention to the breaking point where, in light of the relationship between entities supporting each other, one needs to stop looking at bilateral relationships and consider instead the existence of one single conflict with multiple parties.<sup>69</sup> Compared to the strict separation put forward by the ICRC, the latter approach offers a more flexible outlook on situations that are subject to constant evolution. Although the concrete consequences of its adoption are much less important in our case as only the number – and not the classification – of the conflict(s) is at stake, it is in

<sup>64</sup> *ibid* 1241.

<sup>65</sup> For the opposite claim according to which any conflict would be internationalised by the intervention of entities such as IOs, see E David, O Engdahl, 'Debate: How does the involvement of a multinational peacekeeping force affect the classification of a situation?' (2013) *Intl Rev Red Cross* 659.

<sup>66</sup> In cases where an IO is involved against a State some scholars claim that the conflict should be considered an IAC: see Clapham (n 1) 9, Akande (n 13) 69 ff, and C Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) *YB Intl Humanitarian L* 3, 25.

<sup>67</sup> See Mačák (n 2).

<sup>68</sup> Ferraro 'The ICRC's' (n 3). The ICRC explicitly rejected the term 'internationalised internal armed conflict', holding that 'it quite wrongly suggests a blanket application of the law of IAC in such situations, which is contrary to the fragmented approach': *ibid* 1230.

<sup>69</sup> Mačák (n 2) 101.

my opinion worth trying to compare this newly proposed approach with the support-based one, to see whether and how they can be reconciled.

To do so, it is very important to acknowledge that what is support for the purposes of the ICRC's test is not automatically the support that entails the existence of one single conflict under the paradigm put forward by Mačák. In the latter case, the bar is indeed much higher: the assessment is based on the criterion of joint use of force in terms of organisation, coordination and planning of military operations, and it is only when force is being used together by entities that are no longer autonomous from an operational point of view that one can consider that a single catch-all conflict is in place.<sup>70</sup> Since it is clear that the relationship between the JF and MINUSMA does not currently reach the level of joint use of force, it is submitted that the applicable standard in our case would remain the ICRC's fragmented approach. However, a future potential division of tasks would certainly entail strategic and tactical decisions being made not only by the original party to the conflict but also by the supporting/intervening one. The two parties would then no longer be using force autonomously, and the situation would reach the threshold of joint use of force.<sup>71</sup>

In such an event, it would be interesting to take into consideration the hypothesis of the existence of a single multi-party armed conflict as opposed to many sub-conflicts. Of course, since the applicable law would remain that of NIACs, the paradigm shift would in our case nearly amount to mere linguistic change. However, in the different scenario of a supporting entity being involved against a State, such approach would raise many important issues that are in my opinion worth further reflection.<sup>72</sup>

<sup>70</sup> *ibid* 100. Importantly, in Mačák's view, the joint use of force does not entail that one party is in control of the other. Even in presence of a single conflict, each party remains responsible for its own actions, potentially leading to the decoupling of conflict classification and responsibility for violations of IHL: see *ibid* 44, 103. For the related debate see Milanović (n 1) 36 ff and Todeschini (n 24).

<sup>71</sup> See Mačák (n 2) 103.

<sup>72</sup> For the related debate, see K Mačák, 'Symposium: Internationalized Armed Conflicts—Four Concluding Thoughts' *Opinio Juris* (23 January 2019) <[opiniojuris.org/2019/01/23/symposium-internationalized-armed-conflicts-four-concluding-thoughts/](http://opiniojuris.org/2019/01/23/symposium-internationalized-armed-conflicts-four-concluding-thoughts/)>, E Pothelet, 'Symposium: Three Questions to the Author' *Opinio Juris* (21 January 2019) <[opiniojuris.org/2019/01/21/symposium-three-questions-to-the-author/](http://opiniojuris.org/2019/01/21/symposium-three-questions-to-the-author/)> and K Fortin, 'Symposium: Further Thoughts on an IAC with Three Parties and the Capacity of Armed Groups to Adhere to International Norms' *Opinio Juris* (18 January 2019) <[opiniojuris.org/2019/01/18/symposium-further-thoughts-on-an-iac-with-three-parties-and-the-capacity-of-armed-groups-to-adhere-to-international-norms/](http://opiniojuris.org/2019/01/18/symposium-further-thoughts-on-an-iac-with-three-parties-and-the-capacity-of-armed-groups-to-adhere-to-international-norms/)>.



6. *The way forward: towards increasing coordination?*

The analysis conducted so far reveals a scenario shaped by an idea of complementarity whereby different entities participate to a common military effort. Within that context, the ultimate plan for the JF would be to take up combat functions while leaving MINUSMA to deal with political and stabilisation issues. In that respect, it seems that the JF could one day act as a sort of equivalent of the Force Intervention Brigade (FIB) within the UN Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO). In light of its broader impact on the future development of multinational operations, I wish to spend some concluding thoughts on this hypothesis and on its differences and similarities with the experience of the FIB.

Although the FIB is part of MONUSCO, the option of decoupling tasks and assigning enforcement action to a regional non-UN force placed outside the operation had been discussed at the time of its creation.<sup>73</sup> Due to skepticism of observers and partners on the ability to set up and operationalise such an entity,<sup>74</sup> the proposal was in the end rejected in favour of the creation of a force integrated within the UN mission.<sup>75</sup> It was precisely because of the discomfort expressed by some States vis-à-vis the legal implications of this new scenario in terms of the possibility that the UN becomes party to the conflict in the DRC<sup>76</sup> that, when MINUSMA was established, no comparable proactive mandate was adopted despite a call by

<sup>73</sup> See Declaration of the Heads of State and Government of the Member States of the ICGRL on the Security Situation in Eastern DRC (15 July 2012) para 4 <[africanewsonline.blogspot.com/2012/07/declaration-of-heads-of-state-and.html](http://africanewsonline.blogspot.com/2012/07/declaration-of-heads-of-state-and.html)> and O Spijkers, 'The Evolution of the United Nations Peacekeeping Mission in the Congo: From ONUC, to MONUC, to MONUSCO and its Force Intervention Brigade' (2015) *J of Intl Peacekeeping* 88, 99.

<sup>74</sup> See L Muller, 'The Force Intervention Brigade – United Nations Forces beyond the Fine Line Between Peacekeeping and Peace Enforcement' (2015) *J of Conflict and Security* L 359 and 'Issue Brief on the UN Intervention Brigade in the Democratic Republic of the Congo' (International Peace Institute 2013) <[www.ipinst.org/wp-content/uploads/publications/ipi\\_e\\_pub\\_un\\_intervention\\_brigade\\_rev.pdf](http://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_un_intervention_brigade_rev.pdf)>.

<sup>75</sup> See Muller (n 74) 363 and UNSG Letter to the UNSC, UN Doc S/2013/43 (27 December 2012).

<sup>76</sup> See in particular the statements submitted by Pakistan, Guatemala, Rwanda and Argentina at the UNSC meeting on 28 March 2013, UN Doc S/PV.6943. For further details, see Muller (n 74) and B Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues' (2013) *AJIL* 311.

the Malian authorities to consider the option of ‘a rapid intervention force capable of effectively combating terrorists’.<sup>77</sup>

Now, such possibility seems able to re-emerge due to the potential future role of the JF. Leaving aside for the sake of argument doubts related to the effective possibility of realising the project as it is designed, the JF can indeed be seen as an ongoing experiment aimed at slowly building a model entity entrusted with specific tasks in the context of a broader scenario populated by other actors.<sup>78</sup>

Behind the establishment of institutional architectures of this kind ultimately lies the idea of outsourcing combat to external actors that do not carry the UN emblem – from both a physical and a perceptual point of view.<sup>79</sup> At first sight, the choice of having specialised units that take up combat functions – and thus the risk of becoming party to a conflict – is positive inasmuch as it makes it arguably easier to implement the principle of distinction vis-à-vis different actors present on the ground. Instead of mixing the military component of MINUSMA with its civilian branch, and consequently putting the latter at the risk of being targeted,<sup>80</sup> having two entities that support each other while not only pursuing different tasks but also wearing different uniforms would probably do a service to the non-military personnel of the UN mission.<sup>81</sup> On the other hand, since it is

<sup>77</sup> See ‘Informal Interactive Dialogue on UN Mission in Mali’s Mandate’ Whatsinblue (10 November 2014) <[www.whatsinblue.org/2014/11/informal-interactive-dialogue-on-un-mission-in-malis-mandate.php](http://www.whatsinblue.org/2014/11/informal-interactive-dialogue-on-un-mission-in-malis-mandate.php)>. For details, see Charbonneau (n 6).

<sup>78</sup> See in that respect International Crisis Group, ‘Finding the Right Role for the G5 Sahel Joint Force’ (n 4) 2.

<sup>79</sup> The envisaged scenario seems in line with the recommendations contained in the ‘Report of the High-Level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people’ UN Doc A/70/95-S/2015/446 (17 June 2015) para 34, according to which the UN should not engage in counter-terrorism operations but rather work in parallel with entities having such objective.

<sup>80</sup> See CT Hunt, ‘All Necessary Means to What Ends? The Unintended Consequences of the “Robust Turn” in UN Peace Operations’ (2017) *Intl Peacekeeping* 108.

<sup>81</sup> Whether this would be enough to completely put aside the risk that civilian personnel could be targeted, however, remains an open question. See R Sutton, ‘The “Phantom Local” and the Everyday Distinction Practices of Humanitarian Actors in War: A Socio-Legal Perspective’ (2018) *New Political Science* 1 and R Sutton, ‘A Hidden Fault Line: How International Actors Engage with IHL’s Principle of Distinction’, in M Deland, M Klamberg, P Wrange (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives* (Routledge 2019) 85. See also Oxford Research Group (n 53).



already extremely difficult to hold an entity such as the UN accountable for the wrongdoings committed by multinational operations deployed under its aegis,<sup>82</sup> further fragmentation and decoupling of responsibility would probably lead to increased difficulties in that regard. However, the adoption of the UN due diligence policy for support to non-UN forces<sup>83</sup> and, in our specific case, the inclusion of a compliance framework to ensure respect for IHL and HRL by the JF in the technical agreement concluded between the G5, the EU and MINUSMA<sup>84</sup> could possibly constitute a valid counter-argument to the last point. If we consider those specific instruments together with a generally applicable customary obligation to ensure respect for IHL by each party to the conflict,<sup>85</sup> it might be that for some reasons – be them sincere concerns or instrumental preoccupation of seeing the UN label ‘stained’ with others’ misbehaviours – the UN could be more careful with the scrutiny of the conduct of its partners than with its own actions.<sup>86</sup>

## 7. *Concluding remarks*

This contribution shows that – with few adjustments – the support-based approach constitutes a useful lens to assess the direction that the relationship between the JF and MINUSMA has been designed to take. Crucially, the approach might prove particularly key to shed some light on moments of transition towards a situation where different entities perform different tasks which, considered altogether, amount to a collective conduct of hostilities.

<sup>82</sup> For a general discussion, see Kolb, Porretto, Vité and Gill (n 7). For a more recent perspective, see KC Chang, ‘When Do-Gooders Do Harm: Accountability of the United Nations toward Third Parties in Peace Operations’ (2016) *J Intl Peacekeeping* 86.

<sup>83</sup> See ‘Human rights due diligence policy on United Nations support to non-United Nations security forces’ UN Doc A/67/775-S/2013/110 (5 March 2013). Forms of support such as ‘capacity- and institution-building and other forms of technical cooperation for the purpose of enhancing the operational capabilities of non-United Nations security forces’ seems to fall within those currently undertaken by MINUSMA in support of the JF: see *ibid*, para 8.

<sup>84</sup> See UNSG Report (n 33) para 26 ff.

<sup>85</sup> See Geiss and ICRC (n 7).

<sup>86</sup> According to ‘Human rights due diligence’ (n 83) para 28, suspension of support might be necessary even at the cost of running counter the common aim of the operations.

In that respect, my main findings can be summarised as follows. As regards its capability to be party to a conflict, the G5 lacks at the moment the necessary characteristics to be considered as such; yet, it has the potential of becoming so in the future if the JF is operationalised to the point of meeting its envisaged structure. With respect to the relationship of support occurring between the latter and MINUSMA, my claim is twofold. On the one hand, I advance that it is in principle possible to tackle the relationship of support from a reversed perspective and analyse whether the support provided by a party to the conflict to a third entity can transform the latter into a party thereto. However, this is not the case for the situation at hand as the type of support that MINUSMA is currently providing to the JF does not fulfil the required conditions. On the other hand, by analysing the relationship of support from a mutual rather than unilateral perspective, I submit that the very low-profile type of support provided by the JF to MINUSMA could potentially reach the level of support needed for the ICRC's test to apply and that, in any case, the support envisaged for the relationship between the two entities is in the end aimed at reaching a point where different entities fight the same enemy by performing different tasks.

More broadly, my analysis offers some reflections on what I believe are possible future developments to be expected in the context of complex conflict situations. Beyond Mali, those observations could be for instance relevant with respect to the activities of the Multinational Joint Task Force (FMM) created by the Lake Chad Basin Commission.<sup>87</sup> Although any concrete development in the end depends on the actual implementation of models such as that of the JF, I believe time is ripe to start this conversation in order for IHL to be prepared to face the situation when time comes.

<sup>87</sup> The FMM is a regional force established by some of the members states of the Lake Chad Basin Commission (plus Benin) and authorised by the AU to fight against Boko Haram: see AU Peace and Security Council Communiqué (29 January 2015) PSC/AHG/COMM.2(CDLXXXIV). For details, see W Assanvo, JEA Abatan, WA Sawadogo, 'Assessing the Multinational Joint Task Force against Boko Haram' Institute for Security Studies, West Africa Report (September 2016) <[issafrica.org/research/west-africa-report/assessing-the-multinational-joint-task-force-against-boko-haram](http://issafrica.org/research/west-africa-report/assessing-the-multinational-joint-task-force-against-boko-haram)>. On the potential relationship of support between the FMM and the JF, see International Crisis Group, 'Finding the Right Role for the G5 Sahel Joint Force' (n 4).

