INTERNATIONAL LAW ASSOCIATION

VIENNA CONFERENCE (2026)

USE OF FORCE: MILITARY ACTION WITH CONSENT[*]

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[*] This Committee was originally created under the title 'Use of Force: Military Assistance on Request'. However, the Committee decided to change its name to 'Use of Force: Military Action with Consent', for the reasons set out in section I.B of this report. This change was approved by the ILA Executive Council in November 2024.

[^] From the inception of this Committee in 2018 until 2023, Professor Vera Rusinova held the role of Co-Chair and Professor Tom Ruys held the role of Co-Rapporteur. Unfortunately, both had to step down in 2023, although they remained Committee members until the conclusion of its work. They were replaced as officers by Dr Hannah Woolaver and Dr Erin Pobjie respectively. Huge thanks go to Professor Rusinova and Professor Ruys for their substantial contributions as Committee officers. In particular, Professor Ruys took a leading role in the early drafting of sections of this report. Thanks also to Professor Noëlle Quénivet, Christian Dadomo, Dr Svenja Raube, Dr Seyfullah Hasar and M. Emre Hayyar. All members served on this Committee in their personal capacity.

FINAL REPORT

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I. Introduction

A. Scope, background and structure

1. This report focuses on military action that would violate the prohibition of the use of force as enshrined in Article 2(4) of the United Nations Charter and customary international law[1] absent the valid consent of the State on the territory[2] of which that action is undertaken. The most prominent instances of such action are offensive operations involving the deployment of ground troops and/or air operations by one State in another State's territory. However, the situations covered by this report are not limited to deployments of this kind. More targeted operations, such as drone strikes against non-State actors,[3] certain law enforcement operations,[4] 'protection of nationals' operations,[5] deployments based upon (or purportedly based upon) troop-stationing agreements or Status of Forces Agreements (SOFAs),[6] may fall within this report's scope, to the extent that – absent the consent of the territorial State – these acts would violate the prohibition of the use of force.[7] This includes situations where foreign troops remain in the territory after consent is withdrawn, even in instances where no shots are fired.[8]

2. As a starting point, the notion that consent can provide a valid legal basis for foreign military action is accepted.[9] The proposition finds expression in State practice[10] and in the case-law of

[1] See Charter of the United Nations (1945) 1 UNTS XVI ('UN Charter'), Article 2(4) and, relating to the prohibition's parallel status in customary international law, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*), Merits [1986] ICJ Rep. 14, paras. 174–178. For discussion of the meaning of 'force' in the context of the prohibition, see ILA, Committee on the Use of Force, *Final Report on Aggression and the Use of Force*, Sydney Conference (2018), 4–5; Erin Pobjie, *Prohibited Force: The Meaning of 'Use of Force' in International Law* (Cambridge University Press, 2023); Mary Ellen O'Connell, *The Art of Law in the International Community* (Cambridge University Press, 2019), 57–65. It is worth noting that the prohibition must logically be read as applicable not just to States but also to international organisations comprised of State members. See, e.g., Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2nd edn 2023), 38–39, 168–171. As such, military action by international organisations – as distinct from their members – also falls within the scope of this report (where the action in question would violate the prohibition of the use of force absent the valid consent of the territorial State).

[2] For the purposes of this report, the term 'territory' may include certain extraterritorial objects subject to a State's jurisdiction. See *infra* para. 7.

[3] See, e.g., Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 *Journal on the Use of Force and International Law* 97.

[4] See, e.g., Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 *American Journal of International Law* 159, 201-208.

[5] See, e.g., Ronald Alcala and Hitoshi Nasu, 'The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis' (2024) 14 *Journal of National Security Law & Policy* 1.

[6] See, e.g., Joop Voetelink, 'The Status of Forces Agreements', in Sergey Sayapin, Rustam Atadjanov, Umesh Kadam, Gerhard Kemp, Nicolás Zambrana-Tévar and Noëlle Quénivet (eds), *International Conflict and Security Law* (Springer, 2022), 229.

[7] On whether 'protection of nationals' operations, isolated drone strikes, or certain law enforcement operations come within the scope of the *jus ad bellum*, see Ruys (2014), *supra* note 4. Taking a different position on the same question, see Olivier Corten, *Le droit contre la guerre* (Pedone, 3rd edn 2020), 105–159; O'Connell (2019), *supra* note 1, 194–197.

[8] See section III.F.

[9] The 'legalising' effect of such consent is limited to the compatibility of (or, strictly speaking, 'non-engagement' of) such action with the *jus ad bellum*. It cannot, for example, set aside the application of relevant provisions of international humanitarian law (IHL) or international human rights law. See Part IV.

[10] See Henderson (2023), *supra* note 1, 449 (noting that '[h]istory is replete with examples of states intervening upon the justification that there has been an invitation to intervene by the government of a state' and going on to provide a long list of examples).

the International Court of Justice (ICJ).[11] It also is confirmed by legal writings.[12] At the same time, as the previous International Law Association (ILA) Committee on the Use of Force observed in its 2018 Final Report, the relatively simple conclusion that a State can consent to foreign military action on its territory 'is deceptive in that the identity of those providing consent, the parameters of consent, the determination of its existence, and the implications of its withdrawal raise important questions in relation to the prohibition of force.'[13] The topic of military action with consent has attracted renewed attention in recent years.[14] While the ILA has not addressed the issue in depth in the past,[15] the Institut de Droit International (IDI) has done so on two occasions. In 1975, the IDI adopted a resolution on the matter at its Wiesbaden session.[16] This resolution was, however, confined to intervention 'in civil wars', and proved controversial.[17] At its 2011 Rhodes session, the IDI adopted a resolution on 'military assistance on request', the scope of which was limited to situations *below* the threshold of a non-international armed conflict.[18]

3. Against this background, the present report offers a more holistic, comprehensive account of 'consent' as a legal basis for foreign military operations, as well as considering other key international legal requirements for the lawful undertaking of such military action. The aim is to bring greater clarity to the existing law. To this end, this report is structured as follows. Part II considers the place of military action with consent in the context of the wider international law framework. Part III focuses on consent as the legal basis for military action and examines questions of validity surrounding its issuance and withdrawal. Part IV then considers other requirements of international law that can affect the lawfulness of military actions of this kind. Part V briefly addresses two aspects of the practical operation of military action with consent:

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[11] See *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Merits [2005] ICJ Rep. 168, especially paras. 39–54. See also *Nicaragua*, Merits, *supra* note 1, para. 246 (noting that intervention is normally 'allowable at the request of the government of a State' – albeit that this statement can be seen as a reference to intervention generally, and not necessarily in relation to intervention that would constitute a use of force absent consent).

[12] See, e.g., Olivier Corten, Gregory Fox, and Dino Kritsiotis, *Armed Intervention and Consent*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. IV (Cambridge University Press, 2023); Seyfullah Hasar, *State Consent to Foreign Military Intervention during Civil Wars* (Brill Nijhoff, 2022); Chiara Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart Publishing, 2021); Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020); O'Connell (2019), *supra* note 1, 206–234; Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 743; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013); three special issues of the *Journal on the Use of Force and International Law* comprising 14 major articles dedicated to the subject (issues 7(1) 2020; 7(2) 2020; 8(1) 2021).

[13] ILA Use of Force Sydney Report, *supra* note 1, 19.

[14] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189 remained perhaps the most well-known and commonly referenced scholarly work on military action with consent for decades. However, there have been many high-quality publications on the topic in recent years. See, e.g., the scholarship listed at *supra* note 12.

[15] Although see the discussion of the topic as a part of the ILA Use of Force Sydney Report, *supra* note 1, 18–20.

[16] IDI, 'The Principle of Non-Intervention in Civil Wars', Session of Wiesbaden, Resolution (1975).

[17] See 'Délibérations de l'Institut en séances plénières – Troisième question: Le principe de non-intervention dans les guerres civiles' (1975) 56 *Annuaire de l'Institut de droit international* 411, 474; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press, 2nd edn 2021), 98–101; Georg Nolte, 'The Resolution of the Institut de droit international on Military Assistance on Request' (2012) *Revue belge de droit international* 241, 243.

[18] IDI, 'Present Problems of the Use of Force in International Law: Military Assistance on Request', Rhodes Session, Resolution (2011), Article 2. It is worth noting that, in regard to the notion of a 'civil war' in the context of military action with consent, '[n]o generally accepted definition exists, largely because 'civil war' is not a critical term of art in international legal instruments', Gregory H. Fox, 'Intervention by Invitation', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 816, 827.

the relevant burden of proof and the legal consequences of undertaking military action without, or beyond the scope of, valid consent, or in violation of other rules of international law. Finally, in Part VI, the report sets out a series of Conclusions. Before turning to these parts of the report, however, the remainder of this Introduction provides more detail on the terminology used in this report.

B. Terminology

4. There exists no authoritative terminology to describe the situations covered by this report, and various labels have been adopted or proposed by writers in different contexts.[19] Perhaps the most commonly used terms in scholarship have been 'intervention by invitation'[20] and 'military assistance on request'.[21] However, there are very few examples of States themselves adopting either of these terms.[22] They also are both descriptively inaccurate and/or misleading.

5. For example, an issue common to both of the terms 'intervention by invitation' and 'military assistance on request' is that the use of either 'invitation' or 'request' in the label suggests that consent to military action must be initiated by the territorial State, when in fact it can also be solicited by the State that undertakes the military action.[23] The term 'intervention by invitation', moreover, implicitly situates the action as one that – absent valid consent – would violate the principle of non-intervention, whereas the focus of this report at least, is on actions that would violate the prohibition of the use of force.[24] Valid consent would also normally preclude the existence of an (unlawful) 'intervention'/'use of force' to begin with,[25] making the notion of 'intervention by invitation' a *contradictio in terminis*.[26] Similarly, with regard to the term 'military assistance on request', the word 'assistance' may imply the inclusion of forms of assistance of a different legal character, which still may be 'military' in nature: for instance, certain humanitarian relief operations conducted by military personnel.[27]

6. This Committee has thus adopted the term 'military action with consent' to describe the

[19] See, e.g., Laura Visser, 'What's in a Name? The Terminology of Intervention by Invitation' (2019) 79 *ZaöRV* 651, 652–653 ('use of force by invitation'); Ashley S. Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 *Harvard International Law Journal* 1 ('consent to the use of force').

[20] See, e.g., Doswald-Beck, *supra* note 14; Fox (2015), *supra* note 18; Nolte, *supra* note 17; Anne Peters, 'Intervention by Invitation: Impulses from the Max Planck Trialogues on the Law of Peace and War' (2019) 79 *ZaöRV* 635.

[21] See, e.g., de Wet (2020-1), *supra* note 12; Patrick M. Butchard, 'Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force' (2020) 7 *Journal on the Use of Force and International Law* 35; Federica I. Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force' (2020) 7 *Journal on the Use of Force and International Law* 227. This term was also adopted by the IDI. See, e.g., IDI Rhodes Resolution, *supra* note 18. For discussion, see Gerhard Hafner, *l'Institut de droit international*, 10th Commission, 'Problèmes actuels du recours à la force en droit international Sous-groupe: Intervention sur invitation / Present Problems of the Use of Force in International Law Sub-group: Intervention by Invitation' (2009) 73 *Annuaire de l'Institut de droit international* 299, 311.

[22] However, see, e.g., UN Doc. A/C.6/35/SR.29 (24 October 1980), para. 42 (Mexico) (a rare instance of a State using the term 'intervention by invitation' in this context).

[23] See *infra* para. 43.

[24] Noting that this Committee defined the scope of its work as relating to military action that would violate the prohibition of the use of force absent the valid consent of the territorial State. See *supra* para. 1. See also Visser (2019-1), *supra* note 19, 652 (adopting the same focus as herein, and thus concluding that '[c]onsequently, it would be more appropriate to refer to a use of force rather than an intervention when discussing military activity in a foreign state upon invitation.').

[25] See *infra* para. 12.

[26] See Hafner, *supra* note 21, 310–311.

[27] See *infra* para. 17.

scenarios covered in this report. While this has the disadvantage of departing from dominant academic nomenclature,[28] it is the term that best reflects the situations to which it refers. In particular, it focuses on the key legalising component of such scenarios, namely, valid consent, as discussed in section II.A.

7. In addition to employing the term 'military action with consent', this report uses the term 'territorial State' to refer to a State on the territory of which military action is undertaken by another State. It uses the term 'acting State' to refer to a State that is undertaking military action on the territory of another State.[29] It also should be noted that for the purposes of this report, the term 'territory' may include certain extraterritorial objects subject to a State's jurisdiction, such as military bases and vessels.

II. Military action with consent: the international legal framework

8. This Part sets out the international legal framework for military action with consent. It confirms that the legal basis for such actions is the consent of the territorial State, considers how military action with consent interacts with the prohibition of the use of force, and then examines the relationship between military action with consent and three other concepts in international law: collective self-defence, humanitarian relief operations and peacekeeping.

A. Consent as the legal basis for military action

9. A State's power to consent to foreign military action on its territory stems from territorial sovereignty, and consequent notions of territorial control and autonomy. In 1976, for example, the UN Security Council (UNSC) was clear that it is 'the *inherent* and lawful *right* of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States.'[30] The primary legal question is thus whether the territorial State has validly exercised its right to consent to foreign military activity on its territory.[31] Ultimately, it is widely accepted that force based on consent is legally permitted, albeit within limits.[32] The basis of this legality is the issuance of valid consent[33] by the territorial State: 'the presence of valid consent is a normative game changer that turns what would otherwise have been an intervention into cooperation.'[34]

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[28] The closest example of terminology applied previously in scholarship to that used in this report would seem to be Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, entry last updated May 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306, para. 2 ('armed action upon invitation or with the consent of the target State').

[29] This terminology is without prejudice to the fact that military action with consent also can be undertaken by an international organisation, see *supra* note 1. Likewise, there also can be multiple 'acting States' undertaking military action with consent.

[30] UN Doc. S/RES/387 (31 March 1976) (emphasis added). See also UN Doc. A/AC.119/SR.28 (23 October 1964), 6 (Argentina); Gregory H. Fox, 'Invitations to Intervene After the Cold War: Toward a New Collective Model', in Corten, Fox, and Kritsiotis, *supra* note 12, 179, 179.

[31] See Federica I. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge University Press, 2018), 131–134, 170–172.

[32] Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review* 21, 21; Paddeu (2020), *supra* note 21, 228. See Part IV for consideration of rules of international law that may place limits upon military action undertaken with the consent of the territorial State (other than issues related to the validity of the consent itself).

[33] See Part III for consideration of the validity of the consent issued by the terriorial State.

[34] Marco Roscini, *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with*

B. Relationship to the prohibition of the use of force

10. Military action with consent is not subject to explicit regulation in the UN Charter. This has led to some debate over its conceptual underpinning[35] and relationship to the prohibition of the use of force, specifically in relation to whether consent acts as a distinct circumstance precluding the wrongfulness of a breach of the prohibition[36] or whether the consensual use of force falls outside of the scope of the prohibition.[37]

11. Only limited evidence of States' views on this matter is available, but to the extent that one can identify States' positions, this indicates that an action undertaken pursuant to valid consent does not engage the prohibition of the use of force at all.[38] That is to say that the prohibition is not engaged where the territorial State has provided valid consent.

12. The majority view in scholarship is, likewise, that military action based on (valid) consent does not engage the prohibition of the use of force.[39] This understanding is commonly situated in the language of Article 2(4): i.e., consensual force is not 'against' another State, is not incompatible with the 'territorial integrity or political independence of another State', and/or does not amount to a use of force in 'international relations'.[40] This was the view taken by the previous ILA Committee on the Use of Force[41] and is the position adopted in this report.

Other Principles (Oxford University Press, 2024), 3.

[35] See, e.g., David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke Journal of Comparative and International Law* 209, 210 ('[t]he theoretical basis for the rule that consent may validate an otherwise wrongful intervention is not entirely clear.').

[36] See, e.g., Paddeu (2020), *supra* note 21; Florian Kriener, 'Invitation – Excluding *ab initio* a Breach of Art. 2 (4) UNCh or a Preclusion of Wrongfulness?' (2019) 79 *ZaöRV* 643.

[37] See, e.g., Terry Gill and Kinga Tibori-Szabó, *The Use of Force and the International Legal System* (Cambridge University Press, 2023), 62; Petra Perisic, 'Intervention by Invitation – When Can Consent from a Host State Justify Foreign Military Intervention?' (2019) 7 *Russian Law Journal* 4, 9.

[38] See, e.g., United Kingdom, Prime Minister's Office, Policy paper: 'Summary of the Government Legal Position on Military Action in Iraq against ISIL' (25 September 2014), www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil ('international law is … clear that this prohibition [of the use of force] *does not apply* to the use of military force by one State on the territory of another if the territorial State so requests or consents', emphasis added).

[39] See, e.g., Gill and Tibori-Szabó, *supra* note 37, 62; Perisic, *supra* note 37, 9; Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implication of the Saudi-Led Military Intervention in Yemen' (2016) 65 *International and Comparative Law Quarterly* 61, 79–80; Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"' (2017) 4 *Journal on the Use of Force and International Law* 110, 125–126.

[40] See Visser (2019-2), *supra* note 32, 31–33; Byrne, *supra* note 3, particularly 99. One reason that some see it as conceptually valuable to view consent as 'built in' to the primary norm is that the prohibition of the use of force (or, at least, the prohibition of aggression) is commonly considered to be a peremptory norm of general international law (*jus cogens*), and if consent takes the military action wholly outside of the scope of the peremptory norm, then there is no contradiction between the accepted lawfulness of military action with consent and the immutability of *jus cogens*. See, e.g., Hasar, *supra* note 12, 43; Katie A. Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus ad Bellum*' (2021) 70 *International and Comparative Law Quarterly* 29. Regarding peremptory norms of general international law (*jus cogens*), see *infra* note 284.

[41] ILA Use of Force Sydney Report, *supra* note 1, 18.

C. Relationship to other legal concepts

1. Collective self-defence

13. Military action with consent and collective self-defence share some similarities.[42] They both involve a military deployment by a State that is subject to the approval of another State.[43] Indeed, when making legal arguments in relation to forcible action, States have often been unclear in distinguishing claims of military action with consent from claims of collective self-defence, at times explicitly mixing the two.[44]

14. One must, however, draw a clear distinction between military action with consent and collective self-defence. They are different conceptually,[45] and require the fulfilment of different legal criteria for their operation. The lawful exercise of collective self-defence must be in response to an armed attack,[46] which is not required for military action with consent.[47] Another distinction is that collective self-defence can provide a legal justification for using force against a third State (the attacker),[48] whereas consent to military action only permits the use of force vis-à-vis the territory of the consenting State (not beyond it).[49] There are various other differences between military action with consent and collective self-defence.[50] Despite their

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[42] See Laura Visser, 'Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin?' (2020) 7 *Journal on the Use of Force and International Law* 292; James A. Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*' (2022) 9 *Journal on the Use of Force and International Law* 4, 22; Dino Kritsiotis, 'Intervention and the Problematisation of Consent', in Corten, Fox, and Kritsiotis, *supra* note 12, 26, 80–81.

[43] Collective self-defence requires, under customary international law, a request for aid by the victim State; military action with consent is, of course, subject to the consent of the territorial State. See, further, *infra* note 50.

[44] See, e.g., UN Doc. S/26610 (21 October 1993) appendix I, para. 2 / UN Doc. S/26110 (19 July 1993) (Russia/Commonwealth of Independent States); UN Doc. S/2013/17 (14 January 2013) / Press conference given by M. Laurent Fabius, Minister of Foreign Affairs (11 January 2013) (France); UN Doc. S/2015/217 (27 March 2015) (Qatar). For discussion, see James A. Green, *Collective Self-Defence in International Law* (Cambridge University Press, 2024), 283–286; Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) (2009) vol. II, 282.

[45] As noted in Part II, the lawfulness of military action with consent flows, ultimately, from a State's sovereign territorial jurisdiction, and takes the action outside of the scope of the prohibition of the use of force. In contrast, collective self-defence is a corollary of the victim State's entitlement to defend itself against an armed attack and acts as a justification in law for a *prima facie* violation of the prohibition of the use of force. See Paddeu (2018), *supra* note 31, 131–134, 170–172; Jens David Ohlin, 'The Doctrine of Legitimate Defense' (2015) 91 *International Law Studies* 119.

[46] UN Charter, *supra* note 1, Article 51; *Nicaragua*, Merits, *supra* note 1, para. 237. Note that this report does not take a position on debates over whether self-defence can be taken in response to an imminent armed attack. See, generally, ILA Use of Force Sydney Report, *supra* note 1, 13–14; James A. Green, 'The *Ratione Temporis* Elements of Self-Defence' (2015) 2 *Journal on the Use of Force and International Law* 97, 102–108.

[47] This can be easily demonstrated by the fact that a State can consent to the peacetime stationing of another State's troops on its territory, which would be an unlawful use of force without that consent but is not legally dependant on an armed attack. See UN Doc. A/RES/3314(XXIX) (14 December 1974), annex, Article 3(e); James A. Green, 'The Annexation of Crimea: Russia, Passportisation and the Protection of National Revisited' (2014) 1 *Journal on the Use of Force and International Law* 3, 5–6.

[48] See Green (2024), *supra* note 44, 299–310.

[49] See, e.g., United Kingdom, 'Summary of the Government Legal Position', *supra* note 38.

[50] One such difference is that an exercise of collective self-defence must be undertaken at the request of the victim State, but a 'request' in this context is not necessarily the same as 'consent' because a State cannot 'consent' to another State using force against a third State. Moreover, as discussed in section III.C, consent to military action can be provided by means other than through a request from the territorial State. On the distinction between 'request' in the context of collective self-defence and 'consent' in the context of military action with consent, see Green (2024), *supra* note 44, 286–287. Another distinction is that action taken in self-defence must comply with the customary international law requirements of necessity and proportionality, whereas there is no State practice to suggest that military action with consent is legally limited by these criteria for the purpose of the *jus ad bellum* (although these criteria as they operate in other areas of international law, such as IHL or international human rights law, may be relevant to the wider legal assessment of military action with consent). Further, it is unclear

apparent similarities and the fact that States at times do not make a clear distinction when stating their legal positions, it is important that claims of military action with consent and collective self-defence are assessed separately, in relation to the different respective requirements for their lawful exercise.

2. Humanitarian relief operations

15. Military action with consent must also be distinguished from humanitarian relief operations undertaken on a State's territory by other States or by international organisations, so far as is possible. This is not straightforward because the legal basis for both is the consent of the territorial State.[51]

16. Humanitarian relief operations are governed by specific requirements under international humanitarian law (IHL),[52] international human rights law,[53] and/or the emerging body of rules that are engaged by international disaster responses,[54] as applicable. The key distinction

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against what necessity and proportionality would be measured in the context of miliary action with consent. See Green (2024), *supra* note 44, 295–297. *Contra*, e.g., Ruys and Ferro, *supra* note 39, 93; Roscini, *supra* note 34, 294, arguing that, at least in the context of 'counter-interventions' a requirement of proportionality is applicable. *Contra* also Mary Ellen O'Connell, 'Necessity and Proportionality: *Jus ad Bellum* Restrictions on Consent-Based Military Action', in Claus Kreß, Hannah Woolaver, James A. Green, Erin Pobjie and Tom Ruys (eds), *The Cambridge Handbook of State Consent and the Use of Force* (Cambridge University Press, forthcoming 2028); Mary Ellen O'Connell, 'What Remains of Law Against War' (2024) 113 *The Georgetown Law Journal* 319, 321 (footnote 7), 374, 379, arguing that necessity and proportionality are general principles inherent in law that apply to all lawful coercive action – countermeasures, self-defence, and military action with consent. Another distinction that can be made between collective self-defence and military action with consent is the lack of a reporting requirement for the latter in the way that exists under UN Charter, *supra* note 1, Article 51 for the former. See *infra* para. 52.

[51] In relation to the need for territorial State consent in humanitarian relief operations: in the context of an armed conflict (whether international or non-international), see, e.g., *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (UNOCHA, 2016), 16–20; outside of the context of an armed conflict, see, e.g., UN Doc. A/RES/46/182 (19 December 1991), annex, para. 3 ('[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations … [H]umanitarian assistance should be provided with the consent of the affected country.'). *Contra Nicaragua*, Merits, *supra* note 1, para. 242 (where the Court arguably implied that consent was not required, by asserting that humanitarian relief operations 'cannot be regarded as unlawful intervention, or as in any other way contrary to international law.').

[52] In relation to international armed conflicts, see Geneva Convention relative to the Protection of Civilian Persons in Times of War (GC IV) (1949) 75 UNTS 287, Articles 23 and 59; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1977) 1125 UNTS 3, Articles 69–71. In relation to non-international armed conflicts, see Common Article 3(2) of the Geneva Conventions and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) (1977) 1125 UNTS 609, Article 18. According to the ICRC Study, these rules are mirrored in customary international law applicable in both international and non-international armed conflicts: Jean-Marie Heckaerts and Louise-Doswald Beck (eds), *Customary International Humanitarian Law* (ICRC, 2005), Rule 55.

[53] The obligation to provide humanitarian relief to civilian populations can be seen as stemming from various elements of the international human rights law regime, particularly – but not solely – the right to life (see, e.g., International Covenant on Civil and Political Rights (ICCPR) (1966) 999 UNTS 171, Article 6) and the right to food (see, e.g., International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) 993 UNTS 3, Article 11). See Maruša T. Veber, 'Artificial Intelligence and Humanitarian Assistance: Reassessing the Role of State Consent' (2024) 84 *Ljubljana Law Review* 217, 226–228.

[54] See, e.g., ILC, Draft Articles on the Protection of Persons in the Event of Disasters, with commentaries (2016) *Yearbook of the International Law Commission*, vol. II, pt. 2, chap. IV, UN Doc. A/71/10; International Federation of the Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and International Recovery Assistance* (2007), https://disasterlaw.ifrc.org/idrlguidelines.

between humanitarian relief operations and military action with consent is to be found in the character of the former, which are limited by their humanitarian purpose.[55] The UN General Assembly has affirmed that humanitarian relief operations must be provided in accordance with the principles of humanity, impartiality, neutrality and independence.[56] In contrast, military action with consent can be – and commonly is – partisan in nature, although it must, of course, still comply with applicable rules of IHL and international human rights law.[57] Another distinction of note is that, at least in the context of an armed conflict, the territorial State's consent to foreign humanitarian relief operations cannot be arbitrarily withheld,[58] whereas in instances of military action with consent, there is no such restriction on the discretion of the territorial State to give or withhold its consent.[59]

17. In the *Nicaragua* case, the ICJ endorsed – based on US legislation – a strict division between the concepts of humanitarian relief operations and military action, noting that the former 'does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.'[60] Similarly, in 2003, the IDI stressed that humanitarian relief '*never* includes weapons, ammunition or any other military material.'[61] However, as a practical matter, the line between humanitarian relief and military action with consent may sometimes be thinner than these categorical statements would suggest, for instance where aid convoys are being protected by armed personnel.[62] If a

[55] See, e.g., IDI, 'Humanitarian Assistance', Bruges Session, Resolution (2003), Article I(1) (defining 'humanitarian assistance' as 'all acts, activities and the human and material resources for the provision of goods and services *of an exclusively humanitarian character*...', emphasis added).

[56] See UN Doc. A/RES/46/182 (19 December 1991), annex, Article 2 (regarding the first three of these principles only); UN Doc. A/RES/58/114 (17 December 2003). For definitions of these principles, see, e.g., *Emergency Handbook: Humanitarian Principles* (UNHCR, last updated 14 March 2025), https://emergency.unhcr.org/protection/protection-principles/humanitarian-principles, 3; *Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies* (UNOCHA, 2003 (revised 2006)), particularly para. 22. These definitions indicate that the principle of 'humanity' requires that relief must be aimed solely at saving lives, preventing and alleviating suffering, and maintaining human dignity; the principle of 'impartiality' requires that relief must be provided without discrimination and must be guided solely by need; the principle of 'neutrality' requires that relief must be provided without engaging in hostilities or engaging in political, religious or ideological controversies; and the principle of 'independence' requires that relief operations must be autonomous, and free from political, economic, or military influence.

[57] See section IV.B.

[58] See Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict' (2016) 92 *International Law Studies* 483. In the context of an armed conflict, if consent to humanitarian relief is arbitrarily withheld, this will entail the international responsibility of the refusing State but will not legally justify the use of force to ensure the provision of foreign humanitarian relief without consent (absent UNSC authorisation). See, e.g., *Oxford Guidance*, *supra* note 51, 48–55; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar, 2nd edn 2024), 635–636. It is arguably also the case that consent to humanitarian relief cannot be arbitrarily withheld in situations involving disaster relief outside of the context of armed conflict, as stated in Draft Articles on the Protection of Persons in the Event of Disasters, with commentaries, *supra* note 54, Article 13(2). However, whether this has crystalised into binding customary international law in the disaster context remains contested. See Sandesh Sivakumaran, 'Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster' (2015) 64 *International and Comparative Law Quarterly* 501. In situations of occupation there is an even more stringent requirement: consent to undertake humanitarian relief operations cannot be withheld by an occupying power. See GC IV, *supra* note 52, Article 59; *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Advisory Opinion [2025] ICJ, paras. 91–127; *Oxford Guidance*, *supra* note 51, 18 and 38.

[59] Regarding the sovereign power to consent to military action, see *supra* para. 9.

[60] *Nicaragua*, Merits, *supra* note 1, para. 97 (citing with approval this understanding from the US legislation authorising the provision of funds).

[61] IDI, Bruges Resolution, *supra* note 55, Article I(1)(a).

[62] See, generally, Annabel Bassil, 'Armed Escorts to Humanitarian Convoys: An Unexplored Framework under International Humanitarian Law' (2021) 102 *International Review of the Red Cross* 559.

humanitarian relief operation includes action that would violate the prohibition of the use of force without the valid consent of the territorial State, such action will fall within the scope of the present report.

3. Peacekeeping

18. Peacekeeping refers to a range of military operations undertaken with the purpose of stabilising (post-)conflict situations, protecting civilians, and facilitating the peaceful resolution of conflicts.[63] In most instances, peacekeeping takes place within the framework of the UN,[64] although regional organisations may also undertake such operations.[65]

19. Traditionally, peacekeeping has been defined along three operational parameters, considered 'bedrock principles':[66] consent, impartiality, and non-use of force except in self-defence.[67] The fact that consent is one of these key parameters means that peacekeeping operations cannot always be neatly distinguished from military action with consent.[68] In contrast, both peacekeeping and military action with consent can be clearly distinguished from 'peace enforcement' operations, which are undertaken on a coercive basis under Chapter VII of the UN Charter.[69]

20. Early UN peacekeeping operations were not established under Chapter VII and so necessarily relied on the consent of the territorial State(s) to act as their foundational legal

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[63] The majority of peacekeeping operations involve intra-, not inter-State conflicts. See UN Peacekeeping, 'Where We Operate', https://peacekeeping.un.org/en/where-we-operate; UN Peacekeeping, 'List of Past Peacekeeping Operations', https://peacekeeping.un.org/en/list-of-past-peacekeeping-operations.

[64] See, generally, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping', UN Doc. ST/DPI/1247 (1992). To an extent this can be seen as contrasting to military action with consent, which is more commonly exercised by a single State or small group of States. However, no firm distinction can be made here: it is possible for peacekeeping to be provided by one or more States (see, e.g., the Multinational Force and Observers (MFO) in the Sinai or the French Opération Turquoise in Rwanda in 1994), just as it is possible for military action with consent to be exercised by international organisations, see *supra* note 1.

[65] See de Wet (2020-1), *supra* note 12, 87 and 90–91. See also UN Charter, *supra* note 1, Article 53.

[66] See Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305-S/2000/809 (21 August 2000), ix.

[67] See, e.g., UN Secretary-General, Summary Study of the Experience Derived from the Establishment and Operation of the Force, UN Doc. A/3943 (9 October 1958), particularly paras. 154–193. It should be noted that 'self-defence' in this context refers to personal self-defence, as well as to the defence of the operation/mission, as distinct from self-defence in the *ad bellum* sense. See Sabine Hassler, 'Peace(keeping) Operations: Soldiers Without Enemies?', in Sayapin, Atadjanov, Kadam, Kemp, Zambrana-Tévar and Quénivet (eds), *supra* note 6, 201, 213.

[68] It is worth noting that, operationally, consent can be viewed as being essential for ensuring the success of most (if not all) peacekeeping operations. See *The Blue Helmets: A Review of United Nations Peacekeeping* (UN Department of Public Information, 2nd edn 1990), xix. However, such operational need for consent should be distinguished from 'consent' as the legal basis for the presence of foreign armed forces on a State's territory. See Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden (with Marco Benatar and Remy Jorritsma) (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (prepared by an international group of experts at the invitation of the International Society for Military Law and the Law of War) (Cambridge University Press, 2017), 8.

[69] See UN Peacekeeping, 'Terminology', https://peacekeeping.un.org/en/terminology. See also *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*), Advisory Opinion [1962], ICJ Rep. 151, 171 (drawing a clear distinction between peacekeeping (requiring consent) and enforcement actions). Note that the umbrella term 'peace operations' is now used by the UN to refer both to 'peacekeeping' operations and 'peace enforcement' operations, see, generally, UN Peacekeeping, 'Department of Peace Operations', https://peacekeeping.un.org/en/department-of-peace-operations.

basis.[70] Since the 1990s, however, the UNSC has commonly established peacekeeping operations under Chapter VII of the Charter.[71] Within that context, peacekeeping missions have become increasingly 'robust' in nature.[72] In particular, it has become standard practice for peacekeeping operations to be authorised to use force in defence of the mandate and to protect civilians.[73] Modern peacekeeping missions of this sort have strained traditional understandings of the peacekeeping principles of impartiality and non-use of force,[74] which previously could be seen as distinguishing peacekeeping from military action with consent.

21. At the same time, since peacekeeping missions are also now established under Chapter VII, there exists significant debate amongst scholars as to the legal basis of modern, robust peacekeeping operations.[75] The UNSC has commonly shied away from being explicit as to the specific provision(s) of Chapter VII under which it has established any given mission,[76] and territorial State consent is still emphasised as an essential feature of UN peacekeeping.[77] Whether the legal basis for peacekeeping operations that are established under Chapter VII (but that stop short of coercive 'peace enforcement') is territorial State consent,[78] Chapter VII,[79] or some mixture of both[80] has generated 'an abundance of scholarly hypothesis but little legal certainty.'[81]

22. For the purposes of this report, to the extent that consent constitutes the legal basis for a peacekeeping operation that involves the deployment of troops, there is likely to be overlap between that operation and the concept of military action with consent.[82] Put differently, if any given peacekeeping mission would be considered a violation of the prohibition of the use of force if there had been no consent from the territorial State (or where such consent is withdrawn), the operation will fall within the scope of this report. The designation 'peacekeeping' ultimately serves as a framework for evaluating an action's objectives and operational parameters. When peacekeeping overlaps with military action with consent, both

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[70] See Henderson (2023), *supra* note 1, 227.
[71] See *ibid.*, 224–226. Noting, of course, that not all peacekeeping missions have been established by the UN (see *supra* para. 18), and not all UN peacekeeping missions have been established by the UNSC (see, e.g., United Nations Emergency Force I (UNEF I), established by UN Doc. A/RES/1001 (ES-I) (7 November 1956)).
[72] See Marco Longobardo, 'Robust Peacekeeping Mandates: An Assessment in Light of *Jus Post Bellum*', in Carsten Stahn and Jens Iverson (eds), *Just Peace After Conflict* (Oxford University Press, 2020), 165.
[73] See, e.g., the United Nations Stabilization Mission in the Democratic Republic of the Congo (Mission de l'Organisation des Nations Unies en République Démocratic du Congo (MONUSCO)), UN Doc. S/RES/1493 (28 July 2003), para. 25.
[74] Giserd Marqeshi and Nigel D. White, 'Operational Lawmaking within the UN: The Origins of the Legal Framework for Peacekeeping', in Rick Lawson and Ramses A. Wessel (eds), *Unity in Diversity: Perspectives on the Law of International Organizations: Liber Amicorum for Niels M. Blokker* (Brill Nihoff, 2025), 57, 69.
[75] See Patryk Labuda, 'UN Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations' (2020) 7 *Journal on the Use of Force and International Law* 317, 331–336 (providing a helpful summary of these debates).
[76] See *ibid.*, 333.
[77] See, e.g., UN Peacekeeping, 'Principles of Peacekeeping', https://peacekeeping.un.org/en/principles-of-peacekeeping.
[78] See Russell Buchan and Nicholas Tsagourias, *Regulating the Use of Force: Stability and Change* (Edward Elgar, 2021), 199–202.
[79] See Marco Longobardo, '"Super-Robust" Peacekeeping Mandates in Non-International Armed Conflicts under International Law' (2020) 24 *Spanish Yearbook of International Law* 42.
[80] See Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', in Corten, Fox, and Kritsiotis, *supra* note 12, 101, 176.
[81] Labuda, *supra* note 75, 333.
[82] See *ibid.*, 356 (referring to certain robust peacekeeping actions as 'a qualitatively distinct form of UN-mandated intervention by invitation'); Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, and James Sloan, *Oppenheim's International Law: United Nations*, vol. II (Oxford University Press, 2017), 1059, para. 27.60 (referring to such actions as being 'akin to' military action with consent).

frameworks apply – the peacekeeping framework does not eliminate the need to assess compliance with the legal requirements for military action with consent[83] that are examined herein.[84]

III. Valid consent to military action

23. This Part examines the legal requirements for establishing that consent to military action has been validly given. As such, it considers the necessary authority to provide consent to military action, matters relating to the timing of the issuance of consent, the form and modalities of consent, the parameters of consent as established by the territorial State and the withdrawal of consent that had previously been validly issued.

A. Authority to consent to military action

1. Consent of the territorial State

24. Consent to military action can be provided only by the territorial State. States have consistently refrained from invoking supposed consent from non-State actors as a legal justification for military action.[85] As the ICJ held in the *Nicaragua* case, the principle of non-intervention 'would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request of assistance made by an opposition group in another State.'[86]

25. As a juridical construct, the State requires a person or group of persons to express consent on its behalf.[87] At the international level, it is usually through its government that a State acts.[88] As the ICJ has put it, 'in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level'.[89] This holds true in relation to instances of foreign military action on a State's territory:

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[83] See Hafner, *supra* note 21, 314.

[84] It is worth being clear that this conclusion does not apply to peace enforcement operations, the legal basis for which is UNSC authorisation, not State consent.

[85] See, e.g., Corten (2020), *supra* note 7, 430 (« *Nous ne connaissons … aucun précédent dans lequel un Etat aurait prétendu justifier juridiquement une intervention militaire sur le territoire d'un autre Etat sur la seul base d'un appel lancé par l'opposition*. »); Henderson (2023), *supra* note 1, 452 ('States have not attempted to develop a general right to assist non-governmental forces.'); Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018), 104 (noting 'an impressive uniformity amongst states as to the prohibition of intervention to support armed opposition groups.'). That said, it is worth noting that there have been occasional instances where States appear to have gone against this trend. See, e.g., Questions Relating to the Declaration of the Granting of Independence and to the Trusteeship System (1975) *UN Yearbook* 743, 859 (Indonesia, justifying its intervention in East Timor 1975, 'in response to a request from the parties which favoured integration with Indonesia'); UN Doc. A/34/PV.62 (12 November 1979), para. 53 (Vietnam, in relation to activity in Cambodia 1978, arguing that it was responding 'to the appeal of the National United Front for the Salvation of Kampuchea').

[86] *Nicaragua*, Merits, *supra* note 1, para. 246. See also *ibid.* ('… it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. … Such a situation does not in the Court's view correspond to the present state of international law.').

[87] See, e.g., *German Settlers in Poland*, Advisory Opinion [1923] PCIJ, Series B, No.6, 5, 22.

[88] State practice is replete with acknowledgments, express and implied, that this is the case. See, e.g., UN Charter, *supra* note 1, preamble ('our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.'). See, generally, Niko Pavlopoulos, *The Identity of Governments in International Law* (Oxford University Press, 2024), 10, 24–30.

[89] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia*

it is the government that possesses the requisite authority to consent to such action on behalf of the territorial State.[90]

2. The location of governmental authority

26. In most instances identifying the entity empowered to consent to military action on behalf of the territorial State will be unproblematic, especially when there is only one claimant to governmental authority. However, particularly in cases where the location of governmental authority is contested, various considerations can affect the question of which entity, if any, has the authority to consent on behalf of the territorial State to military action. These may include the autonomous effective control of territory,[91] democratic legitimacy,[92] internal constitutional legitimacy (which may or may not align with democratic credentials)[93] and compliance with internal and/or external legal obligations.[94]

27. Variances in State practice[95] regarding how these considerations interact and the respective weight accorded to them by States in any particular scenario mean that it is difficult to ascertain a clear legal framework for identifying the location of governmental authority.[96] The prevailing view is that there are 'too many variables to support a one-size-fits-all' approach to identifying the location of governmental authority to consent to military action.[97] Instead, it must ultimately be ascertained through a holistic, context-specific assessment of the relevant considerations in

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v Russian Federation), Preliminary Objections [2011] ICJ Rep. 70, para. 37.

[90] See de Wet (2020-1), *supra* note 12, 21 (noting that there exists a '*well-established principle* in international law that the competence to request either direct military assistance or indirect military assistance … rests with the *de jure* government', emphasis added); Hafner, *supra* note 21, 320 ('[d]octrine is *quite clear* when asserting that it is within the sovereign prerogative of a State and its government to give such consent', emphasis added); Doswald-Beck, *supra* note 14, 190–192; Deeks, *supra* note 19, 24; Roscini, *supra* note 34, 205–206; Wippman (1996), *supra* note 35, 211–212; Gloria Fernández Arribas, *Contemporary Challenges to the Fundamental Principles of International Law and EU Interaction* (Springer, 2024), 149. However, it should be noted that the concept of 'government' in this context should be understood as being potentially wider than merely the 'executive', depending on the constitutional structure of the territorial State: for instance, it may be the case that the power to consent is vested in the State's parliamentary organ. See *infra* para. 33.

[91] See, e.g., Masoud Zamani and Majid Nikouei, 'Intervention by Invitation, Collective Self-Defence and the Enigma of Effective Control' (2017) 16 *Chinese Journal of International Law* 663.

[92] See, e.g., David Wippman, 'Pro-Democratic Intervention', in Weller (ed), *supra* note 18, 797, 805–814.

[93] See, e.g., Pavlopoulos, *supra* note 88, particularly 106–114, 212–213.

[94] See, e.g., Jure Vidmar, 'Abusive Governments as a Threat', in Mary E. Footer, Julia Schmidt, Nigel D. White and Lydia Davies-Bright (eds), *Security and International Law* (Hart Publishing, 2016), 249, 250–260; Hersch Lauterpacht, 'Recognition of Governments: I' (1945) 45 *Columbia Law Review* 815, 826.

[95] In relation to instances where 'effective control' has appeared to be the significant factor, see extensive surveys of State practice by both de Wet (2020-1), *supra* note 12, 31–73 and Hasar, *supra* note 12, 68–94; in relation to instances where, respectively, 'constitutionality' and 'democratic legitimacy' have appeared to be of greater significance than 'effective control', see extensive surveys of State practice by both Pavlopoulos, *supra* note 88, 98–139 and Fox (2023), *supra* note 30, 238–249.

[96] See, e.g., Redaelli, *supra* note 12, 119 (arguing, indeed, that international law simply '*does not offer objective criteria* to determine whom the government of a particular state is…', emphasis added). *Contra* Pavlopoulos, *supra* note 88, 36–38 (arguing that an objective framework must exist, as a logical consequence of the right of States to select their own government and of the notion that a State cannot have two governments simultaneously, as well as noting some examples where States themselves have alluded to the objective determination of governmental status under international law).

[97] Fox (2023), *supra* note 30, 207 (making this point when considering the potential role of 'democratic legitimacy' in this context). See also *ibid*., 250 (noting that none of the various considerations can be seen as a 'dominant' concern, at least in UNSC practice); Brad R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 1 *Melbourne Journal of International Law* 393, particularly 439–440; de Wet (2020-1), *supra* note 12, 72–73.

each case.[98]

28. The relative lack of certainty as to how this assessment should be undertaken in any given instance has meant that, in practice, the collective acceptance of an entity as the holder of governmental authority on behalf of the territorial State by *other* States (and/or by international organisations) has acquired a particular significance, in the sense that it can provide evidence that there exists a basis for that entity's claim to governmental authority under international law.[99] It is important to be clear, however, that international 'acceptance' of this sort cannot, in itself, be legally constitutive as to the location of governmental authority, only indicative of it.[100] States are, of course, free to choose their own government.[101] Nonetheless, in cases of ambiguity concerning the location of governmental authority, broad international acceptance (or lack thereof) will, in practice, act as strong evidence that the legal basis for governmental authority has been met (or not), and thus can provide a valuable indication as to whether an entity can legally consent to military action on behalf of the territorial State.[102]

29. Where such 'acceptance' comes from international organisations, this may have especial indicative weight in this regard.[103] Acceptance by the UNSC, in particular, has had notable pertinence in situations involving foreign military action within the territorial State, for obvious

[98] See ILA, Committee on Recognition/Non-Recognition in International Law, *Fourth (Final) Report*, Sydney Conference (2018), 20 ('[t]here are varying criteria for deciding which regime to support, including, "*inter alia*, effectiveness, national interest, the position adopted by regional and international organizations, and respect for democratic and constitutional procedures." The analysis *is on a case-by-case basis*, with little evidence of a grand, overarching, theory of governmental recognition', emphasis added, references omitted).

[99] See Roscini, *supra* note 34, 218–219; Christopher J. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 *New York University Journal of International Law and Politics* 741, 791. See also *Chirinos Salamanca et al. v Venezuela*, Preliminary Objections [2025] IACtHR, Serie C No. 562, paras. 39–53 (considering the acceptance by (and within the membership of) the Organization of American States of Juan Guaidó as the (interim) President of Venezuela – despite a lack of effective control – as the key factor in establishing authority to consent on behalf of the State to be bound by a treaty).

[100] See Roscini, *supra* note 34, 219 (noting that acceptance by other States is 'neither necessary nor sufficient' but that it nonetheless can have the 'practical effect of evidencing or consolidating' the location of governmental authority); Pavlopoulos, *supra* note 88, 87–92. *Contra* Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 1999), 121–199; Brad R. Roth, 'Reconceptualizing Recognition of States and Governments', in Christopher Daase, Caroline Fehl, Anna Geis and Georgios Kolliarakis (eds), *Recognition in International Relations* (Palgrave Macmillan, 2015), 141.

[101] See, e.g., Charter of the Organization of American States (1948) 119 UNTS 3, Article 3(e) ('[e]very State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it.'); Organization for Security and Co-operation in Europe, Conference on Security and Co-operation in Europe: Final Act of Helsinki (1 August 1975), Principle I (participating States will 'respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.'). See also *Nicaragua*, Merits, *supra* note 1, para. 263; James Crawford, 'Sovereignty as a Legal Value', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 117, 129–132; Pavlopoulos, *supra* note 88, 34–36.

[102] See Hafner, *supra* note 21, 401 (going as far as to assert that international acceptance is likely to be '*decisive* for assessing whether an authority calling itself the government is entitled to issue a request legitimising military assistance', emphasis added); Doswald-Beck, *supra* note 14, 199; Pavlopoulos, *supra* note 88, 88–92.

[103] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, 1998), 149. See also Hannah Woolaver, 'State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States' (2014) 32 *Wisconsin International Law Journal* 595, 608 (making a similar point in the context of so-called 'failed States': 'it appears that, in the absence of *any* body able to assert control, a body that emerges from a national reconciliation process with UN-backing will be identified as the authoritative government of the state even before it is established…'); Agata Kleczkowska, '"Recognition" of Governments by International Organizations – The Example of the UN General Assembly and Asian States' (2017) 35 *Chinese (Taiwan) Yearbook of International Law and Affairs* 136 (noting but critiquing the reliance on international organisations in this regard).

reasons.[104] In instances where the UNSC has acted to endorse or note (including implicitly) the 'legitimacy' of an entity asserting governmental authority to consent to military action on behalf of the territorial State,[105] this has significant influence. This was the case in, for example, Sierra Leone (1998),[106] Mali (2013),[107] Afghanistan (2014),[108] and The Gambia (2017).[109] In such instances, the view of the Council has had considerable evidential weight in identifying the government of the State.[110] It is worth recalling that, pursuant to Article 25 of the UN Charter, UN Member States are obliged to accept and carry out the Council's decisions.[111]

30. Ultimately, broad international acceptance of a 'contender'– especially when routed through the multilateral processes of international organisations (and particularly the UNSC) – will in practice be difficult for other 'contenders' to overcome and will, in effect, act to clarify the location of authority to consent to foreign military action within the territorial State.

31. Care must, however, be exercised when assessing whether conduct evidences acceptance of the location of governmental authority.[112] In instances where the relevant considerations pull in different directions and/or where there is no clear international acceptance of a given 'contender', any would-be acting State needs to proceed with particular caution if considering undertaking military action based on the 'consent' of an entity claiming to possess the necessary governmental authority. Military action in the context of contested governmental authority could, in certain circumstances, constitute a violation of the internal dimension of the right to self-determination by the acting State.[113] Likewise, if military action is based upon 'consent' given by an entity that does not possess the authority to provide it, that action will *prima facie* amount to a violation of the principle of non-intervention[114] in addition to violating the prohibition of the use of force.[115]

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[104] See Corten (2023), *supra* note 80, 172–173; Fox (2023), *supra* note 30, 250; Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017' (2017) 4 *Journal on the Use of Force in International Law* 239, 252; Gray, *supra* note 85, 104–107; Roscini, *supra* note 34, 302.

[105] Noting, however, that there are many instances where the Council has *not* done this. See Fox (2023), *supra* note 30, Appendix II (providing possible examples in this regard).

[106] See UN Doc. S/RES/1132 (8 October 1997); UN Doc. S/PRST/1998/5 (26 February 1998).

[107] See UN Doc. S/RES/2100 (25 April 2013).

[108] See UN Doc. S/RES/2189 (12 December 2014).

[109] See UN Doc. SC/12616-AFR/3501 (10 December 2016); UN Doc. S/RES/2337 (19 January 2017).

[110] See Christian J. Tams, 'Military Action with Consent: The Impact of Security Council Action', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50.

[111] UN Charter, *supra* note 1, Article 25.

[112] See, e.g., Pavlopoulos, *supra* note 88, 52–71, 164–168; Kleczkowska, *supra* note 103.

[113] Regarding the need for acting States to respect the right of self-determination, see section IV.C.

[114] See, e.g., United States, Memorandum of Julia Willis, Attorney Adviser in the Office of the Department of State's Legal Adviser, dated 26 February 1976, in Eleanor C. McDowell (ed), *Digest of United States Practice in International Law 1976* (Department of State Publication, 1977), 3 ([i]n Angola, *where there is a total absence of an established government* … foreign intervention in terms of troops, supply of arms, [etc] would appear to violate the heart of the legal rationale of the nonintervention principle…', emphasis added). *Contra* Woolaver, *supra* note 103, 609–613 (arguing that even in instances where a State possesses no effective government, the right to consent to military action remains, thus implying governmental authority is still vested somewhere).

[115] See *infra* para. 86.

3. Individuals or entities with authority to represent the State

32. There is a rebuttable presumption that consent to military action be issued by the holders of the highest offices of the State.[116] Specifically, there is a presumption that consent can be given by the Head of State, Head of Government, or Foreign Minister,[117] i.e., the three categories of persons considered, by virtue of their functions, to represent the State under the law of treaties[118] and beyond.[119] Consent to military action has commonly been issued by a member of the 'troika'.[120] However, the identification of the person(s) or institution with the relevant authority to consent must be determined on a case-by-case basis.

33. The key legal question is whether the issuer of consent can be said to possess the authority, as a representative of the State, to do so.[121] Provisions of domestic law or established domestic practice may, for instance, rebut the presumption that a member of the troika has the power to consent to military action on behalf of the State in question.[122] Likewise, domestic law may grant such authority to office holders or State institutions other than members of the troika (such as, for example, a minister of defence, head of the military, or the State's legislative organ).[123] Even where not explicit in domestic law, by analogy with Article 7(1) of the Vienna Convention on the Law of Treaties (VCLT), there may be exceptional circumstances where it appears 'from the practice of the States concerned or from other circumstances' that the territorial State intended to consider other officials (not belonging to the troika) as having the authority to issue consent. Domestic law may also indicate that in instances involving the incapacity of the official(s) usually possessing the authority to consent on behalf of the territorial State, a different official is so empowered.[124] What may be said is that where consent is provided by an

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[116] See Christof Heyns, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/68/382 (13 September 2013), para. 82; Byrne, *supra* note 3, 117–120; Roscini, *supra* note 34, 206, 229. Thus, unless clearly authorised by the central government to do so, sub-national executive authorities cannot issue consent to military action. See, e.g., Heyns, *supra* note 116, para. 82. For example, Belgium's reference to a request from the 'head of the provincial government' of Katanga in connection with its 1960 intervention in Congo (see UN Doc. S/PV.873 (13 July 1960), paras. 184–187) was not accepted by other States (see, e.g., *ibid.*, para. 127 (UK); *ibid.*, para. 209 (Tunisia)) and could not prevent the adoption of a UNSC resolution calling for a withdrawal of Belgian troops (UN Doc. S/4387 (14 July 1960)).

[117] See ILA Use of Force Sydney Report, *supra* note 1, 19; de Wet (2020-1), *supra* note 12, 154–155; Byrne, *supra* note 3, 117; Henderson (2023), *supra* note 1, 450; Corten (2020), *supra* note 7, 428; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff, 1993), 22–23.

[118] See Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (VCLT), Article 7(2)(a) (dispensing with the need to produce 'full powers' for the categories concerned when performing acts related to the conclusion of a treaty).

[119] See, e.g., *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility [2006] ICJ Rep. 6, para. 46; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with commentaries, UN Doc. A/56/10 (2001), 39 (commentary to Chapter II).

[120] See de Wet (2020-1), *supra* note 12, 154–155 (cross referencing a large number of examples earlier in her book); Hafner, *supra* note 21, 325. For a comparatively rare example of issuance of consent to military action by a foreign minister, see UN Doc. S/2014/440 (25 June 2014) (Iraq); UN Doc. S/2014/691 (22 September 2014) (Iraq).

[121] See Buchan and Tsagourias (2021), *supra* note 78, 109.

[122] For instance, the Governor-General of Australia does not possess such power under Australian domestic constitutional law and convention, despite Head of State status. See, generally, Anne Twomey, 'The governor-general is also commander-in-chief of the defence forces. What does this mean in practice?', *The Conversation* (3 September 2023), https://theconversation.com/explainer-the-governor-general-is-also-commander-in-chief-of-the-defence-forces-what-does-this-mean-in-practice-237959.

[123] See, e.g., the Constitution of Ukraine (adopted at the Fifth Session of the Verkhovna Rada of Ukraine, 28 June 1996), Article 85(23) (vesting this power with the Ukrainian Parliament). This was of especial importance in the context of Russia's intervention in Crimea in 2014, see, e.g., UN Doc. S/PV.7125 (3 March 2014), 5 (United States, '[u]nder the Ukrainian Constitution, only the Ukrainian Rada can approve the presence of foreign troops').

[124] de Wet (2020-1), *supra* note 12, 155. Indeed, during *in extremis* situations of incapacity of (all of) the relevant

official whose competence to do so is not clearly stipulated in domestic law, the risk of that consent being invalid because it has not been given by the necessary authority lies with the acting State that does not seek the issuance of consent at the highest level of the territorial State's government.[125]

34. In practical terms, complications may arise where the highest office holders in the government on the one hand, and the legislative branch on the other hand, send out mixed signals. In 2020, for example, Iraq's parliament adopted a resolution seeking to end a 2014 agreement with the US to station US troops in Iraqi territory; the resolution was, however, non-binding.[126] Likewise, in the early 2010s, Pakistan's parliament repeatedly adopted resolutions condemning and demanding an end to US drone strikes in its territory,[127] despite the concurrent issuance of (non-public) consent by the government.[128] In such situations, there remains a presumption that consent issued by a member of the troika will be valid, unless this would amount to a manifest violation of provisions of domestic law locating such authority elsewhere, which was 'objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.'[129] Similarly, where there is a difference of view between the highest office holders of the State and lower-level officials, the view of those in higher office should be taken as determinative.[130]

officials, another official may be able to provide consent instead even in the absence of a clear rule to this effect in domestic law. See Hafner, *supra* note 21, 325. See also Roscini, *supra* note 34, 206–207 (suggesting that in such circumstances this power will be vested in 'the highest surviving governmental official.').

[125] Of relevance analogously is the way in which VCLT, *supra* note 118, Article 7(1) is similarly interpreted. See Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), 138–139.

[126] The resolution merely called upon the Iraqi government to 'work to end the presence of any foreign troops on Iraqi soil and prohibit them from using its land, airspace or water for any reason.' See 'Iraqi parliament votes to expel US troops', *Deutsche Welle* (1 May 2020).

[127] See, e.g., 'Pakistan's parliament passes new guidelines on U.S. relations', *CBS News* (12 April 2012), www.cbsnews.com/news/pakistans-parliament-passes-new-guidelines-on-us-relations; National Assembly of Pakistan, Resolution (10 December 2013); Tom Ruys (ed), 'Digest of State Practice, 1 July–31 December 2013' (2014) 1 *Journal on the Use of Force and International Law* 149, 169.

[128] See, e.g., Mark Mazzetti, 'A secret deal on drones, sealed in blood', *New York Times* (6 April 2013), www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all; Greg Miller and Bob Woodward, 'Secret memos reveal explicit nature of US, Pakistan agreement on drones', *Washington Post* (24 October 2013), www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html. Regarding 'non-public' consent, see section III.C.3.

[129] VCLT, *supra* note 118, Article 46 (relevant by analogy).

[130] de Wet (2020-1), *supra* note 12, 155 ('[f]or example, in 2008 the chief of the Pakistani army, General Kayani, criticised the United States for sending commandos into Pakistan for a raid against the Taliban. Yet, the newly elected President Zardari at the time refused to condemn the raid… To the extent that the President's lack of protest evinced tacit consent, it would override the objection of the head of the army, as there was nothing to suggest that Pakistani law allowed him to overrule the President.'). See also Russell Buchan and Nicholas Tsagourias, 'Intervention by Invitation and the Scope of State Consent' (2023) 10 *Journal on the Use of Force and International Law* 252, 269; Heyns, *supra* note 116, para. 82; Byrne, *supra* note 3, 118.

B. Timing of consent

1. Prior consent

35. Consent can only serve as a legal basis for military action within the territorial State if it is given before the military action in question is undertaken.[131] According to the International Law Commission (ILC), consent given after the conduct has occurred cannot preclude wrongfulness, but constitutes 'a form of waiver or acquiescence, leading to loss of the right to invoke responsibility'.[132] While this is relevant only analogously here, given that consent removes military action from the scope of the prohibition of the use of force altogether rather than precluding the wrongfulness of a violation,[133] the need for consent to be given in advance is essential in the context of extra-territorial military action: if 'consent' to undertake military action on a State's territory could be issued after the action had started this would provide notable scope for abuse.

36. The UN era has featured multiple examples where a foreign military action resulted in the installation of a new regime, with the installed government subsequently extending a retroactive 'invitation' to the acting State.[134] State practice confirms that such 'manufactured' consent will be invalid.[135] Thus, when Iraq claimed that its 1990 invasion of Kuwait was requested by the 'Free Provisional Government of Kuwait',[136] which Iraq had itself installed, other States did not accept that consent had been validly issued by a competent authority.[137]

37. As the examples of Afghanistan[138] and Iraq[139] illustrate, it is not impossible for an ongoing military action – whether one initially based on the lawful exercise of the right of self-defence, or even one initially undertaken in violation of the prohibition of the use of force – to 'transform' into a lawful exercise of military action with consent.[140] However, such a

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[131] See, e.g., Heyns, *supra* note 116, para. 83; Kreß and Nußberger, *supra* note 104, 250–251; Erika de Wet, 'Military Assistance Based on *Ex-Ante* Consent: A Violation of Article 2(4) UN Charter?' (2020) 93 *Die Friedens-Warte* 413, 417; Perisic, *supra* note 37, 11–12; Ruys and Ferro, *supra* note 39, 81.

[132] ARSIWA (with commentaries), *supra* note 119, 73 (commentary to Article 20) (relevant by analogy).

[133] See section II.B.

[134] See, e.g., Henderson (2023), *supra* note 1, 475–476 (discussing examples).

[135] See, e.g., Corten (2020), *supra* note 7, 442–444 (« *La pratique confirme donc l'exigence du caractère antérieur du consentement, aucun précédent n'ayant donné lieu à une justification fondée sur un appel postérieur qui aurait été accepté par l'ensemble des Etats*. »).

[136] UN Doc. S/PV.2932 (2 August 1990), 11.

[137] See, e.g., UN Doc. S/RES/661 (6 August 1990).

[138] See UN Doc. S/RES/2189 (12 December 2014), para. 1; Michael Byers, 'The Intervention in Afghanistan – 2001-', in Tom Ruys and Olivier Corten (with Alexandra Hofer) (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), 625, 635; David Wallace, 'Reflections on the Law of Occupation: Afghanistan and Iraq', *Articles of War* (7 February 2022), https://lieber.westpoint.edu/reflections-law-of-occupation-afghanistan-iraq.

[139] See UN Doc. S/RES/1546 (8 June 2004); Christopher J. Le Mon, 'Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces', *ASIL Insights* (4 June 2004), www.asil.org/insights/volume/8/issue/11/legality-request-interim-iraqi-government-continued-presence-united; Wallace, *supra* note 138.

[140] One might also note, as a more recent example, the deployment of over 3,000 additional troops by Uganda into the DRC in early 2025 (see MONUSCO, Report of the Secretary-General, UN Doc. S/2025/176 (20 March 2025), para. 30). Uganda claimed to be undertaking this military action with the consent of the DRC (see Yoweri K. Museveni (@KagutaMuseveni), *X* (21 February 2025), https://x.com/KagutaMuseveni/status/1892940667141124360 (full thread)), but the action went beyond the parameters of existing DRC consent to the joint Ugandan-DRC *Operation Shujaa* (see Final Report of the Group of Experts on the Democratic Republic of the Congo, UN Doc. S/2025/446 (3 July 2025), paras. 59, 134; on *Operation Shujaa*, see Final Report of the Group of Experts on the Democratic Republic of the Congo, UN Doc. S/2022/479 (14 June 2022), para. 21; regarding the requirement to respect the parameters of any consent issued by the territorial State, see section III.D). The DRC therefore initially indicated that the additional Ugandan troop deployment was undertaken without its consent (see UN Doc. S/2022/479, *supra* note 140, 59). However, it

'transformation' must be very carefully established.[141] A case-by-case analysis will be needed to confirm that the relevant government/official possesses the authority to express the territorial State's consent,[142] and that, in light of the context, such consent is freely given.[143] It is also important to be clear that while consent issued after the start of military action may be a basis of lawfulness, this will only apply to action taken from the point at which valid consent is issued (and for so long as that consent is maintained).

38. Any military action prior to the issuance of valid consent will constitute a violation of the prohibition of the use of force.[144] Valid consent issued after such action has begun can only potentially contribute to establishing a waiver, in the sense of Article 45 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), resulting in a loss of the territorial State's right to invoke the responsibility of the acting State for the breach of the prohibition of the use of force up to the point at which valid consent was issued.[145] Moreover, any 'consent' expressed after military action has started should not lightly be considered to constitute such a waiver. As with other manifestations of State consent, a waiver itself is 'only effective if it is validly given'.[146]

2. Anticipatory consent and contemporaneous consent

39. The requirement that consent must be given in advance raises the question of how far in advance it may be given, and whether a temporal proximity must exist between the consent and the action undertaken pursuant to it. This question has been especially problematic in respect of 'anticipatory' treaty provisions, where a State agrees in advance that another State (or States, or an international organisation), has the right to engage in forcible measures on its territory on the occurrence of specified events, such as a military coup, gross human rights violations, or events that are deemed to threaten the security or interests of other States.[147]

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subsequently 'accepted the deployment post facto' and dispatched officials to engage with the relevant Ugandan military leadership to normalize relations (see *ibid.*, para. 136).

[141] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion [2019], ICJ Rep. 95, para. 172 ('[t]he Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony.') (relevant by analogy).

[142] See section III.A.

[143] See section III.E.

[144] See *infra* para. 86. That is, unless military action undertaken prior to the issuance of valid consent had an alternative legal basis, such as self-defence.

[145] It is worth noting – given that the peremptory status of the prohibition of the use of force (or, at least, the prohibition of aggression) is widely accepted – that, in relation to 'consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law[,] … [s]ince such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law', ARSIWA (with commentaries), *supra* note 119, 122 (commentary to Article 45) (relevant by analogy).

[146] *Ibid*. (relevant by analogy).

[147] See Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements' (2011) 29 *Boston University International Law Journal* 337, particularly 366–373 (using the term 'forward-looking intervention treaties' to describe such treaties/treaty provisions). The majority of the scholarly debate about such anticipatory treaty provisions to date has revolved around the question of whether they are valid. While the legality of treaty provisions providing anticipatory consent to military action has been doubted by some authors (see, e.g., Doswald-Beck, *supra* note 14, 246–250), the prevailing view in legal scholarship is that such clauses are not *prima facie* invalid (see, e.g., Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), 317–321; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Vol 1* (Longman, 9th edn 1992) 446–447; Svenja Raube, 'Anticipatory Consent

40. The question is whether 'anticipatory consent' of this nature can provide the legal basis for military action independently of any confirmatory contemporaneous consent. One view in scholarship is that the existence of a provision in a treaty setting out anticipatory consent – or, indeed, the issuance of anticipatory consent outside of a treaty context[148] – is not by itself sufficient to act as the legal basis for military action at a later stage. Instead, it is said, consent must be (additionally) given immediately prior to military action being undertaken.[149] The 2011 IDI Rhodes resolution, for example, states that where consent to military action has been issued in advance in a treaty, 'an *ad hoc* request is [additionally] required for the specific case.'[150] However, this view has also been strongly contested.[151]

41. When one considers the State practice in relation to this question, the picture that emerges is unclear. In the post-Cold War era, consent to military action has been issued contemporaneously (i.e., shortly before the military action starts) in the majority of instances, either wholly outside of a treaty context or in addition to any anticipatory consent that had been expressed in a treaty.[152] Conversely, 'assistance by individual States that were based on *ex ante* consent expressed in pro-invasion treaty clauses [has] hardly ever occurred.'[153] It is also the case that the practice of concluding bilateral treaties establishing anticipatory consent to military action has become increasingly uncommon.[154] There remain examples,[155] however, and in a multilateral context such provisions have been included in several treaties of African regional organisations since the late 1990s. Article 4(h) of the Constitutive Act of the African Union (AU), for example, asserts 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[156] However, the AU has hitherto refrained from

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to Military Intervention: Analysis in the Wake of the Coup d'état in Niger in 2023' (2023) 10 *Journal on the Use of Force and International Law* 201, 227–230).

[148] Anticipatory consent is commonly expressed in a treaty, but this will not always be the case. Likewise, contemporaneous consent – while commonly expressed by means other than in a treaty – can theoretically also be given in a treaty. See Svenja Raube, *Die antizipierte Einladung zur militärischen Gewaltanwendung im Völkerrecht* (Nomos, 2023), 86–99. It also can be implied through conduct, see section III.C.2.

[149] See, e.g., Paola Gaeta, Jorge E. Viñuales, and Salvatore Zappalá, *Cassese's International Law* (Oxford University Press, 3rd edn 2020), 362 (emphasising that *ex-ante* consent expressed through a treaty cannot serve as a 'blanket authorization for the future'); Agata Kleczkowska, 'The Meaning of Treaty Authorisation and *ad hoc* Consent for the Legality of Military Assistance on Request' (2020) 7 *Journal on the Use of Force and International Law* 270; Brad R. Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000), 328; de Wet (2020-1), *supra* note 12, 169–180; Roscini, *supra* note 34, 222–226.

[150] IDI Rhodes Resolution, *supra* note 18, Article 4(3).

[151] See, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th edn 2017), 129–130; Oliver Dörr, 'Turkey's Intervention in Cyprus – 1974', in Ruys and Corten (with Hofer) (eds), *supra* note 138, 201, 206–208, 212; Hasar, *supra* note 12, 44–53; Raube (2023-1), *supra* note 147, particularly 230–237; Buchan and Tsagourias (2023), *supra* note 130, particularly 256–265.

[152] de Wet (2020-2), *supra* note 131, 414–415 (referring to the French military operation in Mali in 2013, the Ugandan operation in South Sudan from 2014 to 2015, the Russian military presence in Syria since 2015, and the Saudi-led military coalition in Yemen since 2015, as examples).

[153] *Ibid.*, 415 (footnote 3).

[154] See Corten (2020), *supra* note 7, 425.

[155] For a bilateral treaty provision of this nature that is still in place, see Traité destiné à adapter et à confirmer les rapports d'amitié et de coopération entre la République Française et la Principauté de Monaco (2002), in (2006) *Journal de Monaco*, SO no. 407. A recent illustration of a State invoking anticipatory consent that was provided for in a treaty is the Turkish offensive in north-eastern Syria in October 2019. In justifying this action, Turkey *inter alia* invoked The Adana Security Agreement signed by Turkey and Syria in Adana (1998), *Voltaire Network*, www.voltairenet.org/article208057.html, annex 4. See Saeed Bagheri, *International Law and the War with Islamic State: Challenges for Jus ad Bellum and Jus in Bello* (Hart Publishing, 2021), 54–68; Raube (2023-1), *supra* note 147, 221.

[156] Constitutive Act of the African Union (2000), https://au.int/sites/default/files/pages/34873-file-

undertaking military operations in the territory of a Member State absent prior UNSC authorisation or the contemporaneous consent of the territorial State.[157] The same observation applies to the anticipatory consent clause in the 1999 Economic Community of West African States (ECOWAS) Protocol[158] and similar provisions established by Economic Community of Central African States[159] and the International Conference on the Great Lakes Region.[160]

42. However, while there is evidently a preference for additional contemporaneous consent in State practice, such practice is not accompanied by a clear *opinio juris* that additional contemporaneous consent *must* be obtained as a matter of law.[161] Hence there is no legal requirement for additional contemporaneous consent where valid anticipatory consent to military action has already been issued. Contemporaneous consent is, however, still of legal value, in that it can contribute to better establishing the parameters of the consent given. As will be discussed in section III.D, an acting State must respect the limits and conditions of consent set forth by the territorial State, and any consent provided *ex-ante* will be less likely to clarify the scope of that consent, given that it will necessarily have been issued in the abstract. Therefore, despite there not being a legal requirement to obtain contemporaneous consent where valid anticipatory consent exists, acting States will be wise to seek such additional

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constitutiveact_en.pdf, Article 4(h). However, *ibid.*, Article 4(j) separately refers to 'the right of Member States to request intervention from the Union in order to restore peace and security'.

[157] See Tiyanjana Maluwa, 'The UN Security Council: Between Centralism and Regionalism', in Congyan Cai, Larissa Van Den Herik, and Tiyanjana Maluwa, *The UN Security Council and the Maintenance of Peace in a Changing World*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. V (Cambridge University Press, 2024), 186, 200. In 2015, the AU's Peace and Security Council adopted a binding Communiqué authorising a 5,000 strong peace operation to Burundi and recommended in the Communiqué that Article 4(h) of the AU Constitutive Act be invoked should Burundi not accept the establishment of the mission within 96 hours. As a result of a combination of practical and political factors, the AU decided to defer the proposed deployment until Burundi provided additional consent. See Tom Ruys, Luca Ferro and Nele Verlinden (eds), 'Digest of State Practice, 1 July–31 December 2015' (2016) 3 *Journal on the Use of Force and International Law* 126, 136. It has been concluded that 'the non-materialisation of the military operation in Burundi means that as yet there is as no practice supporting the invocation of Article 4(h) of the AU Constitutive Act in the absence of either additional contemporaneous consent, or an authorisation by the UNSC…', de Wet (2020-2), *supra* note 131, 422. For a differing interpretation of the case of Burundi, see Raube (2023-1), *supra* note 147, 233–237 (arguing that it was only The Gambia that explicitly took the view that an additional, contemporaneous issuance consent by the territorial State was required at the moment of intervention, and that the non-implementation of the operation was ultimately due to political reasons).

[158] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace– Keeping and Security (1999), Economic Community of West African States (ECOWAS), Article 25. See de Wet (2020-2), *supra* note 131, 424 (referring, by way of illustration, to the deployment of Economic Community of West African States Monitoring Group forces in The Gambia in 2017). Article 25 applies to a range of situations, including external aggression, massive human rights violations, or the (attempted) overthrow of a democratically elected government.

[159] Pacte d'Assistance Mutuelle of the Economic Community of Central African States (ECCAS) (2000), Article 7.

[160] Protocol on Non-Aggression and Mutual Defence, International Conference on the Great Lakes Region (ICGLR) (2006), Article 4(8).

[161] An often-cited example in support of the need for additional contemporaneous consent is Turkey's military intervention in Cyprus in 1974, which Turkey sought to justify in part on the basis of the plurilateral Treaty of Guarantee (1960) 4 UNTS 5475. The intervention was indeed widely denounced as unlawful and formally condemned by the UNSC (UN Doc. S/RES/360 (16 August 1974), sub 1). However, as Dörr, *supra* note 151, 212 notes, the need for additional contemporaneous consent 'was not argued by any of the parties to the dispute'. Dörr further notes that Turkey's actions were condemned for other reasons – specifically because it had failed to abide by the substantive and procedural limitations of the Treaty of Guarantee. See also Hasar, *supra* note 12, 47–49. The position that contemporaneous consent is legally required *was* taken, however, by The Gambia in relation to Burundi, see discussion in *supra* note 158. Yet this ultimately amounts to a relatively isolated example of a State adopting this position in law. For a detailed analysis of State practice on this question, see Raube (2023-2), *supra* note 148, 160–290, 498–505.

consent in the majority of instances.

C. Form of consent

43. The expression of consent to military action is not subject to any particular form or modality and may be express or implied.[162] It can be given either at the initiative of the territorial State or of the acting State.[163] However, in all cases, territorial State consent to military action must be clearly established.[164]

1. Express consent

44. The most unambiguous form of consent is express consent. Express consent to military action can be given by the territorial State in writing or orally.[165] Written consent can be given unilaterally, such as in a letter to another State (or group of States)[166] or in some public manner, for example in a letter to the UNSC.[167] Written consent may also take the form of a bilateral or multilateral agreement – including, but not limited to, a treaty – between the parties.[168] Oral consent can be expressed in various fora, for example in a speech before a legislative assembly or a UN organ,[169] or another form of public declaration.

2. Implied consent

45. Valid consent to military action can be implied by words (whether written or oral), conduct, or a combination of both. The fact that consent can be inferred from what States say (or, indeed, do not say) in combination with their conduct is illustrated by the *Armed Activities* case. The ICJ acknowledged that, while the Protocol on Security concluded between the Democratic Republic of the Congo (DRC) and Uganda in April 1998 did not provide for *express* consent,

> both the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol.[170]

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[162] See ARSIWA (with commentaries), *supra* note 119, 73 (commentary to Article 20) (where the ILC cites the example of the *Savarkar* case [1911] UNRIAA, vol. XI (Sales No. 61.V.4), 243, 252–255) (relevant by analogy).
[163] For example, a State will sometimes solicit the consent of the territorial State to allow it to undertake so-called 'protection of nationals' operations. See Tom Ruys, *'Armed Attack' and the Right of Self-Defence: Customary Law and Practice* (Cambridge University Press, 2010), 246.
[164] ARSIWA (with commentaries), *supra* note 119, 73 (commentary to Article 20) (consent cannot merely be 'presumed on the basis that the State would have consented if it had been asked') (relevant by analogy). See also Hafner, *supra* note 21, 390.
[165] See *Armed Activities*, Merits, *supra* note 11, paras. 46–47. This is illustrated by troop deployments by Rwanda in Sub-Saharan Africa since 2021: Rwanda's military action in the Central African Republic was based upon consent given in a bilateral treaty; whereas its military action in Mozambique was based on consent expressed orally by Mozambican President Filipe Nyusi during a visit to Kigali in April 2021. See, in relation to both deployments, Brendon J. Cannon and Federico Donelli, 'Rwanda's Military Deployments in Sub-Saharan Africa: A Neoclassical Realist Account' (2023) 58 *The International Spectator* 109, 113–114.
[166] See, e.g., UN Doc. S/2015/217 (27 March 2015), enclosure to annex, 3–5 (text of letter from Abdrabuh Mansour Hadi – on behalf of Yemen – to the Gulf Cooperation Council of 24 March 2015).
[167] See, e.g., UN Doc. S/17837 (18 February 1986) (Chad); UN Doc. S/2014/440 (25 June 2014) (Iraq).
[168] See, e.g., Adana Security Agreement, *supra* note 155, annex 4.
[169] See, as a possible example, UN Doc. S/PV.2014(OR) (28 June 1977), paras. 8–51 (Mozambique). It is unclear whether this amounted to an instance of 'military action with consent' as defined herein, but it is certainly possible to view it that way, and no State expressed concern about the issuance of consent in this form.
[170] *Armed Activities*, Merits, *supra* note 11, para. 46. The Protocol referred to the desire of the two States 'to put

46. Similarly, even in the absence of any written or oral statements, consent can at times be inferred from the conduct of the territorial State. This could include, for example, instances where it is clear that the armed forces of the territorial State and those of the acting State are actively cooperating in pursuit of a common objective, or where a clear attitude of support is adopted by the territorial State following the conduct. That said, it should be recalled that consent must be given prior to military action being undertaken.[171] Conduct subsequent to the start of military action cannot form the *basis* of the necessary prior consent, nor help the acting State determine in advance of military action that consent has been provided. Such conduct can, however, help to later evidence that consent had been previously issued.[172]

47. It is highly unlikely that silence or inaction *alone* will be sufficient to establish implied consent to military action.[173] For instance, if the territorial State remains silent in response to a request by a (would be) acting State, this cannot be taken as constituting implied consent, even if that request is made repeatedly.[174] Thus, Germany's claim[175] that its 2011 evacuation operation ('Pegasus') was lawful on the basis of Libyan 'consent' – established solely through its silence in relation to repeated German requests – was questionable.[176] Similarly, if the acting State asserts that it *will* take military action in the territory of another State, a lack of protest in response cannot be equated to implied consent.[177] Indeed, the acting State's assertion may constitute an unlawful threat of force in violation of Article 2(4) of the UN Charter.[178]

48. In most cases, therefore, additional evidence will be necessary to establish implied consent beyond mere silence and/or inaction. For example, a lack of protest (i.e., silence) may be buttressed by conduct implicitly supportive of the action (such as active cooperation by the forces of the territorial State), which could *in combination* establish implied consent in the relevant context.[179]

49. There are good reasons to adopt a cautious approach to implied consent, howsoever derived. It is difficult to establish objectively and therefore is notably prone to abuse.[180] As such, one must carefully examine the facts to determine whether implied consent for specific military

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an end to the existence of the rebel groups operating on either side of the common border' and stated that the armies would 'co-operate in order to insure security and peace along the common border'.

[171] See section III.B.1.

[172] Cooperation between the forces of the territorial State and the acting State in the context of the military action, for instance, may be relevant because it can imply that it was preceded by non-public consent involving discussions/negotiations between the respective office holders, possessing the appropriate level of authority, of the States concerned. Henderson (2023), *supra* note 1, 474–475. Regarding 'non-public' consent, see section III.C.3.

[173] See Danae Azaria, 'State Silence as Acceptance: A Presumption and an Exception' (2024) *British Yearbook of International Law* (advance access version: https://doi.org/10.1093/bybil/brae002), 1, 11–19.

[174] Danae Azaria, 'State Silence as Consent to Military Action', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50. See also Azaria (2024), *supra* note xx, 4, 13–15 (explaining that acquiescence as a type of silent consent requires that the silent State is faced with asserted legal claims).

[175] Deutscher Bundestag Drucksache 17/5359 (4 April 2011), Antwort der Bundesregierung (Doc. 17/5002), Einsatz bewaffneter deutscher Streitkräfte in Libyen, https://dserver.bundestag.de/btd/17/053/1705359.pdf, 7.

[176] See Claus Kreß, 'On the Principle of Non-Use of Force in Current International Law', *Just Security* (30 September 2019), www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law (describing this as a 'somewhat shaky justification'). See also Azaria (2028), *supra* note 174.

[177] Azaria (2028), *supra* note 174. *Cf.* Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Law Studies* 1, 27.

[178] Azaria (2028), *supra* note 174.

[179] This was ultimately the approach taken by the ICJ to inferring consent in *Armed Activities*, Merits, *supra* note 11, para. 99.

[180] See, e.g., Mr Njenga (1979) *Yearbook of the International Law Commission*, vol. I, 36th sess., 1538th mtg., UN Doc. A/CN.4/SER.A/1979, paras. 21–22 (arguing that the historical abuse of purported 'consent' as a basis for military interventions meant that what became Article 20 should be deleted from ARSIWA altogether).

activities has been given.[181] As consent will often be, as it were, only 'one phone-call away',[182] in most circumstances it will be difficult to make the case that considerations of urgency justify a more flexible approach.

50. Ultimately, if implied consent is relied upon as the basis for military action, it must be clearly established. In international law, State consent is not the default state of affairs: in the absence of clear evidence to the contrary a State should thus be presumed not to have given consent.[183]

3. Publicity

51. Consent to military action may be communicated only to the acting State(s).[184] Non-public consent of this kind is likely to be unambiguous as between the territorial State and acting State(s)[185] and where this is the case it can constitute a valid means of expressing consent to military action. There is no legal requirement of 'publicity' in relation to the issuance of consent to military action.[186] This respects the right of the territorial State to decide whether to make its issuance of consent public.[187]

52. There is an increasing trend of States communicating the exercise of military action with consent, at least of a certain nature,[188] in writing to the UNSC (whether by the territorial or the acting State),[189] or of confirming orally during debates in UN forums that a given military action has been undertaken on the basis of consent.[190] The 2011 IDI Rhodes resolution seemingly inferred from this trend a legal rule to the effect that '[a]ny request that is followed by military assistance shall be notified to the Secretary-General of the United Nations.'[191] However, when States 'report' instances of military action with consent, there is nothing to suggest that they do

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[181] For example, in *Armed Activities*, Merits, *supra* note 11, para. 99, the ICJ affirmed that the fact that the DRC later agreed on a *modus operandi* with Uganda for the orderly withdrawal of foreign forces within a specific timeframe should not be mistaken for evidence of implied consent to the presence of Ugandan troops on its territory (neither for the period preceding the agreement, nor for the subsequent period until the fulfilment of its terms).
[182] Federica I. Paddeu, 'The Defence of Consent in the Law of State Responsibility', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50.
[183] Azaria (2028), *supra* note 174. See section V.A in relation to the burden of proof in establishing valid consent.
[184] See Azaria (2028), *supra* note 174 (noting that such non-public consent normally involves expression through words (written or oral) and is based on positive action rather than inaction).
[185] Azaria (2024), *supra* note xx, 15–16.
[186] See ILA Use of Force Sydney Report, *supra* note 1, 19; Heyns, *supra* note 116, para. 83; Henderson (2023), *supra* note 1, 473–474; Corten (2020), *supra* note 7, 451.
[187] As an example, one might note the deployment of Ugandan special forces in South Sudan in early March 2025. Uganda asserted that this action was undertaken 'on the invitation of government of South Sudan', whereas South Sudan initially denied that Ugandan forces were even present in its territory. See 'Uganda says it has deployed troops in South Sudan capital', *Reuters* (11 March 2025), www.reuters.com/world/africa/uganda-says-special-forces-deploy-south-sudan-capital-amid-tensions-2025-03-11. However, in the weeks that followed, South Sudan acknowledged the Ugandan military presence and the fact that it had consented to it. The Information Minister of South Sudan stated that he had needed to confirm this publicly because the information had already leaked, even though the arrangement with Uganda 'was supposed to be a secret in terms of security'. See 'South Sudan confirms presence of Ugandan troops, citing military pact', *Sudan Tribune* (17 March 2025), https://sudantribune.com/article298717.
[188] Minor or more routine operations/alliance deployments (e.g., a single counter-terrorist operation or a joint military exercise) are not commonly 'reported'.
[189] See, e.g., UN Doc. S/26110 (19 July 1993) (Russia); UN Doc. S/2013/17 (14 January 2013) (France); UN Doc. S/2016/869 (17 October 2016) (United States).
[190] See, e.g., UN Doc. S/PV.7125, *supra* note 123, 3–4 (Russia); UN Doc. S/PV.7866 (19 January 2017) (Senegal).
[191] IDI Rhodes Resolution, *supra* note 18, Article 4(4). It is not altogether clear why the IDI identified the *Secretary-General* as the necessary recipient of these notifications, as opposed to the UNSC (the latter being where States have tended to 'report'). See Green (2024), *supra* note 44, 298.

so out of a sense of legal obligation.[192] As an aspect of the conclusion reached in the previous paragraph that there is no *lex lata* obligation for consent to military action to be made public, there is no *lex lata* obligation to report instances of military action with consent to the UN.

53. The lack of a legal 'publicity' requirement means that problems may arise where there is an apparent contradiction between a public denial of consent by the territorial State, on the one hand, alongside non-public consent by the same State and/or operational cooperation between the respective States, on the other hand.[193] Such contradictions ultimately raise an evidentiary issue,[194] whereby it will be for the acting State to demonstrate[195] that consent was granted by an appropriate authority of the territorial State[196] and that the consent covered the scope and duration of the military action in question.[197]

D. Parameters of consent

54. A State is free to set specific parameters for any consent that it gives to military action on its territory.

55. For instance, the territorial State can set limits on the duration of the action. Consent may be granted for a specific action (e.g., a single air strike), in which case that consent is exhausted upon execution of that action.[198] Alternatively, consent can be granted for an extended period, in which case it remains valid until it is withdrawn or expires, unless it is prolonged. The ILC's ARSIWA commentary explicitly refers to foreign troops that overstay their welcome as an example of the limits of consent, noting that continued troop presence after the expiry of the issued consent becomes unlawful.[199] Similarly, the 2011 IDI Rhodes resolution affirms that military action with consent 'shall not be provided beyond the time agreed to by the territorial State, without further agreement thereon'.[200] The ICJ, in the *Armed Activities* case, effectively found that Uganda breached the prohibition of the use of force by continuing to deploy troops on Congolese territory after the DRC's consent had lapsed.[201] However, in certain circumstances, implied consent to the continued stay of foreign troops beyond the term provided

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[192] See, e.g., UN Doc. S/2016/869, *supra* note 189 (United States: '…actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification … is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.'). The acting State may have various reasons to prefer a certain degree of publicity that have nothing to do with legal obligation: for example, to avoid accusations of interventionism or neocolonialism, or to avoid the risk of the territorial State later denying the provision of consent or the scope of the consent given.

[193] Such was the case for US drone strikes against suspected terrorists in Pakistan post-9/11. In 2013, the *Washington Post* reported that top-secret CIA documents and Pakistani diplomatic memos indicated that high-ranking officials of the Pakistani government had for years secretly endorsed US drone strikes and had routinely received classified briefings regarding them: Miller and Woodward, *supra* note 128. See Byrne, *supra* note 3, 110–112. For another example, consider the Eritrean intervention in Ethiopia's Tigray region in 2021. After months of denials from Ethiopia and Eritrea, Ethiopian Prime Minister Abiy Ahmed admitted for the first time that troops from Eritrea had entered the region. While denouncing atrocities committed, Dr Abiy also stated that the 'Eritrean people and government did a lasting favour to our soldiers', see 'Ethiopia PM admits Eritrean soldiers entered Tigray region', *Al Jazeera* (23 March 2021), www.aljazeera.com/news/2021/3/23/ethiopia-pm-abiy-ahmed-says-atrocities-committed-in-tigray.

[194] ILA Use of Force Sydney Report, *supra* note 1, 19; Henderson (2023), *supra* note 1, 476.

[195] See section V.A.

[196] See section III.A.

[197] See section III.D.

[198] Paddeu (2028), *supra* note 182 (referring by way of illustration to the *Ailes* affair).

[199] ARSIWA (with commentaries), *supra* note 119, 74 (commentary to Article 20) (relevant by analogy). This may also constitute an act of aggression, see *infra* para. 87.

[200] IDI Rhodes Resolution, *supra* note 18, Article 6(2).

[201] *Armed Activities*, Merits, *supra* note 11.

for in an initial agreement may be identified, though it must be clearly established.[202]

56. The territorial State can also stipulate other substantive constraints, such as restrictions on geographic areas of operation, the number and type of deployed troops or materiel, or permissible targets.[203] Similarly, it can stipulate procedural constraints, such as prior notification of specific operations or consultation between militaries. For instance, troop-stationing agreements and SOFAs commonly contain detailed and technical provisions, such as limits on troops numbers, permitted activities, financial compensation owed to the territorial State and the duration and termination of the agreement.[204] In the *Armed Activities* case, the ICJ confirmed that the DRC's consent to Ugandan military operations on its soil was not 'open-ended', but instead included restrictive parameters 'in terms of geographic location and objectives'.[205]

57. The acting State must respect the parameters set by the territorial State when carrying out military action with consent.[206] For instance, following the United States drone strike on Iraqi territory in early 2020 that killed General Qassem Soleimani (as well as nine others),[207] Iraq condemned the action as unlawful,[208] arguing that 'United States forces – *which are present in Iraq at the request of the Iraqi Government*, and *subject to its approval* – unexpectedly conducted *another* military operation [the drone strike], in a serious violation of the sovereignty of Iraq.'[209] While wider State response to the drone strike was mixed, with some States viewing it as lawful and others unlawful,[210] it is notable that all of the States that took a legal position did so through the application of the law governing self-defence,[211] which was also the legal justification given by the United States itself.[212] No State publicly considered that the drone strike could be lawful on the basis that it fell within the parameters of existing Iraqi consent.

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[202] See section III.C.2.

[203] See, e.g., *Armed Activities*, Merits, *supra* note 11, para. 52.

[204] See, e.g., the 1997 'Black Sea Fleet Agreement' between the Russian Federation and Ukraine, for example, allowed Russia to maintain up to 25,000 troops, 24 artillery systems, 132 armoured vehicles and 22 military planes in Crimea. The agreement was initially applicable for a period of 20 years, subsequently to be automatically renewed for successive periods of five years, absent termination with a year's notice. See Partition Treaty on the Status and Conditions of the Black Sea Fleet (28 May 1997), https://archive.today/ue0rj (Russian text).

[205] *Armed Activities*, Merits, *supra* note 11, para. 52 (the Court further elaborated that '[t]he DRC accepted [only] that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border.'). See also ARSIWA (with commentaries), *supra* note 119, 74 (commentary to Article 20) (stating that consent only precludes wrongfulness to the extent that the conduct concerned falls within the parameters of the consent given) (relevant by analogy).

[206] IDI Rhodes Resolution, *supra* note 18, Article 6(1) ('[m]ilitary assistance shall be carried out in conformity with the terms and modalities of the request.'). See also Isabella Wong, 'Authority to Consent to the Use of Force in Contemporary International Law: the Crimean and Yemeni Conflicts' (2019) 6 *Journal on the Use of Force and International Law* 52, 57; Buchan and Tsagourias (2021), *supra* note 78, 109; Gill and Tibori-Szabó, *supra* note 37, 62.

[207] See, e.g., United States, 'Statement by the Department of Defense' (2 January 2020), www.defense.gov/News/Releases/Release/article/2049534/statement-by-the-department-of-defense. See also Patrick Butchard (ed), 'Digest of State Practice, 1 January–30 June 2020' (2020) 7 *Journal on the Use of Force and International Law* 357, 380–392.

[208] UN Doc. S/2020/15 (6 January 2020) (Iraq), 2.

[209] *Ibid.*, 1 (emphasis added).

[210] For a comprehensive review of States' reactions to the drone strike (and well as the subsequent use of force in response by Iran), including numerous links to primary sources, see Mehrnusch Anssari and Benjamin Nußberger, 'Compilation of states' reactions to U.S. and Iranian uses of force in Iraq in January 2020', *Just Security* (22 January 2020), www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020.

[211] See *ibid.*

[212] See *Statement by the Department of Defense*, *supra* note 207; UN Doc. S/2020/20 (9 January 2020) (United States).

58. If military action exceeds the scope of the territorial State's consent, this will usually constitute a violation of the prohibition of the use of force (absent another legal basis).[213] However, not all failures to observe the parameters set by the territorial State will necessarily exceed the consent given and transform the action into an unlawful use of force. For example, non-compliance with certain procedural requirements may merely constitute a breach of the relevant agreement (thus giving rise to State responsibility) without exceeding the scope of the consent itself.[214] That said, if the territorial State expressly indicates that non-conformity with a particular requirement will invalidate its consent, then a failure to comply with that requirement will indeed exceed the scope of that consent, irrespective of whether or not the requirement might objectively appear to be of a more 'procedural' character.

59. Uncertainty often arises in practice regarding the parameters of consent to military action, particularly where it has been granted in broad terms, such as through a generally framed anticipatory treaty provision,[215] or is only implied.[216] For legal clarity and operational prudence, acting States should ensure that the limits and conditions of the consent are clearly established, and, in cases of ambiguity, are best advised to seek additional contemporaneous and/or express consent.

E. Defects of consent

60. Consent to military action must be free from coercion and may be vitiated by other defects such as error, fraud, or corruption.[217] Where military action by one State on the territory of another is consented to by way of a treaty, the provisions in the VCLT or the corresponding rules of customary international law will regulate the consequences of any potential defects. The relevant defects reflected in the VCLT include:

- Error, where an essential basis of the State's consent concerns an error in the treaty relating to a fact or situation 'which was assumed by that State to exist at the time' of the conclusion of the treaty;[218]
- Fraud, where a State was induced to give consent by the fraudulent conduct of the other party;[219]
- Corruption, where consent was procured through the corruption of a State's representative directly or indirectly by the other State;[220] and

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[213] See *infra* para. 86.

[214] See ARSIWA (with commentaries), *supra* note 119, 74 (commentary to Article 20) ('[t]he non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.') (relevant by analogy).

[215] See section III.B.2.

[216] See section III.C.2.

[217] ARSIWA (with commentaries), *supra* note 119, 73 (commentary to Article 20) (relevant by analogy).

[218] VCLT, *supra* note 118, Article 48. See Thilo Rensmann, 'Article 48 (Error)', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2nd edn 2018), 879; Éric Wyler and Rémi Samson, '1969 Vienna Convention, Article 48 (Error)', in Olivier Corten, Pierre Klein, Vaios Koutroulis, and Anne Lagerwall (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2nd edn, 2025), vol. II, 1267.

[219] VCLT, *supra* note 118, Article 49. See Thilo Rensmann, 'Article 49 (Fraud)', in Dörr and Schmalenbach (eds), *supra* note 218, 899; Gérard Niyungeko, '1969 Vienna Convention, Article 49 (Fraud)', in Corten, Klein, Koutroulis, and Lagerwall (eds), *supra* note 218, vol. II, 1294.

[220] VCLT, *supra* note 118, Article 50. See Thilo Rensmann, 'Article 50 (Corruption of a representative of a State)', in Dörr and Schmalenbach (eds), *supra* note 218, 915; Jean-Pierre Cot and Alexandra Hofer, '1969 Vienna

- Coercion: i) against a State's representative (where consent was procured through acts or threats directed at a State's representative)[221] or ii) against the State as such (where it was procured by the threat or use of force in violation of 'the principles of international law embodied in the Charter of the United Nations').[222]

61. The grounds of invalidity in the VCLT are narrow and establish high thresholds in order to ensure the certainty and stability of treaty relations.[223] They are also exhaustive, such that treaty invalidity cannot be based on other factors.[224] Perhaps unsurprisingly, outside of situations involving a State being coerced by means of an unlawful threat or use of force, there is limited (if not non-existent) practice on invalidity of consent to treaties.[225] Moreover, the practice that does exist on vitiation of consent by unlawful threat or use of force is somewhat ambiguous.[226]

62. VCLT provisions do not apply to consent expressed by a State outside of a treaty. Comparable rules are nevertheless understood to apply in other contexts.[227] The VCLT thus provides some guidance in these cases. Despite a paucity of confirmatory State practice, there are indications to suggest that the VCLT grounds of invalidity will also invalidate consent to military action issued by means other than in a treaty. A notable example in this respect is the decision of the Constitutional Court of Latvia, which held that Latvia's (non-treaty based) consent to the deployment of Soviet Union troops in 1940 was invalid as a result of coercion involving the threat or use of force.[228] There is, moreover, room to argue that for non-treaty based consent to conduct that would otherwise be in *prima facie* breach of the territorial State's rights, the types of coercion vitiating a State's consent may be wider than as is the case in the law of treaties.[229] For instance, consent to military action issued by means other than a treaty

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Convention, Article 50 (Corruption of a representative of a State)', in Corten, Klein, Koutroulis, and Lagerwall (eds), *supra* note 218, vol. II, 1325.

[221] VCLT, *supra* note 118, Article 51. See Thilo Rensmann, 'Article 51 (Coercion of a representative of a State)', in Dörr and Schmalenbach (eds), *supra* note 218, 923; Giovanni Distefano, '1969 Vienna Convention, Article 51 (Coercion of a representative of a State)', in Corten, Klein, Koutroulis, and Lagerwall (eds), *supra* note 218, vol. II, 1336.

[222] VCLT, *supra* note 118, Article 52. See Kirsten Schmalenbach, 'Article 52 (Coercion of a State by the threat or use of force)', in Dörr and Schmalenbach (eds), *supra* note 218, 937; Olivier Corten and Mathias Forteau, '1969 Vienna Convention, Article 52 (Coercion of a State by the threat or use of force)', in Corten, Klein, Koutroulis, and Lagerwall (eds), *supra* note 218, vol. II, 1361.

[223] See Humphrey Waldock, Second Report of the Special Rapporteur on the law of treaties (1963) *Yearbook of the International Law Commission*, vol. II, UN Doc. A/CN.4/156, 52.

[224] VCLT, *supra* note 118, Article 42(1). See Villiger, *supra* note 125, 546.

[225] See Joe Verhoeven, 'Invalidity of Treaties: Anything New in/under the Vienna Conventions?', in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), 299.

[226] See Schmalenbach, *supra* note 222, 941.

[227] For example, the ILC does not mandate the application of the VCLT rules to the issuance of consent as a circumstance precluding wrongfulness under Article 20 ARSIWA, which may be analogously relevant to consent to military action. The ILC simply notes that '[c]onsent may be vitiated by error, fraud, corruption or coercion', adding that '[i]n this respect, the principles concerning the validity of consent to treaties provide *relevant guidance*' (emphasis added). See ARSIWA (with commentaries), *supra* note 119, 73 (commentary to Article 20) (relevant by analogy).

[228] *Border Treaty, Re, Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia*, Constitutional Review, Case No 2007-10-0102 (29 November 2007), Constitutional Court of Latvia, ILDC 884 (LV 2007). Other potential examples may be found in Corten (2020), 442–445, though as the author notes some of these examples are confounded by the presence of UNSC decisions and often concern treaties or agreements entered into in the context of armed conflict.

[229] Federica I. Paddeu and Kimberley N. Trapp, 'Defences to State Responsibility in International Humanitarian Law' (2022) 25 *Yearbook of International Humanitarian Law* 71, 79–80. While the VCLT limits coercion to acts or threats directed at a State's representative or unlawful threats or uses of force, coercion in wider international law is not so narrowly defined. See Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law' (2023) 117 *American Journal of International Law* 601. ARSIWA, for example, defines coercion as pressure that nullifies a State's will and compels it to commit an act that, absent such coercion,

may be invalid where it is the result of coercion that contravenes the principle of non-intervention.[230]

F. Withdrawal of consent

63. An important aspect of a State's right to consent to foreign military action on its territory is that it can also withdraw that consent.[231] In general, the conditions for the valid issuance of consent also apply to the valid withdrawal of consent.[232] For instance, the withdrawal of consent must emanate from an appropriate authority of the territorial State, usually its highest offices.[233]

64. The withdrawal of consent is not generally subject to any particular form or modality,[234] but it must be clearly established.[235] The ICJ held in the *Armed Activities* case that consent to military action can be 'withdrawn at any time … without further formalities being necessary'.[236] However, this conclusion should be read in the context of the ICJ's finding that the DRC's consent preceded the Protocol on Security concluded between the DRC and Uganda in April 1998,[237] and so cannot necessarily be seen as relating to situations where consent has been granted in a treaty.[238] In such instances, the treaty terms and the law of treaties regarding formalities for the withdrawal from or termination of the treaty,[239] including a notice period

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would be an internationally wrongful act against a third State, even if such pressure does not involve an unlawful threat or use of force – or indeed, even if it is not unlawful, see ARSIWA (with commentaries), *supra* note 119, 69–70 (commentary to Article 18).

[230] Paddeu and Trapp, *supra* note 229, 79–80. In particular, as per UN Doc. A/RES/2625(XXV) (24 October 1970), annex, the principle of non-intervention prohibits the 'use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.

[231] See Byrne, *supra* note 3, 112 (referring to the right to withdraw consent to military action as 'the logical corollary' of the right to give it).

[232] See Wippman (1996), *supra* note 35, 236 (making the general point that the requirements for the valid issuance of consent to military action should be mirrored in relation to the valid withdrawal of that consent, as they represent corresponding exercises of sovereign will).

[233] Raube (2023-1), *supra* note 147, 241. See section III.A. Who possesses the authority to withdraw consent is – as with the authority to issue it – ultimately a matter to be dictated by domestic law. Of note analogously to military action with consent, therefore, is the fact that in the context of treaty law there is a trend amongst States towards a 'symmetrical' approach – whereby the location of authority to issue consent under domestic law is mirrored by the location of authority to withdraw it ('*actus contrarius*') – although State practice is not entirely consistent in this regard. See Report on the Domestic Procedures of Ratification and Denunciation of International Treaties (CDL-AD(2022)001), European Commission for Democracy through Law (Venice Commission), Opinion No. 1045/2021 of 22 March 2022, particularly paras. 227–229. VCLT, *supra* note 118, Article 67(2) provides that where a State seeks to terminate or withdraw from a treaty, if the instrument communicating this to the other parties 'is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.' It should also be noted that where conditions have deteriorated to the point that there is no central authority acting for the territorial State, there may be nobody left vested with the competence to withdraw consent that had been previously expressed. In such cases, it has been argued that the consent survives indefinitely, so far as military action remains within the scope of what was consented to. See Lieblich (2013), *supra* note 12, 196; Dinstein (2017), *supra* note 151, 130.

[234] *Armed Activities*, Merits, *supra* note 11, paras. 47, 51.

[235] See de Wet (2020-1), *supra* note 12, 160–167.

[236] *Armed Activities*, Merits, *supra* note 11, para. 47.

[237] *Ibid.* ('[w]hile the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, *it was not the legal basis for such authorization or consent*. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent *could thus* be withdrawn at any time by the Government of the DRC, without further formalities being necessary', emphasis added).

[238] See Buchan and Tsagourias (2023), *supra* note 130, 259–260.

[239] For example, VCLT, *supra* note 118, Article 67(1) requires a notification of termination/withdrawal under *ibid.*, Article 65(1) to be made in writing.

where relevant, must be complied with.[240]

65. Objecting to this position, some commentators[241] argue that the strict application of the law of treaties to limit a State's right to withdraw consent to military action may undermine the peremptory character of the prohibition on the use of force (or, at least, of the prohibition of aggression).[242] On this point, the 2011 IDI Rhodes resolution concluded that the territorial State is 'free to … withdraw its consent to the provision of military assistance at any time, *irrespective of the expression of consent through a treaty*'.[243] However, while there is some limited State practice that may appear to support this view, that practice is insufficient to establish a rule displacing the normal operation of the law of treaties, since in each instance the denunciation of the relevant treaty appears to have been accepted by the acting State, meaning that the treaty was terminated by the consent of all the parties as per Article 54(b) VCLT.[244]

66. In any event, if a relevant treaty providing consent to military action does not contain a provision regarding termination, denunciation or withdrawal, it is likely that a right for the parties to denounce the treaty is implied by the nature of such treaties, as per Article 56(1)(b) VCLT.[245] Thus, the territorial State retains the right to withdraw consent to military action provided for in a treaty, although any implied right of denunciation under the law of treaties would still be subject to the residual 12-month notice period enshrined in Article 56(2)

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[240] See, e.g., Roscini, *supra* note 34, 234–235; Sean D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2008) 85 *International Law Studies* 109, 119; Dinstein (2017), *supra* note 151, 128–130; Hasar, *supra* note 12, 44–46; Buchan and Tsagourias (2023), *supra* note 130, 259–260.

[241] Including a minority of the membership of this Committee.

[242] See, e.g., Raube (2023-1), *supra* note 147, 240; Lieblich (2011), *supra* note 147, 366; Lieblich (2013), *supra* note 12, 193; Gill and Tibori-Szabó, *supra* note 37, 261. Regarding peremptory norms of general international law (*jus cogens*), see *infra* note 284.

[243] IDI Rhodes Resolution, *supra* note 18, Article 5 (emphasis added).

[244] VCLT, *supra* note 118, Article 54(b). As a recent possible example, one might note the 2017 treaties between Syria and Russia that established Syrian consent to Russian bases on its territory. These agreements provided for a 49-year lease and no further means of withdrawal (only allowing for the prevention of an automatic renewal of the agreements through withdrawal via a 12-month notice period). See Agreement between the Russian Federation and the Syrian Arab Republic on the expansion of the Russian Federation Navy Logistics Support Facility in the port of Tartus and Entry of Russian Federation warships into the territorial sea, internal waters, and ports of the Syrian Arab Republic, Ratified, Federal law (29 December 2017), No. 441-FZ, Article 25; Agreement between the Russian Federation and the Syrian Arab Republic on the stationing of an Aviation Group of the Armed Forces of the Russian Federation on the territory of the Syrian Arab Republic (as amended on January 18, 2017), document with revisions according to the International Protocol of January 18, 2017 (temporarily implemented since 18 January 2017), Ratified, Federal Law (14 October 2016), N376-FZ, Article 12. However, the new Syrian government announced that it had 'nullified' such agreements in April 2025. See Christina Goldbaum, 'Syria's Jihadist-Turned-President Seeks New Allies', *The New York Times* (23 April 2025), www.nytimes.com/2025/04/23/world/middleeast/syria-president-al-shara-interview.html (President Ahmed al-Shara: '[w]e nullified past agreements [relating to military action with consent] between Syria and other countries'.). Russia appeared to accept Syria's right to do so. See 'Foreign Minister Sergey Lavrov's interview with Rossiya Segodnya' (29 December 2024), Ministry of Foreign Affairs of the Russian Federation, www.mid.ru/en/foreign_policy/international_safety/regprla/1989678/ ('Syria is a sovereign country that has the right to conclude and terminate any agreements with its foreign partners.'). Given Russia's apparent acceptance, this could simply be considered an instance of termination by consent of all the parties. Another possible, more recent, example is the termination of the troop stationing agreement between Niger and the United States in 2024. It is, however, unclear whether the United States' acceptance of the withdrawal indicates mutual agreement to terminate the treaty rather than indicating acceptance of a right of unilateral withdrawal. See 'U.S. Withdrawal from Niger completed', *United States Africa Command* (16 September 2024), www.africom.mil/pressrelease/35590/us-withdrawal-from-niger-completed.

[245] VCLT, *supra* note 118, Article 56(1) (a 'treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal', unless, *inter alia*, 'a right of denunciation or withdrawal may be implied by the nature of the treaty.'). See Jeremy Hill, *Aust's Modern Treaty Law and Practice* (Cambridge University Press, 4th edn 2023), 298 (noting that 'treaties of alliance' are likely candidates to which Article 56(1)(b) VCLT would apply).

VCLT.[246] It is also important to note that, regardless of whether or not the treaty contains an explicit termination or withdrawal provision, the territorial State may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from the treaty if the conditions in Article 62 VCLT are met,[247] in which case 'special urgency' may justify the absence of a notice period.[248]

67. For legal certainty, when entering into treaty arrangements relating to military action with consent, States should ensure that the treaty explicitly provides for an appropriate notice period for the withdrawal of consent or termination of the treaty.

68. Upon the valid withdrawal of consent, the acting State must cease its military action and proceed with withdrawing any troops that it may have on the territory as rapidly as is possible.[249] Failure to withdraw within a reasonable period[250] – noting that there should always be allowance for sufficient time to undertake this is in an orderly and safe manner[251] – will entail a *prima facie* breach of the prohibition on the use of force.[252]

IV. Other legal considerations

69. Valid consent issued by the territorial State means that military action undertaken within the parameters of that consent does not engage the prohibition of the use of force.[253] However, valid consent in such situations does not relieve the acting State from the requirement to abide by other applicable legal obligations.[254] This Part thus examines legal considerations of particular importance, beyond those considered in Part III concerning the validity of the consent issued by the territorial State, which may be relevant to the lawfulness of military action with

[246] VCLT, *supra* note 118, Article 56(2).
[247] See *ibid.*, Article 62(1). The ILC did not exclude that a change of government policy could be invoked under Article 62(1) VCLT, provided the definition of a 'fundamental change in circumstances' and the requirements set out in the article are met, see ILC, Draft Articles on the Law of Treaties, with commentaries (1966) *Yearbook of the International Law Commission*, vol. II, pt. V, UN Doc. A/6309/Rev.1, 187, 257 (commentary to Article 59), para. 10. See also Wolff Heintschel von Heinegg, 'Treaties, Fundamental Change of Circumstances', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, entry last updated March 2021), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1378?rskey=mz8v37&result=1&prd=MPIL, para. 37 ('a change of political alignment by a government may very well be invoked for terminating a treaty, e.g. *a treaty of alliance* … if all the conditions for invoking a fundamental change are fulfilled', emphasis added).
[248] VCLT, *supra* note 118, Article 65(2).
[249] See Dinstein (2017), *supra* note 151, 128–129; Wippman (1996), *supra* note 35, 234; Zamani and Nikouei, *supra* note 91, 679. It should be noted that a right of personal self-defence (as distinct from the *ad bellum* right of self-defence) will still apply to members of the acting State's forces while troops undertake the withdrawal from the territory. See, generally, Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (Oxford University Press, 2017), 217–234.
[250] See, generally, Eric A. Heinze and Brent J. Steele, 'The Ethics and Politics of Military Withdrawal' (2025) 18 *Ethics & Global Politics* 1. Specifically in relation to military action with consent under international law, see Dinstein (2017), *supra* note 151, 128 (noting that the action must cease and troops removed from the territory 'without *undue* delay', emphasis added).
[251] Wippman (1996), *supra* note 35, 235 (referring to a need for 'reasonable notice' on the part of the territorial State to facilitate the practicalities and logistics of ending military action on another State's territory).
[252] See, e.g., Dinstein (2017), *supra* note 151, 128–129; Buchan and Tsagourias (2021), *supra* note 78, 109. Continuing action following the valid withdrawal of territorial State consent may also constitute an act of aggression. See *infra* para. 87.
[253] See section II.B and section V.B.
[254] The territorial State cannot consent to conduct by another State that it would not itself lawfully be able to undertake. See, e.g., Deeks, *supra* note 19, 35; Michael N. Schmitt, 'Drone Attacks under the *Jus ad Bellum* and *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law* 311, 315.

consent. It is not intended to be an exhaustive account of such rules.

A. Respect for UN Security Council decisions

70. The acting State must abide by any obligations that are imposed upon it by the UNSC in a binding decision.[255] Should the Council, for example, explicitly prohibit States from intervening or require an acting State to withdraw its military presence, then any such military action will be unlawful under the UN Charter.[256] In this context, it is worth recalling the Charter requirement that States 'refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'.[257]

B. Respect for the provisions of international humanitarian law, international human rights law, and other relevant international legal obligations

71. The consent of the territorial State does not preclude the wrongfulness of the violation of norms that are extraneous to the prohibition of the use of force and that surpass the bilateral relationship between the territorial State and the acting State.[258] The territorial State is not free to dispose of such obligations,[259] meaning that they are unaffected by its consent. Obligations of this kind may restrict *how* the acting State is allowed to operate within the territorial State (e.g., by imposing limits on the use of lethal force).

72. For instance, in the event that it becomes party to an international or non-international armed conflict or is in occupation of a foreign State, the acting State remains bound by all applicable treaty and customary rules of IHL, including the obligation to respect and ensure respect for the Geneva Conventions.[260] It must also respect its obligations under international human rights law, subject to their extraterritorial applicability on the facts.[261] States likewise must comply with any other relevant treaty and customary international law obligations, including (but not limited to) the obligation to prevent genocide,[262] the obligation to prevent crimes against

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[255] UN Charter, *supra* note 1, Article 25 *juncto* Article 103. In a similar vein, see, e.g., IDI Rhodes Resolution, *supra* note 18, Article 3(2). See also, e.g., Corten (2020), *supra* note 7, 454–455.

[256] See, e.g., UN Doc. S/RES/2488 (12 September 2019), para. 1 (regarding the Central African Republic). Disregard for these obligations would not entail a breach of the prohibition of the use of force but rather a breach of the obligations imposed by the UNSC (the two being conceptually different).

[257] UN Charter, *supra* note 1, Article 2(5).

[258] Military action that violates any of the obligations noted in this section will involve internationally wrongful acts on the part of the acting State under the relevant legal regime, but this does not mean, in instances where the consent is otherwise valid (see Part III), that the action engages the requirements of the *jus ad bellum* (see section V.B).

[259] An incapacity to dispose of obligations also applies in respect of obligations owed to multiple States (other than the prohibition of the use of force itself).

[260] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) (1949) 75 UNTS 31, Article 1; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC II) (1949) 75 UNTS 85, Article 1; Geneva Convention relative to the Treatment of Prisoners of War (GC III) (1949) 75 UNTS 135, Article 1; GC IV, *supra* note 52, Article 1. See Luca Ferro, 'Common Article 1 of the Geneva Conventions: Leveraging Military Action with Consent for Compliance with the Laws of War', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50.

[261] See *Georgia v Russia (II) [GC]* Merits [2021] ECtHR, App. No. 38263/08, paras. 126 and 133–144, especially 137; *Ukraine and the Netherlands v Russia [GC]* Merits [2025] ECtHR, App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22, paras. 237–261 (holding that this requires jurisdiction and applying the standard of 'effective control').

[262] Convention on the Prevention and Punishment of the Crime of Genocide (1948) 78 UNTS 277, Article 1. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections [1996] ICJ Rep. 595, para. 31 (noting that this obligation 'is

humanity,[263] and obligations under the Arms Trade Treaty regarding international transfers of conventional arms.[264]

C. Respect for the right to self-determination

73. Military action will be unlawful if and to the extent that it contravenes the duty of every State 'to refrain from any forcible action which deprives peoples … of their right to self-determination…'.[265] This right is vested in 'peoples', not States: it cannot be dispensed with through the issuance of State consent.[266]

74. The external dimension[267] of the right to self-determination prohibits foreign military action to assist the government in instances involving wars of 'national liberation' against colonial rule, alien occupation or a racist regime.[268] The internal dimension of the right – which entails 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state',[269] and the freedom to do so 'without external interference'[270] – may also be violated by foreign military action in some instances. Partisan foreign military action during a civil war[271] is one situation where such action may be particularly likely to constitute a violation of the internal dimension of the right of self-determination, but this is in each instance to be determined on the facts, not assumed.[272] The same analysis is also required

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not territorially limited by the Convention').

[263] See UN Doc. A/RES/79/122 (12 December 2024), preambular para. 8; ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries (2019) *Yearbook of the International Law Commission*, vol. II, pt. 2, chap. IV, UN Doc. A/74/10, particularly Article 4. It should be acknowledged that this obligation is not (yet) codified in treaty law and its basis in customary international law remains somewhat contentious. See Federica D'Alessandra and Shannon Rfaj Singh, 'Operationalizing Obligations to Prevent Mass Atrocities: Proposing Atrocity Impact Assessments as Due Diligence Best Practice' (2022) 14 *Journal of Human Rights Practice* 769, 776–779.

[264] Arms Trade Treaty (2013) 3013 UNTS 269, Article 6(3) (requiring a State to prevent the transfer of conventional arms if 'it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party'); *ibid.*, Article 7(1)(a) and (b)(i) and (ii) (further requiring States parties to 'assess the potential that the conventional arms or items: (a) would contribute to or undermine peace and security;' [or] (b) 'could be used to … commit or facilitate a serious violation of international humanitarian law' or international human rights law). Importantly, *ibid.*, Article 7(3) provides that '[i]f, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.'

[265] UN Doc. A/RES/2625(XXV), *supra* note 230, annex; UN Doc. A/RES/34/44 (23 November 1979). See also ILA Use of Force Sydney Report, *supra* note 1, 19–20; IDI Rhodes Resolution, *supra* note 18, Article 3(1); Corten (2023), *supra* note 80, 172; Hafner, *supra* note 21, 39 (noting that '[i]t can quite safely be concluded' that military action that violates the right of self-determination will be unlawful). Military action that violates the right of self-determination will amount to an internationally wrongful act on the part of the acting State, but the violation of the right does not mean, in instances where the issued consent is otherwise valid (see Part III), that the action engages the requirements of the *jus ad bellum* (see *infra* para. 86).

[266] Hafner, *supra* note 21, 336.

[267] See, in relation to the internal and external dimensions of the right of self-determination, Fernández Arribas, *supra* note 90, 48–52.

[268] Redaelli, *supra* note 12, 206.

[269] *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217, para. 126.

[270] Final Act of Helsinki, *supra* note 101, Principle VIII.

[271] See *supra* note 18 regarding the concept of a 'civil war' in the context of military action with consent.

[272] See, e.g., 'Intervention', Canada, Department of External Affairs, Legal Bureau, Note dated 1 December 1983, in (1984) 22 *Canadian Yearbook of International Law* 333, 334 ('when two rival factions are competing over control … acceptance of a request to intervene by one of the factions *might well* constitute an intervention in the domestic affairs of the state, and *in some cases* be inconsistent with the principle of self-determination', emphasis added). See also Eliav Lieblich, 'Internal Self-Determination and the Legality of Military Action with Consent',

in relation to military action with consent that provides support for a State's government in situations of civil unrest below the threshold of a civil war.[273]

75. Determining whether the internal dimension of the right to self-determination will be/has been violated in any given situation involving foreign military action often will not be an easy task. Indeed, concerns about the precise scope of the right of self-determination and difficulties with its application in practice are not specific to the context of military action with consent.[274] Consequently, States should be cautious when considering undertaking military action in support of a government, the authority of which is being significantly challenged internally in circumstances that may engage the right of self-determination.

D. Military action with the consent of a territorial State committing internationally wrongful acts

76. Military action with consent in support of a territorial State that is committing internationally wrongful acts, including international crimes, human rights violations, or a violation of the right to self-determination, may give rise to State responsibility of the acting State for aiding or assisting those acts.[275] In addition, specific substantive rules may prohibit States from undertaking military action in support of a territorial State committing such acts, including, for instance, Article III of the Genocide Convention with respect to complicity in genocide.[276]

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in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50 ('[c]learly, concerning some civil wars, a *prima facie* case can be made that the war engages a people's self-determination. But this is certainly not the case in all civil wars…'); Lieblich (2013), *supra* note 12, 139; de Wet (2020-1), *supra* note 12, 81–82; Dapo Akande and Zachary Vermeer, 'The airstrikes against Islamic State in Iraq and the alleged prohibition on military assistance to governments in civil wars', *EJIL: Talk!* (2 February 2015), www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars; Redaelli, *supra* note 12, 96; Cóman Kenny and Seán Butler, 'The Legality of "Intervention by Invitation" in Situations of R2P Violations' (2018) 51 *New York University Journal of International Law & Politics* 135, 145–146; Antonello Tancredi, 'A "Principle-Based" Approach to Intervention by Invitation in Civil Wars' (2019) 79 *ZaöRV* 659, 659. It is important to note that the position taken herein – that the question of whether any given foreign military action in a civil war context amounts to a violation of the right of self-determination must be ascertained on a case by case basis – is disputed by a minority of this Committee, who take the view that there is a *presumption* that foreign military action in a civil war will be in violation of the right of self-determination. In support of this view, see, e.g., IDI Wiesbaden Resolution, *supra* note 15, Article 2; IIFFMCG Report, *supra* note 44, vol. II, 277–278; Doswald-Beck, *supra* note 14, particularly 200–208 and 242–243; Mohamed Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes* (Librairie generale de droit et de jurisprudence, 1974); Hasar, *supra* note 12, 124–153; Luca Ferro, 'The Doctrine of "Negative Equality" and the Silent Majority of States' (2021) 8 *Journal on the Use of Force and International Law* 4; Roscini, *supra* note 34, 250–277. See also Brad R. Roth, 'The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention' (2015) 16 *German Law Journal* 384 (arguing that having a clear 'threshold' is especially important for reasons of certainty and the limitation of abuse).

[273] The right to self-determination is not limited to a civil war context: foreign interference with other forms of mass civil disobedience also can impinge the right. See Redaelli, *supra* note 12, 96, 116; Anne Peters, 'Introduction: Principle and Practice of Armed Intervention and Consent', in Corten, Fox, and Kritsiotis, *supra* note 12, 1, 14. See also IDI Rhodes Resolution, *supra* note 18 (which applies, as per Article 2(1), only to situations below the level of a a non-international armed conflict, alongside stating, in Article 3(1), that foreign military action in such circumstances will be unlawful where it violates the right of self-determination).

[274] See Gregory H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?' (1995) 16 *Michigan Journal of International Law* 733; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review* 609.

[275] See, generally, Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, 2016), 92–161; Miles Jackson, *Complicity in International Law* (Oxford University Press, 2015); Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011).

[276] Genocide Convention, *supra* note 262, Article III(e).

77. Article 16 ARSIWA provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State.[277]

This is without prejudice to the international responsibility of the territorial State for committing the internationally wrongful act(s) in question.[278] According to this provision, which the ICJ has held reflects a rule of customary international law,[279] 'the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.'[280] The ILC explained that:

> Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[281]

78. The aid or assistance given must contribute 'significantly' to the subsequent wrongful conduct.[282] An example given by the ILC is the provision of 'material aid to a State that uses the aid to commit human rights violations', noting that '[i]n this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.'[283]

79. Military action is sometimes consented to by a State implicated in violations of peremptory norms of general international law (*jus cogens*).[284] While there is ongoing debate about the precise scope and content of individual peremptory norms, such scenarios may affect the legality of military action with consent.[285] In particular, consent that is expressed in a treaty that

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[277] ARSIWA (with commentaries), *supra* note 119, Article 16.
[278] *Ibid*.
[279] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment [2007] ICJ Rep. 43, para. 420.
[280] ARSIWA (with commentaries), *supra* note 119, 66 (commentary to Article 16).
[281] *Ibid*.
[282] *Ibid*. Although note that at *ibid.*, 67, the ILC refers to the fact that 'the assistance may have been only an incidental factor in the commission of the primary act.' See Jennifer Trahan, 'Invitation to Atrocities: The Consequences of Military Action with Consent violating the *Ius contra Bellum*', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50 (discussing the necessary causal link and *mens rea* requirement).
[283] ARSIWA (with commentaries), *supra* note 119, 67 (commentary to Article 16, citing Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, UN Doc. A/37/745, 50).
[284] A peremptory norm of general international law (*jus cogens*) is 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character', as per VCLT, *supra* note 118, Article 53. Examples of peremptory norms are given in ILC, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with commentaries, UN Doc. A/77/10 (2022), 89, annex. See also ARSIWA (with commentaries), *supra* note 119, 85 (commentary to Article 26) and 113 (commentary to Article 40).
[285] Some scholars have proposed that a State's authority to consent may be limited by its failure to meet international obligations to protect its own population. Drawing on the concept of sovereignty as responsibility (see Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press, 1996); International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, 2001), 51), this

conflicts with a peremptory norm cannot be invoked as the legal basis for military action, as that treaty would be void.[286] There is, however, considerable State practice that does not support the general invalidity of consent to military action by a State that is committing *jus cogens* violations.[287] For instance, States did not condemn Russia's military action with consent against Islamic State in Syria in 2014 as a violation of the prohibition of the use of force despite the Assad government's commission of mass atrocities against the civilian population.[288]

80. Nonetheless, in the case of a serious breach by the territorial State of a peremptory norm, States are obliged to cooperate to bring such breach to an end using lawful means and '[n]o State shall recognize as lawful a situation created by [such breach], nor render aid or assistance in maintaining that situation.'[289] It is also important to reiterate that irrespective of the validity of the territorial State's consent, the acting State is still bound by its own international legal obligations, including the obligations set out earlier in this Part of the report, such as compliance with its direct obligations under IHL and international human rights law.

V. Burden of proof and legal consequences

81. This Part examines two aspects of the practical operation of military action with consent: the burden of proof when consent is contested, and the legal consequences that follow when the requirements for military action with consent – as set out in Parts III and IV – are not satisfied.

A. The burden of proof

82. Given that consensual military action is *prima facie* lawful,[290] it might be supposed that the burden of proof in relation to establishing the issuance (or withdrawal) of valid consent would

perspective suggests that a State's sovereignty – and, consequently, its authority to consent – may be limited or partially forfeited as a result of such failures (see Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513, 515). In this view, such violations of international obligations could 'adversely affect the government's legal capacity to express consent to external intervention' (Lieblich (2013), *supra* note 12, 188). However, this argument is not reflected in State practice.

[286] VCLT, *supra* note 118, Article 53; *Jus Cogens* Draft Conclusions (with commentaries), *supra* note 284, 60, Conclusion 15, para. 2.

[287] This practice is surveyed in Erika de Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request' (2018) 67 *International and Comparative Law Quarterly* 1, 6–10. It should be noted, however, that a minority view within this Committee is that this State practice lacks clear *opinio juris* affirming the validity of the consent issued, and such instances should thus be interpreted harmoniously to conform with peremptory norms. See, e.g., Anne Peters, 'Invitation to Atrocities: When Military Action with Consent Violates the *Ius contra Bellum*', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50.

[288] See Bannelier-Christakis, *supra* note 12, 762–763 ('*no state* called into question the legality of the Russian airstrikes against ISIL on the basis of intervention by invitation', emphasis added). It is also worth noting a parallel trend in the peacekeeping context, where some robust peacekeeping missions have become embroiled in accusations of complicity in the atrocity crimes of forces of the consenting State's government – and yet such accusations have not necessarily resulted in the withdrawal of the mission concerned. One might note the example of UN peacekeeping missions in the DRC (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) / United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)), which have been long dogged by concerns about association with serious violations by DRC government forces, whilst continuing to operate. See, e.g., Mark Tran, 'UN denies complicity in Congo', *The Guardian* (11 November 2009), www.theguardian.com/world/2009/nov/11/congo-un-rebels-rwanda-kimia.

[289] ARSIWA (with commentaries), *supra* note 119, Articles 41(1) and 41(2); *Jus Cogens* Draft Conclusions (with commentaries), *supra* note 284, 70, Conclusion 19.

[290] See section II.B.

fall on the territorial State: i.e., on the basis that the acting State will have committed no legal 'wrong' for which it is required to 'answer'.[291] However, to oblige the territorial State to prove that it has *not* provided consent – i.e., to require it to evidence a negative as a default approach – would be impractical and open to abuse.

83. State practice would indeed seem to support the view that the *onus probandi* for establishing the valid consent of the territorial State rests with the acting State, albeit that this view can only be inferred.[292] Similarly, the issue of the burden of proof was touched upon by the parties in the *Armed Activities* proceedings,[293] and although the ICJ itself did not engage with the question in its final judgment, one might infer from the decision that the Court saw the burden of establishing valid consent as falling upon the acting State.[294] While there is relatively little discussion of the question in scholarship, some support for this position can be identified there too.[295] It thus seems relatively clear that in instances of military action with consent the burden of proof lies with the acting State.

84. It is worth recalling that consent to military action can at times be implied and/or non-public,[296] which may present particular evidentiary difficulties for the acting State.[297] This does not, however, affect the allocation of the burden of proof.

85. Evidentiary questions regarding the valid issuance of consent to military action must ultimately be considered on a case-by-case basis.

B. Legal consequences

86. Military action undertaken without the valid consent of the territorial State – in the absence of an alternative *ad bellum* basis – will constitute a violation of the prohibition of the use of force by the acting State under Article 2(4) of the UN Charter and customary international law,[298] giving rise to State responsibility for an internationally wrongful act, including the obligations of cessation and reparation.[299] This applies to military action undertaken where no valid consent has been given, as well as to military action following the valid withdrawal of

[291] See Paddeu (2020), *supra* note 21, 233–234 (discussing, but not adopting, this line of reasoning).
[292] See *ibid.*, 256–263 (considering a number of recent examples where the acting State sought explicitly to establish/confirm the existence of valid consent).
[293] In particular, Uganda argued that, where the initial consent is established, it is for the territorial State (the DRC) to prove the subsequent *withdrawal* thereof. See *Armed Activities on the Territory of the Congo* (*DRC v Uganda*), Rejoinder submitted by the Republic of Uganda [2002] ICJ Rep, para. 95. Uganda did not appear to suggest that the initial existence of consent (as opposed to its withdrawal) need be proven by the territorial State. The DRC, for its part, argued, rather distinctly, that inasmuch as Uganda was invoking the exception of self-defence, it bore the burden of proof to establish that the conditions for self-defence were fulfilled. See *Affaire relative aux activités armées sur le territoire du Congo* (*RDC c. Ouganda*), Réplique de la RDC [2002] ICJ Rep, para. 3.106.
[294] Paddeu (2018), *supra* note 31, 169.
[295] At times this has been explicit, see, e.g., Rein Müllerson, 'Intervention by Invitation', in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Westview Press, 1991), 127, 133. However, it also can be inferred from other writings, see, e.g., Butchard, *supra* note 21, 64; Hafner, *supra* note 21, 334.
[296] See section III.C.
[297] Ultimately, however – despite such difficulties – implied consent must be clearly established, see section III.C.2. Likewise, non-public consent may present evidentiary issues for the acting State, meaning that – in most instances – public consent will be advisable, see section III.C.3.
[298] Of course, this conclusion relates specifically to 'military action' *as considered in this report*, and in this respect is arguably self-evident, given that this Committee defined the scope of its work as relating to military action that would violate the prohibition of the use of force absent the valid consent of the territorial State. See *supra* para. 1.
[299] ARSIWA (with commentaries), *supra* note 119, Articles 30(a) and 31(1). As noted (see *supra* para. 80), a serious breach of a peremptory norm also gives rise to particular consequences under ARSIWA (with commentaries), *supra* note 119, Articles 41(1) and 41(2).

consent, including the continued presence of troops in the territorial State beyond a reasonable period for their orderly and safe departure.[300] It also applies to military action that exceeds the parameters of valid consent as prescribed by the territorial State, for example in relation to its duration.[301] Where military action is undertaken with valid consent but violates other international legal obligations, such as – but not limited to – those outlined in Part IV, this does not per se affect the validity of the consent or result in a *jus ad bellum* violation. However, it will constitute a separate internationally wrongful act under the relevant applicable legal framework[302] and thus involve legal consequences including the obligations of cessation and reparation in relation to the internationally wrongful act(s) in question.[303]

87. If military action that does not have a legal basis in valid consent (or an alternative *ad bellum* justification) amounts to an armed attack, it will trigger a right of individual and collective self-defence,[304] subject to the requirements of necessity and proportionality.[305] The UNSC may authorise enforcement action against the acting State under Chapter VII of the UN Charter if it determines the existence of a threat to the peace, breach of the peace, or act of aggression.[306] Under certain circumstances, military action without valid consent may constitute aggression by the acting State[307] and may give rise to individual responsibility for the crime of aggression.[308]

[300] See section III.F. See also Lieblich (2011), *supra* note 147, 366.
[301] See section III.D. See also Janina Barkholdt, 'Intervention by Invitation', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, entry last updated May 2024), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=Jzk98C&result=1&prd=MPIL, para. 51.
[302] See Claus Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 *Journal on the Use of Force and International Law* 11, 30; Hasar, *supra* note 12, 154. However, one should note the position taken by Rwanda in February 2025 regarding the Southern African Development Community Mission in the DRC (SAMIDRC) deployment in the DRC, which could be read as pointing against this position. See Ministry of Foreign Affairs and International Cooperation of Rwanda, 'Rwanda Rejects SADC Summit Accusations Against the RDF' (2 February 2025), www.minaffet.gov.rw/updates/news-details/rwanda-rejects-sadc-summit-accusations-against-the-rdf ('[t]he argument that SAMIDRC was invited by the Government of the DRC *is rendered void* by the fact that they are there to fight the citizens of that country, and effectively bring war to Rwanda', emphasis added).
[303] ARSIWA (with commentaries), *supra* note 119, Articles 30(a) and 31(1).
[304] See UN Charter, *supra* note 1, Article 51; *Nicaragua*, Merits, *supra* note 1, para. 237; Ruys (2010), *supra* note 163.
[305] See Gray, *supra* note 85, 157 (noting that 'all states agree' that necessity and proportionality are legally required for the exercise of the right of self-defence).
[306] UN Charter, *supra* note 1, Article 39.
[307] See, e.g., UN Doc. A/RES/3314(XXIX), *supra* note 47, Article 3(e) (holding that '[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement' amounts to an act of aggression). See also Dinstein (2017), *supra* note 151, 128–129.
[308] See Rome Statute of the International Criminal Court (1998) 2187 UNTS 90 (as amended), Article 8*bis*(2)(e) (an act of aggression includes '[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement'); Jennifer Trahan, 'When Military Action with Consent Falls Within the Crime of Aggression', in Kreß, Woolaver, Green, Pobjie and Ruys (eds), *supra* note 50.

VI. Conclusions

88. In line with the foregoing, the Committee on Use of Force: Military Action with Consent has reached the following Conclusions:

1. Military action that would otherwise violate the prohibition of the use of force does not engage the prohibition where that action is undertaken with the valid consent of the territorial State.

2. Consent to military action can only be provided by the territorial State. Non-State actors cannot provide valid consent to military action.

3. It is the government of the territorial State that possesses the authority to consent to military action. In cases where there are competing governmental claimants, any would-be acting State should proceed with particular care if considering undertaking military action based on the 'consent' of any entity claiming to possess governmental authority.

4. The identification of the person(s) or institution with the relevant authority to consent to military action must be determined on a case-by-case basis. There is a rebuttable presumption that consent to military action may be issued by the holders of the highest offices of the territorial State.

5. Consent can only serve as a legal basis for military action if it is issued before the military action in question is undertaken.
    a) Consent that is otherwise valid but issued after military action has commenced can act as a legal basis for that action from the point at which it is issued.
    b) With respect to military action undertaken prior to the issuance of valid consent, that consent can only potentially contribute to establishing a waiver resulting in a loss of the territorial State's right to invoke the responsibility of the acting State for the consequent breach of the prohibition of the use of force.

6. Consent to military action can be issued in an 'anticipatory' manner, whereby the territorial State agrees in advance that military action may be undertaken on its territory in specified circumstances. It may nonetheless be advisable for an acting State to seek additional contemporaneous consent to establish clearly the parameters of the consent that had been provided.

7. The issuance of consent to military action is not subject to any particular form or modality and can be express or implied. However, consent must in all cases be clearly established.
    a) Express consent to military action can be issued in writing or orally.
    b) Implied consent to military action can be communicated through words (whether written or oral), conduct (beyond silence and/or inaction alone), or a combination of both.
    c) There is no legal requirement of 'publicity' in relation to the issuance of consent to military action.

8. The territorial State is free to set specific parameters, whether substantive and/or procedural, to its consent to military action. Consent can only serve as a legal basis for military action that remains within those parameters. Acting States should ensure that the limits and conditions of the consent are clearly established, and, in cases of ambiguity, should seek additional contemporaneous and/or express consent from the territorial State.

9. Consent to military action will be invalid where it was procured by coercion, whether against a State's representative or against the State as such, and may be vitiated by other defects, namely, error, fraud or corruption. In this connection, the rules concerning the validity of treaties apply in instances where consent has been issued in a treaty, and in other instances provide relevant guidance.

10. If consent to military action is expressed in a treaty that conflicts with a peremptory norm of general international law (*jus cogens*), that treaty cannot provide the basis for valid consent.

11. A State that has issued valid consent to military action has the right to withdraw that consent.

    a) In general, the conditions for the valid withdrawal of consent to military action mirror those applicable to the valid issuance of consent.

    b) Where consent to military action has been issued outside of a treaty, its withdrawal is not subject to any particular form or modality.

    c) Where consent to military action has been issued in a treaty, such consent must be withdrawn in compliance with the applicable rules of the law of treaties.

    d) Upon the valid withdrawal of consent, and subject to any binding treaty terms governing the withdrawal of consent, the acting State must cease its military action in an orderly and safe manner as rapidly as is possible.

12. The burden of proof for establishing the existence of valid consent to military action lies with the acting State. Evidentiary questions regarding the valid issuance of consent to military action must be considered on a case-by-case basis.

13. Legal considerations beyond those concerning the valid issuance of consent may be relevant to the lawfulness of conduct related to military action with consent. Particular regard must be paid to the following obligations, which remain unaffected by the issuance of valid consent. This list is indicative, not exhaustive.

    a) Any obligations imposed by the United Nations Security Council in a binding decision;

    b) The duty to refrain from action that deprives peoples of their right to self-determination;

    c) Applicable rules of international humanitarian law, including the obligation to respect and ensure respect for the Geneva Conventions;

    d) The obligation to prevent and punish, and to refrain from complicity in, genocide;

    e) Applicable rules of international human rights law;

f) Applicable obligations under the Arms Trade Treaty regarding international transfers of conventional arms;

g) The obligation to cooperate to bring any serious breach of a peremptory norm of general international law (*jus cogens*) to an end using lawful means, to refrain from recognising as lawful a situation created by such a breach, and to refrain from rendering aid or assistance in maintaining the situation so created.

14. Where military action is undertaken with valid consent but conduct related to such military action violates other international legal obligations, such as (but not limited to) those listed in Conclusion 13, the validity of the consent is not affected, meaning that the acting State will not have violated the prohibition of the use of force. Any such violation constitutes a separate internationally wrongful act under the relevant applicable legal framework and involves legal consequences, including the obligation of cessation, in relation to the internationally wrongful act(s) in question.

15. Military action with consent undertaken in support of a territorial State that is committing internationally wrongful acts may give rise to the responsibility of the acting State for aiding or assisting those acts.

16. Military action undertaken without the valid consent of the territorial State, as determined by reference to Conclusions 2–12 (and in the absence of an alternative legal justification under the *jus ad bellum*) will constitute a violation of the prohibition of the use of force by the acting State. This applies to military action undertaken where no valid consent has been issued, military action that exceeds the parameters of valid consent as prescribed by the territorial State, and the continuation of military action following the valid withdrawal of consent beyond a reasonable period for the orderly and safe departure of troops.

17. Military action undertaken without the valid consent of the territorial State may constitute an act of aggression by the acting State and may give rise to individual responsibility for the crime of aggression.