

## Conclusion

### *Half-Hearted Multilateralisation of a Unilateral Doctrine*

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This Trialogue has shed light on the legal problems surrounding armed intervention and consent from three different angles:

- historical and conceptual analysis aiming to uncover the origins and links of the current doctrine of consensual military intervention (Dino Kritsiotis);
- in-depth case studies of recent state practice (Olivier Corten); and
- large-N case analysis of instances from state practice (Gregory H. Fox).

Based on their distinct methodologies, each author has made a specific contribution.

- Kritsiotis provided contextual information, tracing the evolution of concepts and uncovering links to, and potential conflicts with, other concepts of public international law. He has provided a substantive and nuanced account, taking an overarching perspective.
- Corten used case analysis to uncover how legal concepts operate in practice and he traced – through the detailed scrutiny of precedents – that practice, as well as the *opinio iuris* of states.
- Fox tested prominent legal concepts by referencing a comprehensive assessment of state practice. He did so by working with existing databases of conflict research – namely, the Uppsala Conflict Data Program (UCDP).

This concluding chapter aims to draw the important threads of this book together. It proceeds in five steps, offering conclusions on the limitation of consensual military interventions (section I) and the institutionalisation triggered by the increased importance of the UN Security Council in the operation of the law (section II). It then takes up the question of whether Security Council practice may contribute to the development of the law (section III), and it addresses the politicisation of the practice of consensual military interventions (section IV). Lastly, it turns to the limits of multilateralisation (section V).

## I. LIMITATION: THE STATE OF NEGATIVE EQUALITY

One contested issue regarding a state's right to invite foreign military intervention concerns the question of whether – and, if so, which – limitations exist under current international law.<sup>1</sup> One traditional question that the authors contributing to this Trialogue address remains a focal point of the academic debate: whether this right is limited in situations in which foreign troops would become involved in a civil war. This (potential) limitation has been discussed as the doctrine of 'strict abstentionism',<sup>2</sup> or 'negative equality',<sup>3</sup> and it has long been strongly supported by scholarship.<sup>4</sup>

The three authors have discussed these limitations from different perspectives. Kritsiotis traced the emergence and evolution of the doctrine of abstentionism by analysing the resolutions of the Institut de droit international (IDI).<sup>5</sup> In its 1975 Wiesbaden Declaration, the IDI postulated that '[t]hird States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State'.<sup>6</sup> In its 2011 Rhodes Resolution, the IDI found that:

Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of

<sup>1</sup> See the general overview on limitations discussed in Anne Peters, 'Introduction: Principle and Practice of Armed Intervention and Conflict', in this volume, section II.B, pp. 11–19.

<sup>2</sup> Eliav Liebllich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2013), 130–40.

<sup>3</sup> The equality referred to in this term is between the government and its internal adversary, the non-state actor. When the armed adversary is prohibited from inviting foreign assistance, so must be – according to this doctrine – the state. This doctrine is premised on the assumption that the support for the government would otherwise take position in an internal conflict and therefore interfere with the right of self-determination of the respective population. See Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), *Report*, vol. II, September 2009, 278.

<sup>4</sup> Derek W. Bowett, 'The Interrelation of Theories of Intervention and Self-Defense', in John N. Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press 1974), 38–50 (41); Oscar Schachter, 'International Law in Theory and Practice', *Recueil des Cours* 178 (1982), 9–396 (160); Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (195–6); Rein Müllerson, 'Intervention by Invitation', in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder: Westview Press 1991), 127–34 (132); Brad Roth, *Governmental Illegitimacy in International Law* (Oxford: OUP 2000), 181; Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance": Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13 (2014), 13–53 (42).

<sup>5</sup> Dino Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, sections IV.A and IV.B pp. 64–73.

<sup>6</sup> IDI, 'The Principle of Non-Intervention in Civil Wars', *Annuaire de l'Institut de Droit International* 56 (1975), 545–9 (547) (Art. 2(1)).

equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.<sup>7</sup>

Fox labelled this position the ‘IDI view’ and tested whether it is confirmed or disproven by international practice – particularly that of the UN Security Council.<sup>8</sup> Based on his case analysis of consensual military interventions upon request and Security Council involvement in each instance, Fox clearly finds that the IDI view is not established practice: the Security Council approved outside intervention in 18 of the 44 internal conflicts under investigation in the chapter. The assessment of a large number of conflicts thus confirms an apparent trend in state practice, according to which interventions in civil wars are the rule rather than the exception.

But there is, as Fox acknowledges, a difficulty. Fox’s dataset clearly shows that interventions in civil war situations are frequent, which provides *prima facie* clear evidence against a comprehensive prohibition of intervention in such situations. However, the data does not readily answer the question of whether the Security Council may have supported certain interventions because an established exception to the general prohibitory rule applied. Even in the IDI view, it is acknowledged that this rule would not apply in cases of ‘counter-intervention’<sup>9</sup> – that is, where non-state actors have already received support from other states.<sup>10</sup> In this case, military assistance upon government request would be lawful. As Fox concedes, it is difficult to test this exception.<sup>11</sup> In the end, however, he argues that the element of counter-intervention was not essential to the Security Council, and he therefore concludes that the doctrine of negative equality is disproven.<sup>12</sup>

Here, Fox essentially provides a large-N proof for a commonly held position – namely, that strict abstentionism is untenable because states often regard interventions in civil war situations as lawful.<sup>13</sup> One finding of

<sup>7</sup> IDI, ‘Military Assistance on Request’, *Annuaire de l’Institut de droit international* 74 (2011), 359–61 (360) (Art. 3(1)).

<sup>8</sup> Gregory H. Fox, ‘Invitations to Intervene after the Cold War: Towards a New Collective Model’, Chapter 3 in this volume, section II.C, pp. 196–201.

<sup>9</sup> On this concept comprehensively, see Kritsiotis, ‘Intervention and the Problematisation of Consent’, Chapter 1 in this volume, section V.B, pp. 82–85.

<sup>10</sup> IDI, ‘The Principle of Non-Intervention in Civil Wars’ (n. 6), 549 (Art. 5).

<sup>11</sup> Fox, ‘Invitations to Intervene after the Cold War’, Chapter 3 in this volume, section V.B, p. 231.

<sup>12</sup> *Ibid.*, p. 233.

<sup>13</sup> Chiara Redaelli, *Intervention in Civil Wars* (Oxford: Hart 2021), 150–1; Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020), 123. See also Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 6th edn 2017), 125.

the Trialogue is therefore that there is no general and rigorous prohibition of intervention in a situation of civil war.

More recent scholarship has, however, taken a more fine-grained approach towards the limits of consensual military interventions.<sup>14</sup> Such limitations have been suggested by supporters of the ‘purpose-based approach’.<sup>15</sup> According to this approach, an invitation to intervene would be unlawful if its purpose were to support a government in settling an internal political strife. The reason for this is that such an intervention would be incompatible with the right to self-determination. The starting point is thus different: there is no general prohibition to intervene in civil wars, but by contrast – and as Corten puts it – there is a ‘strong presumption of legality that characterises a situation in which an intervention has been conducted at the invitation of an official government’.<sup>16</sup> However, when the deployment conflicts with the right to self-determination, the invitation is – according to the purpose-based approach – rendered unlawful. What matters, as the name already signals, is the *purpose* pursued by an intervention.

Corten’s own position shares many of the general assumptions of the purpose-based approach, but he suggests a different terminology and a different way of determining the limitations. He responds to concerns regarding the difficulty of establishing a state’s purpose.<sup>17</sup> Not only may such a purpose be hard to identify because it is an essentially subjective criterion, but also it may be difficult to assess the legality of a purpose such as the fight against terrorism because that assessment depends on unsettled legal concepts such as ‘terrorism’ itself.<sup>18</sup> Corten therefore takes up the proposal of Veronika Bílková, who has suggested an ‘effect-based approach’.<sup>19</sup> Accordingly, Corten refers to ‘the more objective criterion of the “object and effects” of the intervention, which must not violate the right of the population in the inviting state to exercise its right to self-determination’.<sup>20</sup> Based on analysis of the military interventions in Mali

<sup>14</sup> Peters, ‘Introduction’, in this volume, section II.C, pp. 15–16.

<sup>15</sup> This approach has been developed by Karine Bannelier and Theodore Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’, *Leiden Journal of International Law* 26 (2013), 855–74 (860); Karine Bannelier-Christakis, ‘Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent’, *Leiden Journal of International Law* 29 (2016), 743–75 (747).

<sup>16</sup> Olivier Corten, ‘Intervention by Invitation: The Expanding Role of the UN Security Council’, Chapter 2 in this volume, section I.B, p. 109.

<sup>17</sup> See the critical points raised during the Trialogue workshop by Veronika Bílková, ‘Reflections on the Purpose-Based Approach’, *Heidelberg Journal of International Law* 79 (2019), 681–3.

<sup>18</sup> Christian Henderson, *The Use of Force and International Law* (Cambridge: CUP 2018), 366.

<sup>19</sup> Bílková, ‘Reflections on the Purpose-Based Approach’ (n. 17), 683.

<sup>20</sup> Corten, ‘Intervention by Invitation’, Chapter 2 in this volume, section I.B, p. 107.

(2013), Iraq (2014), Syria (2015), and The Gambia (2017), Corten finds that practice supports the existence of limitations. Interventions have not been justified as outright interference in civil wars but rather on the basis of other objectives, such as the fight against terrorism; the essence of the IDI view – the protection of a population’s right to self-determination – remains untouched. The objects and effects clearly show, Corten argues, that states aim to refrain from interfering with the right to self-determination.<sup>21</sup>

Fox raises two objections to this conclusion. First, he argues that analysis of a limited number of cases is not enough to support this claim and that an overall assessment of state practice shows rather that general limitations to the right to invite foreign intervention do not exist.<sup>22</sup> Second, he finds the assumption of a general limitation based on the right to self-determination normatively unconvincing, since, under this view, the right to self-determination is protected only in the abstract. In many cases, the people, Fox emphasises, ‘have made an *actual* choice’, because they had the right to participate in an election. In other words, if an elected government invites foreign military support, such support may be very much in line with the right to self-determination.<sup>23</sup> Here, it becomes clear that – as Kritsiotis puts it – ‘the “self” can become a hotly contested idea’.<sup>24</sup>

Thus a second outcome of the Trialogue is that it adds substance and nuance to the debate on the principle of self-determination as a limit to consensual interventions, with no existing or emerging consensus between the authors. The authors are divided on the question of whether self-determination poses a limit to consensual military interventions under the *lex lata*. Their disagreement appears to be mitigated if we change the perspective and ask not whether self-determination poses a *theoretical* limit but whether it operates as a limit *in practice*. In fact, even if interventions were lawful only when their ‘purpose’, or ‘object and effects’, do not violate the right to self-determination, it seems that states will often find it easy to frame their intervention as pursuing a legitimate purpose. This exercise does not seem to be too demanding, because the relevant legal concepts – such as self-determination, counter-intervention, or terrorism – are sufficiently indeterminate. States will therefore usually be able to present a face-saving justification that asserts the legality of their actions. For that reason, Corten concludes his chapter with a critical diagnosis ‘that the various

<sup>21</sup> *Ibid.*, section VI.A, p. 172.

<sup>22</sup> Fox, ‘Invitations to Intervene after the Cold War’, Chapter 3 in this volume, section VI.A, p. 257.

<sup>23</sup> *Ibid.*, p. 258 (emphasis original).

<sup>24</sup> Kritsiotis, ‘Intervention and the Problematisation of Consent’, Chapter 1 in this volume, section VI, p. 99.

alternative justifications (counter-intervention, counter-terrorism, self-determination, etc.) given by the intervening states largely deprive the doctrine of non-intervention of all normative constraining effect'.<sup>25</sup> In other words, even if we were to assume that the limitation exists as a matter of law, it seems it would not provide any tight restriction to states willing to act in practice.<sup>26</sup>

This discrepancy between words and deeds poses the much-debated, yet still pertinent, question about the relationship between facts and norms in international law. Should international lawyers act as advocates of legal normativity, as well as specific norms – that is, should they reconstruct norms and uphold them, even if primarily at a discursive level, and even if the practical implementation and effect remain precarious? Or should they aim for descriptive accuracy, taking a lack of sufficient implementation as evidence that no general limitation to the right to invite foreign intervention exists and that states' declarations of respect for self-determination are 'cheap talk'? The answer to such questions and the position a scholar adopts are essentially political in attitude, politics shaping expectations of what international law is meant to achieve.

In this Trialogue, three different paradigmatic approaches to international law have been employed:

- Corten's restrictive approach to the use of force, aiming to limit lawful uses of force;
- Fox's aim for comprehensiveness and analytic accuracy, which more strongly emphasises the practice of states rather than their *opinio iuris*; and
- Kritsiotis's approach, comprising conceptual and historical analysis, which does not aim to determine the exact state of the law at a specific moment in time, but rather is interested in broader trajectories and in understanding 'how and why these limitations on consent took root in the way that they did'.<sup>27</sup>

These different premises also find expression in different methodological approaches, particularly to the interpretation of state practice. The Trialogue illustrates the challenges, volatility, and politics involved in interpreting such practice. One significant challenge is the selection of cases, and the breadth and depth of case analysis; another is legal assessment, because the

<sup>25</sup> Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.B, p. 178.

<sup>26</sup> See also de Wet, *Military Assistance on Request* (n. 13), 225.

<sup>27</sup> Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section I, p. 30.

factual situations so often remain uncertain. Additionally, it is not often clear of which facts an actor was aware when they made an assessment regarding the legality of an intervention at a specific moment in time. Moreover, the line between legal and political positions is not clear-cut, and there is room for interpretation, so that scholarship is divided on whether declarations about the purposes of an intervention should be seen to have legal or merely political significance.<sup>28</sup> The exercise thus remains fuzzy and legal positions can easily be challenged from either direction.<sup>29</sup>

## II. INSTITUTIONALISATION: THE ROLE OF THE UN SECURITY COUNCIL

A further finding of the Trialogue – one on which there is broad agreement between the authors – relates to the institutional environment in which consensual military interventions are regularly addressed. Here, the Trialogue has raised and substantiated a finding that marks an interesting difference between the legal debate on military assistance on request and other developments in the *ius contra bellum*: all three contributions highlight the significance of the UN Security Council in the practice of consensual military interventions. This aspect is at the centre of Corten's and Fox's chapters, which refer to 'a new collective model' (Fox) and to the 'expanding role of the Security Council' (Corten) in their titles. Kritsiotis also highlights the role of the Security Council in the operation of consent within the *ius contra bellum*.<sup>30</sup> Its relevance is surprising in view of the widely held belief that the Security Council is, in fact, not capable of adequately guaranteeing international peace and security. A crisis diagnosis seems to prevail within the general debate, pointing out that the Council is regularly blocked and incapable to act.

The contributions in this Trialogue show that, in recent decades, the Security Council has, in practice, taken a crucial role in cases of consensual military intervention. Many of these instances of state practice occurred in the last ten years – a time in which a renewed global polarisation has often been assumed. Corten and Fox particularly emphasise the role of the Security Council. In 36 of

<sup>28</sup> Arguing for a merely political dimension, see Erika de Wet, 'The (Im)permissibility of Military Assistance on Request during Civil War', *Journal on the Use of Force and International Law* 7 (2020), 26–34 (31).

<sup>29</sup> This Trialogue has considered, but does not investigate in depth, other potential limitations of the right to invite foreign interventions, such as limitations stemming from human rights that might be relevant when the foreign state may get involved in human rights abuses of the inviting state. See Peters, 'Introduction', in this volume, section II.B, pp. 16–17.

<sup>30</sup> Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section V.D, pp. 95–97.

the 44 cases Fox analyses, the Security Council reacted to interventions; similarly, the Council played a central role in all of Corten's in-depth case studies. Its involvement was particularly crucial in situations of internal turmoil where several actors competed for effective control over a state's territory.<sup>31</sup> In such situations, it is inherently difficult to identify the entity that should be allowed to issue an invitation for a foreign state to intervene.

Fox and Corten agree that the doctrine on consensual military assistance has already been – or, at least, is about to be – multilateralised.<sup>32</sup> In other words, the doctrine may contain a unilateral core according to which every state is in principle allowed to invite another state's intervention, but the appreciation of the facts and the determination of the respective government is recommended to a multilateral process within the Security Council. Fox and Corten, however, take different turns in their arguments and arrive at different theoretical conclusions. Fox sees the old doctrines (what he calls the 'IDI view' and the 'Nicaragua view') as outdated and too schematic. They were, he argues, justified during the Cold War when the Security Council was actually incapable of acting; today, there is no need for 'categorical' and 'prophylactic' prohibitions – such as the doctrine of negative equality – because the Security Council is able to take a more fine-tuned, nuanced, and therefore more fitting approach.<sup>33</sup>

Corten disagrees. In his reading, both the Security Council and state practice respect the right to self-determination of peoples as the central legal reasoning behind the negative equality doctrine. He therefore regards multilateralisation as a form of operationalising and rationalising limitations of the right to consensual military interventions.<sup>34</sup>

### III. LEGISLATION? THE UN SECURITY COUNCIL'S CONTRIBUTION TO LAWMAKING

The institutionalisation of the practice of consensual military interventions raises a more general question concerning the status of Security Council practice according to the sources of international law. This question is particularly relevant to the development of the international law on consensual military interventions: should the new Council practice be seen as a self-enclosed *lex specialis* or as evidence of customary international law? Can we

<sup>31</sup> See, e.g., the cases of Albania and Mali, discussed by Kritsiotis, *ibid.*, pp. 95–97.

<sup>32</sup> Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VI.A, p. 250; Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.

<sup>33</sup> Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VI.A, p. 251.

<sup>34</sup> Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.

draw from it any conclusions regarding the state of the law, or are we confronted with a collection of case-specific decisions that cannot be generalised? Fox argues that, because the member states of the United Nations have empowered the Security Council to act on their behalf and because the Council in fact dominates the scene, this body's practice should count as important evidence of customary international law in evaluating the lawfulness of consensual interventions.<sup>35</sup>

Generally speaking, under certain circumstances, the practice of international organisations can provide evidence of customary international law. The International Law Commission (ILC) has cautiously formulated the following, indicating that, in 'certain cases, the practice of international organizations ... contributes to the formation, or expression, of rules of customary international law'.<sup>36</sup> General criteria for assessing and weighing the organisation's practice are whether the practice is carried out on behalf of, and whether the practice is endorsed by, the member states of the organisations. Furthermore, the ILC recommends taking into account 'the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is *ultra vires* ... ; and whether the conduct is consonant with that of the member States of the organization'.<sup>37</sup>

The qualification of the Security Council under these criteria is controversial. On the one hand, Article 24 of the UN Charter makes it clear that the Security Council acts on behalf of the UN member states; on the other hand, the Security Council's mandate is not that of a judicial organ.<sup>38</sup> It is not called on to legally settle conflicts, but rather tends to – as Corten points out – act 'pragmatically, as a political body'.<sup>39</sup> Fox's concern is that, should a reading be too strict, customary international law would essentially become irrelevant.<sup>40</sup> Because of the active role of the Security Council, states would not see any need to actively engage in specific conflicts and hence in most cases – in view of the multilateralisation of the doctrine of consensual military interventions – there would simply not be enough state practice to establish any legal rules.

<sup>35</sup> Gregory H. Fox, Kristen E. Boon and Isaac Jenkins, 'Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', *American University Law Review* 67 (2018), 649–731.

<sup>36</sup> International Law Commission, 'Text of the Draft Conclusions on Identification of Customary International Law and Commentaries Thereto', in *Yearbook of the International Law Commission*, vol. II (pt 2) (2018), 91–113 (96, concl. 4.2).

<sup>37</sup> *Ibid.*, 97 (Commentary to concl. 4, para. 7).

<sup>38</sup> See Christine D. Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 21.

<sup>39</sup> Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 111.

<sup>40</sup> Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VII, p. 268.

Even though Fox takes a critical stance towards Corten's view,<sup>41</sup> their eventual positions do not seem to be too far from one another. Corten does not generally oppose the relevance of Security Council practice in establishing rules of customary international law; rather, he opts for a close reading of each case and for an assessment of the reasons that explain Security Council approval or condemnation. Legal relevance can arise only where legal reasons and a sense of legal commitment exists. Where the Security Council acts out of political reasons, its actions cannot be referred to as evidence of customary international law.<sup>42</sup> In any case, the result is that a close reading of each case remains mandatory.

#### IV. POLITICISATION: INCREASING THE COMPLEXITIES

These developments have created a multilateralised framework for the unilateral concept of consensual military intervention. On the plus side of these developments, consensual interventions that were formerly disputed legally – for example because it was unclear which entity was to be regarded as the government – are now subject to an essentially undisputed (legal) qualification. Once the Security Council has given its blessing to a government and its call for assistance, the legality is unchallenged in state practice (at least from an *ius contra bellum* perspective). As Benjamin Nußberger describes it, when the Security Council becomes active, conflicts are taken out of the grey zone and an intervention receives a 'green light'.<sup>43</sup>

This does not come without challenges and problems. One obvious limitation of the institutional setting is that it will not be possible for the Security Council to position itself in opposition to an intervention by a permanent member. For example, the Security Council was not able to take a position on the invitation extended by Ukraine's former President Victor Yanukovich to the Russian Federation,<sup>44</sup> which, among other things, raised questions of whether Yanukovich was still in a position to invite foreign intervention in view of his loss of territorial control. For these cases, unilateral and interest-guided interpretations and applications of the law will prevail – a setting that dominated throughout the Cold War era.<sup>45</sup> Whether or not there is, in fact,

<sup>41</sup> *Ibid.*, section VI.B, p. 266.

<sup>42</sup> Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 112.

<sup>43</sup> Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"', *Journal on the Use of Force and International Law* 4 (2017), 110–60 (159).

<sup>44</sup> UN Doc. S/2014/146, 3 March 2014, 2.

<sup>45</sup> Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.

a ‘new cold war’ emerging between the poles of the United States, on the one hand, and China, on the other, it remains an unanswered question whether such polarisation will have effects on the Security Council’s ability to fulfil this new role in the future. It seems both possible that further polarisations might spill over from the major conflicts (especially Russia’s aggression against Ukraine) into other cases and that the Security Council will prove able to maintain its capability to act – at least as long as the direct interests of its five permanent members are not affected.

But challenges also exist beyond a potential paralysis of the Security Council. In view of the context and the case-specific approach it takes, and in view of the mixture of political and legal considerations that enter into the equation of whether and how it will respond to an individual conflict, we can observe increased complexity that creates challenges. There is, as Kritsiotis puts it, an ‘abiding worth of consent in the dynamics of the laws of the *ius ad bellum*’, but there is also an apparent ‘fragility’ of consent: ‘[I]ts presence cannot be assumed or extended. Its function cannot be generalised but is instead wrapped in the politics and normativity of the particular.’<sup>46</sup> In other words, the practice of consensual intervention now depends on a more complex process of which politicisation is an inherent part – and the predictability of the law is negatively affected.

#### V. MULTILATERALISATION AND ITS LIMITS

An overall view on the current institutionalisation reveals its significant limitations. In fact, the Security Council’s role may be described as half-hearted multilateralisation. Instead of creating mandates for interventions under Chapter VII of the UN Charter, the Council’s current practice is to give its blessing to unilateral interventions. This strategy is well known from other fields and doctrinal debates on the *ius contra bellum*, such as those over the right to self-defence against non-state actors.<sup>47</sup> There, the Security Council has repeatedly acted in a way that has been interpreted as expressing approval for self-defence measures. In the aftermath of the 9/11 terrorist attacks of 2001, it reaffirmed – in the preambles to Resolutions 1368 and 1373 – the inherent right to self-defence, which the United States and its coalition partners interpreted as endorsement of their military intervention

<sup>46</sup> Kritsiotis, ‘Intervention and the Problematisation of Consent’, Chapter 1 in this volume, section IV.A, p. 64.

<sup>47</sup> Mary-Ellen O’Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors* – Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019).

in Afghanistan.<sup>48</sup> With regard to the rise of the so-called Islamic State in the territories of Syria and Iraq, in 2015 the Security Council called upon member states 'to take all necessary measures, in compliance with international law, . . . to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria'.<sup>49</sup> Here, again, members of a coalition of Western states intervened in Syria without the Syrian government's consent and they interpreted the Security Council's resolution as an endorsement of these measures positioned as self-defence.

Thus the Security Council appears to only weakly provide a normative framework for specific conflicts; it favours instead the less ambitious approach of supporting – in language that is sometimes clear, sometimes ambiguous – certain unilateral acts. In this way, the Security Council fails to establish a framework for such interventions. It does not set out strategic and operational goals and limitations, but leaves this to the intervening states. This blurring of measures taken within the United Nations' collective security framework and unilateral measures is unsatisfactory. It precludes legal certainty, and it allows states to provide multiple justifications for their interventions that partly overlap and partly contradict each other.

The law on consensual military interventions remains a contested field. It is our hope that this book's partly complementary and partly contrasting accounts of the law have at least illuminated its current trajectories.

<sup>48</sup> UN SC Res. 1368 of 12 September 2001, cons. 3; UN SC Res. 1373 of 28 September 2001, cons. 4.

<sup>49</sup> Resolution 2249 of 20 November 2015, UN Doc. S/RES/2249, para. 5.