The South African Development Community In Its Brat Era: A Case For Legalizing Anticipatory Consent Clauses in Regional Collective Defense Treaties

A person wearing a green hat and a necklace of bullets

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Introduction

In early 2022, the armed rebel group M23 officially broke the 2013 United Nations-negotiated ceasefire, reigniting hostilities in the eastern provinces of the Democratic Republic of the Congo (DRC). As hostilities escalated, the South African Development Community (SADC), invoking principles of regional and collective security, deployed SAMIDRC in December 2023 to assist the DRC’s efforts to restore peace. SADC’s involvement in the conflict has thus raised questions about whether the treaty-body’s use of armed force within the sovereign territory of the DRC is appropriately justified under international law. Bringing together a legal analysis of existing *lex lata* with appropriate consideration of the distinct policy incentives facing State actors, the deployment of SAMIDRC presents a case for legitimizing anticipatory treaty-based consent as a justification for the use of force.

Context of the Conflict

The Democratic Republic of the Congo (DRC) is one of the world’s most resource-rich lands with an estimated $24 trillion in untapped mineral resources.[[1]](#footnote-2) And yet, the central African nation has been plagued by violence. For decades, the country’s eastern provinces have remained in an ongoing, active state of conflict.[[2]](#footnote-3) The Kivu region in particular is effectively run by over one hundred armed rebel groups, maintaining a constant state of violence, instability, and humanitarian crisis.[[3]](#footnote-4)

The conflict arises from a complex web of political, economic, and socio-ethnic tensions attributable to both the DRC’s long colonial history and violent decolonization as well as the catastrophic impact of the First and Second Congo Wars.[[4]](#footnote-5) The region has effectively become an extended battleground upon which the ethnic tensions underscoring the 1994 Rwandan Genocide have continued to fuel violent clashes.[[5]](#footnote-6) The muddling of boundaries separating the status of State military forces with that of armed rebel groups has produced a power vacuum whereby such insurgent groups have been able to establish and administer political control over various territories.[[6]](#footnote-7) The ability of armed groups to establish such operational, despite illegitimate, political authority has institutionalized a destabilized war economy whereby actors use violence to maintain a state of destruction and destabilization conducive to the economic exploitation of the region’s unparalleled resource wealth.[[7]](#footnote-8) Such wealth has also globalized the conflict as regional and international actors seek to reap these profits.[[8]](#footnote-9)

One of the most prominent rebel groups is the *Mouvement du 23 Mars* (M23). Primarily comprised of ethnic Tutsis, the group emerged in the wake of a failed 2009 effort to integrate non-state forces involved in the Second Congo War with the Congolese military forces (FARDC).[[9]](#footnote-10) The group is known for its particularly brutal tactics: targeting of women and children through barbaric sexual violence, killing and maiming, abduction, forced displacement, and the recruitment of child soldiers.[[10]](#footnote-11) In 2013, the United Nations (UN) Security Council deployed a peacekeeping force, MONUSCO, to support FARDC and eventually facilitate the brokering of a ceasefire later that year.[[11]](#footnote-12)

Nearly a decade after the ceasefire was signed, M23 reemerged on October 20, 2022.[[12]](#footnote-13) By the end of the year, they had regained control of several territories within the province of North Kivu.[[13]](#footnote-14) According to the latest report issued by the Group of Experts on the DRC, under mandate of the United Nations Security Council, reported that the months between November 2023 and March 2024 saw a seventy percent increase in M23’s area of influence and by April 2024, the group’s occupied territory covered the largest area on record.[[14]](#footnote-15)

In December of 2023, in response to the escalating violence, the South African Development Community (SADC), one of the African Union’s eight regional treaty bodies and the leading peace and security body for Africa’s Southern States, entered the conflict.[[15]](#footnote-16) The SADC Mission to the DRC (SAMIDRC), involving troops from SADC member States Malawi, South Africa, and Tanzania, was deployed to support FARDC and the government of the DRC in “restor[ing] peace and security in the eastern DRC” and quelling “the resurgence of armed groups.”[[16]](#footnote-17)

The authorization and operation of SAMIDRC seems to cause friction with the accepted norms of international law. Article 2(4) of the UN Charter explicitly prohibits “the threat or use of force against the territorial integrity or political independence of any state,” unless otherwise sanctioned by the UN Security Council.[[17]](#footnote-18) This principle of non-use of force has since been codified as a non-derogable *jus cogens* norm.[[18]](#footnote-19) As international law has developed over the years, two doctrines allowing for the use of force have been generally accepted and established in the legal canon. The first is the doctrine of *jus ad bellum*, governing States’ inherent right to resort to the use of force in individual or collective self-defense pursuant to the provisions of Article 51 of the UN Charter.[[19]](#footnote-20) Second is the doctrine of “intervention by invitation” under which States may, in specific instances, use force in another State’s territory if explicitly invited to do so by the affected state.[[20]](#footnote-21)

As it stands, the SADC has not stated any legal basis justifying their use of force within the DRC’s sovereign territory nor has it invoked either the *jus ad bellum* or intervention by invitation doctrines.[[21]](#footnote-22) Further, both doctrines seem inadequate when applied to the present conflict. Thus, despite the DRC’s clear need for military assistance in combatting the M23 conflict, it remains to be seen whether SADC’s conduct was sufficiently legitimate under international law.[[22]](#footnote-23)

However, SADC has, in official communiques on the approval and deployment of SAMIDRC, repeatedly invoked the principle of collective defense as provided for in the regional organization’s 2003 Mutual Defense Pact (the Pact).[[23]](#footnote-24) In that Pact, member states provided preemptive consent to military intervention, should it be a necessary response to an armed attack against a member state.[[24]](#footnote-25) It thus begs the question as to whether such anticipatory consent clauses, authorizing treaty members to intervene militarily in each other’s territories to ensure the region’s collective security, is sufficient to serve as an independent legal basis to legitimize the use of force.

This report takes the position that anticipatory intervention treaties provide states like the DRC the unique opportunity to receive critical military support from regional partners without endangering their strategic interests. Developing international law to legitimize the practice will ensure that states are more resilient to regional security threats while maintaining a viable global system of legal norms to protect against abuses of that power.

The following discussion begins with the accepted principles of *jus ad bellum* and intervention by invitation, assessing both doctrines’ legal adequacy and strategic viability. After demonstrating the incompatibility of the current legal canon with the present conflict, the report will then proceed to introduce anticipatory intervention clauses as a third mechanism justifying regional military interventions. Here, I will establish the practice as a rising phenomenon in States’ interactions with each other and provide a legal basis for its use that is grounded in customary principles already embedded in the relevant *lex lata*. Application to the conflict in the DRC will illuminate the unique value of anticipatory intervention clauses.

Ultimately, this article calls for a reformed approach to understanding and applying international law. Law can no longer remain an isolated and unilateral inquiry. If it is to remain the Cerberus of the internation order, it must be understood and developed within the context of the ever-evolving nature of global conflict and the resulting dynamic needs of State actors.

Established Legal Canon

Existing legal justifications for the use of force would place the DRC at a dangerous crossroad. The country would have to decide whether to invoke the likely inapplicable *jus ad bellum* doctrine and critically limit its ability to combat the M23 threat, or to invoke the “intervention by invitation” doctrine that would produce significant strategic disadvantages both on and off the battlefield.

*Jus Ad Bellum*

Invoking *jus ad bellum* doctrine in the present context would not only require SADC to take a firm stance on long-debated issues regarding the doctrine’s legal scope, but would also trigger substantial constraints on SAMIDRC’s ability to actually neutralize the threat. The doctrine of *jus ad bellum* is codified in Article 51 of the UN Charter which states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”[[25]](#footnote-26) Article 51 has status as a *jus cogens* norm.[[26]](#footnote-27) It critically reflects the international community’s recognition of states’ fundamental duty to protect those that reside within its sovereign borders.[[27]](#footnote-28) It naturally follows that states would have an inherent right to use force in self-defense in order to uphold that duty.[[28]](#footnote-29) As summarized by Howard Hensel, there are seven conditions that govern whether states can justly resort to the war[[29]](#footnote-30)

(1) Legitimacy: only legitimate, sovereign authorities can authorize the resort to armed conflict. (2) Just Cause: force may be used only to secure just goals. (3) Proportionality: the positive benefits created by a better peace following the conclusion of the armed conflict must outweigh negative costs in human lives, damage to property, and societal dislocation incurred as a result of the armed conflict. (4) Right Motives: the motivation for resorting to the use of armed force must be to promote good or avoid evil. (5) Last Resort: all other reasonable efforts to resolve the dispute peacefully must have been taken before resorting to armed hostilities. (6) Prospect of Victory: except in situations involving self-defense, there must be a reasonable prospect for the attainment of the just objectives sought. (7) Declaration: the legitimate authorities must issue an explicit statement declaring the commencement of armed hostilities. Finally, (8) Relative Justice of Cause: often, various antagonists engaged in hostilities pursue causes that are based upon relative degrees of justness.[[30]](#footnote-31)

*Jus ad bellum* is, typically, a strictly applied and restrictive domain, placing the burden of proving these conditions are met on the state claiming self-defense.[[31]](#footnote-32) As affirmed by the International Court of Justice (ICJ) in the *Nicaragua* case, the text of Article 51 imposes a reporting requirement whereby the attacked state must declare itself as the victim of an armed attack and immediately report its use of force to the UN Security Council.[[32]](#footnote-33)

Because the conflict caused by M23’s conducting of hostilities has blurred the lines between the domestic and the international as well as the State and non-State, the mere *prima facie* applicability of *jus ad bellum* remains, at best, ambiguous. While initially recognized as an armed rebel group—thus a non-state actor—the exact status of M23 in the present conflict remains unclear.[[33]](#footnote-34) Indeed, evidence revealed that Rwanda is providing some degree of material support to the insurgent group which members of the international community have been quick to loudly condemn.[[34]](#footnote-35) However, while it is clear that Rwanda is providing some support to M23, whether the nature of their relationship is sufficient to satisfy the overall control test as espoused by the ICJ in the *Tadíc* case remains undetermined.[[35]](#footnote-36) The ambiguity of M23’s status, in turn, causes confusion as to whether the conflict in question is an international armed conflict (IAC) or non-international armed conflict (NIAC).

There are two potential arguments that may justify the deployment of SAMIDRC under the *jus ad bellum* doctrine, both of which would have to be predicated upon tenuous factual and legal assumptions. Under the first argument, it would have to be assumed that the SADC believes the operation of M23 to be sufficiently attributable to Rwanda such that the conflict would effectively be between two State actors. This assumption would change the character of the conflict from its current status as a non-international armed conflict (NIAC) to that of an international armed conflict (IAC) and the *jus ad bellum* doctrine would apply as provided for in the text of Article 51. Despite the allegedly unrelated presence of Rwandan military forces in the region and SADC’s statements about the rebel groups operating in the eastern DRC “with support from foreign aggressors,” neither the treaty organization nor the DRC itself have definitively identified Rwanda as a party to the ongoing conflict.[[36]](#footnote-37) Further, such an assumption would still require sufficient basis to pass the *Tadíc* case’s overall control test.[[37]](#footnote-38) This would require evidence demonstrating Rwanda’s role in not only “financing, training and equipping or providing operational support,” but also in “organizing, coordinating or planning the military actions” of M23.[[38]](#footnote-39)

The second argument under *jus ad bellum* would require an assumption that SADC has interpreted the right to use force in self-defense as applicable to armed attacks by non-state actors. Such an argument would maintain the conflict’s character as an NIAC but would require reliance on a particular answer to a question that is far from settled in international legal scholarship. In 2004, the ICJ ruled that that only an armed attack by another state may trigger the right to self-defense under Article 51.[[39]](#footnote-40) Since then, however, critics have maintained that the text of Article 51 makes no mention of who perpetrates the armed attack. This position is buttressed by Security Council Resolutions 1368 and 1373 which, in the addressing the September 11 attack perpetrated by Al-Qaeda terrorists, refer to states’ inherent individual and collective self-defense right.[[40]](#footnote-41) Given its legal ambiguity and the lack of explicit communication from the SADC in this regard, the second argument seems just as inviable as the first.

It is also worth noting that the DRC has distinct and persuasive incentives to steer clear of invoking *jus ad bellum* in its conflict with M23, incentives that, while political and strategic, are far more cogent than the available, unsettled legal arguments. The violence in the DRC is sufficiently sustained and intense such that is an armed conflict governed by the law of *jus in bello*.[[41]](#footnote-42) Under *jus in bello* doctrine, in an IAC, belligerents attributable to the warring State parties are legally considered combatants and entitled to the rights associated with that status.[[42]](#footnote-43) Thus, if M23 is under the overall control of the Rwandan government sufficient to internationalize the conflict, M23 fighters would be legitimized as combatants. This would mean M23 fighters would be entitled to combatant immunity and prisoner of war status.[[43]](#footnote-44) Practically, SADC, by invoking *jus ad bellum*, would be officially legitimizing the existence and power of an armed rebel group and endowing its fighters with a series of protections.[[44]](#footnote-45) This would severely constrain the actions the DRC and SAMIDRC would be lawfully able to take in fighting M23 and would render the establishment of a sustainable peace much more difficult. Doing so also sets a dangerous precedent that may motivate some of the other one hundred rebel groups in the Kivu region to follow M23’s example. A recent report issued by the Group of Experts of the DRC suggests there may be sufficient evidence to prove Rwanda’s actions demonstrate its overall control over M23.[[45]](#footnote-46) Thus, the invocation of *jus ad bellum* in justifying the deployment of SAMIDRC may be legally sound, yet it remains a path the DRC is unlikely to pursue given the strategic consequences that would necessarily follow.

*Intervention by Invitation*

SAMIDRC may also be legally justified if it operates pursuant to an invitation made by the DRC to the SADC, sanctioning such a use of force within its sovereign borders. While legal scholars debate whether ~~or not~~ it exists as an exception to Article 51 self-defense or stands on its own as an independent legal justification, the doctrine of intervention by invitation has been generally accepted into international law as a valid state practice for which there is sufficient *opinio juris*.[[46]](#footnote-47)

Intervention by invitation is predicated upon the notion of consent.[[47]](#footnote-48) It is a foundational principle of customary international treaty law that State’s may voluntarily consent to relinquishing a degree of their sovereign authority to other states or treaty organizations.[[48]](#footnote-49) Consent-based intervention is a legal mechanism whereby States may legitimately exercise this sovereign power for the purpose of honoring its sovereign duty to protect those within its borders. In order to be valid, an invitation must: (1) be issued by the valid or recognized government of the requesting state, (2) contemporaneously reflect the ad hoc will of the state, (3) not grant authority or powers that the requesting state itself does not possess, and (4) be explicitly made as opposed to being assumed by observing state conduct *ex poste facto*.[[49]](#footnote-50) Indeed, it is particularly important for invitations to be explicit and precede interventions, lest the affected state be vulnerable to coercion or abuse by its greedy neighbors.[[50]](#footnote-51) Additionally, intervention by invitation doctrine is not subject to the same procedural thresholds that hindered the applicability of traditional *jus ad bellum* doctrine.[[51]](#footnote-52) In other words, whether or not the conflict with M23 is an NIAC or an IAC does not change the applicability of the doctrine.[[52]](#footnote-53)

However, when applied to the present conflict, there is little evidence that the doctrine’s required elements have been met. For SAMIDRC to be so justified, the invitation would have to be issued by the DRC’s current government, reflect the ad hoc will of the country, have been explicitly made to, rather than assumed by, SADC, and be limited to the boundaries of the DRC’s own power.[[53]](#footnote-54) While the DRC has cooperated with SAMIDRC and seems generally favorable to the operation, no explicit invitation or request is on record.[[54]](#footnote-55) The most salient evidence in this regard is a post made Tanzania Minister of Foreign Affairs and East African Cooperation, in which he stated that SAMIDRC “was a result of the August 2023 SADC Summit decision to accept a request by the DRC government, in conformity with SADC Mutual Defense Pact, to deploy a military mission to assist it [to] address security challenges on its Eastern part.”[[55]](#footnote-56) There is no evidence, however, corroborating the existence of such a request.[[56]](#footnote-57) The DRC’s operational consent alone is insufficient to satisfy the “explicit” requirement consent.[[57]](#footnote-58)

Taking the doctrine within the broader context of the DRC’s strategic interests reveals why making such an invitation may be an inviable course of action for the DRC. Putting such an explicit invitation on record would require the DRC to admit its inability to independently combat the threat posed by M23.[[58]](#footnote-59) States are inherently prideful actors. Such a vulnerable admission would likely receive strong opposition within the country’s leadership. Additionally, doing so, especially prior to the actual deployment of military support, would leave the FARDC forces that are currently operational critically, even if only temporarily, vulnerable on the battlefield. FARDC combatants would have to shift from the offensive to the defensive. The DRC is unlikely to jeopardize any present military advantages in favor of limiting potential legal liability in the hypothetical and distant future. The incentive to maximize military advantages is particularly salient when considering that FARDC is operating in a territory overrun with hundreds of insurgent armed groups of which M23, is only a single, if particularly powerful, member.

Off the battlefield, the DRC is engaged in negotiations with Rwanda for the removal of Rwandan forces and an end to Rwanda’s forceful conduct, unrelated to M23, within and near the DRC’s borders.[[59]](#footnote-60) Bargaining interactions between States is incredibly fragile at all times and States rely on demonstrating strategic resolve and powerful capabilities in order to secure the most favorable outcomes.[[60]](#footnote-61) An explicit invitation for SADC intervention, an explicit request for help, would be seen as indicative of the DRC’s weakness. Such a weakened bargaining position would leave the country vulnerable for Rwanda to intensify its resolve, offering fewer concessions and extracting more from its opponent.[[61]](#footnote-62) Thus, there is little evidence to support SAMIDRC’s legality under intervention by invitation doctrine and an assessment of the strategic context in which such a doctrine would be invoked offers a compelling explanation.

Anticipatory Intervention Treaties

A third alternative mend this gap between legal and strategic concerns. Anticipatory intervention clauses are treaty provisions in which states consent to use of force within their territorial borders in anticipation of a conflict for which they may require international support.[[62]](#footnote-63) While evidence invoking *jus ad bellum* and intervention by invitation has been scarce, SADC’s official communication has repeatedly called upon the organization’s Mutual Defense Pact of 2003 (the Pact).[[63]](#footnote-64) In the January 2024 press statement announcing the deployment of SAMIDRC, the SADC specifically stated that the mission was deployed in accordance with the “principle of collective self-defense" and the Mutual Defense Pact’s principle of collective action.[[64]](#footnote-65) Indeed, article 6 of the Pact, asserts the organization’s view that, “an armed attack against a State Party shall be considered a threat to regional peace and security and such an attack shall be met with immediate collective action.”[[65]](#footnote-66)

This is far from the first of its kind. Indeed, anticipatory consent clauses have invoked repeatedly throughout the 20th Century.[[66]](#footnote-67) Such provisions have become an increasingly prominent feature of regional treaties organizations.[[67]](#footnote-68) This is especially true on the African continent, where the African Union and its eight regional bodies, have included them in their respective mutual defense pacts.[[68]](#footnote-69) Indeed, the SADC invocation of the doctrine would affirm SAMIDRC as a card-carrying member of a trend sweeping across the continent.

Anticipatory treaty clauses are typically operationalized in contexts where established humanitarian law is inapplicable or in which invoking it would trigger too many unfavorable consequences.[[69]](#footnote-70) In that sense, it is a notable mechanism for ensuring that legal compliance does not come at the cost of effective strategy and vice versa. Despite the rise in use and strategic efficacy, international humanitarian law has been notably silent on the legitimacy of such clauses.[[70]](#footnote-71)

The legal basis for such forward-looking intervention clauses is firmly grounded in the principle of state consent and the legal importance of states’ ad hoc will.[[71]](#footnote-72) Contemporary legal scholarship has advanced the view that such anticipatory intervention clauses should be considered an alternate, but still legally valid, form of invitation under invitation to intervene law.[[72]](#footnote-73) While debate remains, intervention by invitation doctrine is understood by most scholars as separate from rather than as an exception to article 51 and jus ad bellum. Thus, as an expansion of intervention by invitation, such anticipatory defense treaties would be understood as existing within an independent class of justifications for the use of force, free from the procedural constraints of article 51.

At present, the doctrine only considers invitations made contemporaneously to the conflict in question.[[73]](#footnote-74) However, the requirement stems from the principle that intervention may only be legally legitimate if the ad hoc will of the affected state has been veritably considered.[[74]](#footnote-75) Contemporaneous invitations clearly honor this requirement.[[75]](#footnote-76) But many argue that anticipatory consent to intervention would still express and be subject to the ad hoc will of the state.[[76]](#footnote-77) Indeed, nothing about the consent requirement indicates a need for temporal proximity.[[77]](#footnote-78) Further, states would still retain the “right to revoke”.[[78]](#footnote-79) The right to revoke is based on the principle of state sovereignty and establishes state’s right to withdraw its consent to intervention “at any time”.[[79]](#footnote-80) In other words, states retain, despite previously given consent, the right to revoke consent in the contemporaneous instance of a particular conflict.[[80]](#footnote-81) Thus, if a state, knowing its obligations under a mutual defense pact to which it has signed onto, chooses not to invoke its right, that choice could be a valid expression of the state’s ad hoc will.[[81]](#footnote-82) In deciding not to revoke consent, the state is actively considering the merits of intervention and making a decision about whether or not it would be welcome.[[82]](#footnote-83) Anticipatory intervention clauses in regional treaties honor the underlying principles of invitation and consent-based doctrine and are thus consistent with already-established legal norms.[[83]](#footnote-84)

Reliance on the anticipatory consent provided for in Article 6 of SADC’s Mutual Defense Pact would provide adequate legal legitimacy for the operation of SAMIDRC without the strategic costs induced by established doctrines. Similar to traditional invitation doctrine, anticipatory treaty-based consent would be applicable to the conflict with M23 regardless of whether or not it is an IAC or an NIAC.[[84]](#footnote-85) Thus, it doesn’t risk the conflict being classified as an IAC and changing the status of M23 from unlawful belligerents to combatants. Anticipatory consent would also avoid the strategic costs of public, contemporaneous requests for support. From the outside, the deployment of SAMIDRC would likely be viewed by Rwanda and M23 fighters more as a passive compliance with the Mutual Defense Pact, rather than an active cry for help. The DRC would still be able to get critical support from its fellow SADC members without being required to make an on-record admission of contemporaneous weakness. There is sufficient political science literature to corroborate the view that invoking mutual defense pacts strengthen States’ bargaining and military advantages rather than weakening them.[[85]](#footnote-86) Given the ease with which such a mechanism could be supported by already accepted legal principles and the clear strategic advantages that already motivate State conduct, regardless of the particular legality, anticipatory intervention clauses should be more seriously considered by international judicial authorities.

Conclusion

In September, the UN Security Council did authorize the extension of MONUSCO’s mandate as well as recognize SAMIDRC’s need, authorizing supportive force to aid in the conflict against M23.[[86]](#footnote-87) However, it remains that SAMIDRC had been operating for almost a year without such recognition by the larger international community.[[87]](#footnote-88) The sequence of events does demonstrate a larger point. The international community can often be slow to act in regional conflicts, especially between less developed nations. This is understandable: large bodies like the UN have other duties, are beholden to a wider range of member states, and are controlled by distinctly different incentives. Regional treaty organizations like SADC are not only closer, strategically and geographically, to the conflict, but also have a real, substantial stake in the conflict’s peaceful resolution. Such regional interventions all invoke principles of collective security because conflicts that are affecting one member, if escalated, threaten to destabilize the entire region. This is especially true as conflicts increasingly feature non-state actors. The need to legalize anticipatory consent to intervention reflects the need for international law to better reflect the complex web of political and strategic incentives motivating the State actors it attempts to regulate.

It may be simpler to assert strict legal rules and simply expect States to fall into line, limiting the understanding of state conduct to what is or is not legally permissible. But we are doing ourselves a disservice by failing to acknowledge that international relations are comprised of a complex web of actors, institutions, and interactions. Established law, in this context, is merely one of many different forces that influence States’ decisions to engage in certain conduct. As such, law and strategic policy cannot be treated as separate, isolated queries. Law regulates States’ conduct by subjecting them to a system of duties that must be upheld and rights that must be protected. But State conduct must also, in turn, influence how the law is developed. States are making strategic choices by balancing competing preferences. Ensuring the firm legality of all actions will not always be the most preferable outcome. It is understandable that States may reconcile operating in legal gray areas in order to secure what they believe is their most favorable outcome. For example, a State desperate to restore peace and security will endure high costs if it fails to do. That is a certain potential outcome. The consequences of operating without full legal basis justifying the actions it takes in its own defense are, comparatively, more ambiguous.

The reliance on anticipatory consent in regional treaties to justify the use of force is one such legal gray area. The DRC and SADC are likely more willing to tolerate legal uncertainty than they are to sacrifice strategic advantages because the consequences of legal certainty are not as tangibly significant as the costs of failing to eliminate or contain the threat created by M23. As it stands, States are increasingly relying on regional defense pacts and anticipatory-consent clauses to legitimize intervention in regional conflicts, despite unsettled legitimacy of such reliance.[[88]](#footnote-89) This legal ambiguity thus means that while states and regional treaty bodies have a somewhat likely ability to justify their interventions, there is little stopping them abusing that power. States must be free to protect domestic peace and security, but that freedom cannot go unrestrained simply because international law has yet to catch up with State practice. By legitimizing the practice of anticipatory consent to intervention via treaty, international law can set norms and expectations that ensure the just exercise of the power. Effective legitimization will empower States to rely on their regional relationships and boost resilience, while effective regulation will ensure they do so without jeopardizing the core principles and non-derogable norms of international law. Silence, however, is unlikely to stop the use or abuse of the practice. The goal is thus for policy and law to work harmoniously toward a system that allows States to protect strategic interests when facing armed attacks, while still holding them accountable.

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2. *Congo, The Democratic Republic of the—The World Factbook*, Central Intelligence Agency, <https://www.cia.gov/the-world-factbook/countries/congo-democratic-republic-of-the/#transnational-issues>, (Sept. 6, 2024).

   *See Also Conflict in The Democratic Republic of the Congo—Center for Preventative Action*, Council on Foreign Relations, <https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo>, (Jun. 20, 2024). [↑](#footnote-ref-3)
3. *Congo, The Democratic Republic of the—The World Factbook, supra* note 2; *Conflict in The Democratic Republic of the Congo—Center for Preventative Action supra* note 2. [↑](#footnote-ref-4)
4. *Conflict in The Democratic Republic of the Congo—Center for Preventative Action supra* note 2. [↑](#footnote-ref-5)
5. *Id*. [↑](#footnote-ref-6)
6. *Id*. [↑](#footnote-ref-7)
7. Sara Meger, *Rape in Contemporary Warfare: The Role of Globalization in Wartime Sexual Violence*, African Conflict and Peacebuilding Review 1, no. 1, 100 (2011). [↑](#footnote-ref-8)
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9. Jason Stearns, *From CNDP to M23: The evolution of an armed movement in Eastern Congo*, Rift Valley Institute (RVI), 2012, at 39. [↑](#footnote-ref-10)
10. Military Group’s Expansion in Democratic Republic of Congo ‘Carries Very Real Risk of Provoking Wider Regional Conflict’, Mission Head Tells Security Council | Meetings Coverage and Press Releases, https://press.un.org/en/2024/sc15760.doc.htm (Jul. 8, 2024). [↑](#footnote-ref-11)
11. *Supra* note 4. [↑](#footnote-ref-12)
12. U.S. Dept’t of State, Office of the Spokesperson, Joint Statement on M23 Advances in Eastern DRC (Nov. 18, 2022). [↑](#footnote-ref-13)
13. Letter dated 31 May 2024 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council, U.N. Security Council, U.N. Doc. S/2024/432, at ¶¶ 30-34 (Jun. 4, 2024). [↑](#footnote-ref-14)
14. *Id*. [↑](#footnote-ref-15)
15. Press Release, South African Development Community, Office of the Secretariat, Deployment of the SADC Mission in the Democratic Republic of Congo (Jan. 4, 2024). [↑](#footnote-ref-16)
16. *Id*. [↑](#footnote-ref-17)
17. U.N. Charter art. 2, ¶ 4. [↑](#footnote-ref-18)
18. Jus Cogens norms of customary international law are formed when there is sufficient state practice and opinion juris to establish the rule as such. The status of the prohibition against the use of force, as articulated in Article 2(4) was most notably confirmed by the International Court of Justice in the Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶188-190 (June 27) [hereinafter Nicaragua Case]; *See also* Yearbook of the international law commission vol. II 1966, *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int.’l L. Comm’n 187, U.N. Doc. A/CN.4/SER. A/1966/Add. 1. [hereinafter *Draft Articles on the Law of Treaties*]. [↑](#footnote-ref-19)
19. Nicaragua Case, *supra* note 18, at ¶193. [↑](#footnote-ref-20)
20. David Wippman, *Treaty-Based Intervention: Who Can Say No*, 62 U. Chi. L. Rev. 607 (Spring 1995). [↑](#footnote-ref-21)
21. *Collective Self-Defense and the Internationalization of Armed Conflicts in Eastern DRC*, Lieber Institute Westpoint, <https://lieber.westpoint.edu/collective-self-defense-internationalization-armed-conflicts-eastern-drc/>, (Apr. 8, 2024) [hereinafter Lieber Institute]. [↑](#footnote-ref-22)
22. *Id*. [↑](#footnote-ref-23)
23. Southern African Development Community (SADC) Mutual Defence Pact, art. 6, Aug. 26, 2003, No. 54114, 3156 U.N.T.S. 259. [↑](#footnote-ref-24)
24. *Id*. [↑](#footnote-ref-25)
25. U.N. Charter art. 51. [↑](#footnote-ref-26)
26. Nicaragua Case, *supra* note 18; *See Also* *Draft Articles on the Law of Treaties*, *supra* note 18. [↑](#footnote-ref-27)
27. *Supra* note 26. [↑](#footnote-ref-28)
28. *Id*. [↑](#footnote-ref-29)
29. Howard Hensel, The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force, 6 (Howard Hensel ed. 2007). [↑](#footnote-ref-30)
30. *Id*. [↑](#footnote-ref-31)
31. *Id*. [↑](#footnote-ref-32)
32. Nicaragua Case, *supra* note 18. [↑](#footnote-ref-33)
33. Lieber Institute, *supra* note 21. [↑](#footnote-ref-34)
34. *Supra* note 13. *See also* Press Release, Matthew Miller, U.S. Dept’t of State, Office of the Spokesperson, Escalation of Hostilities in Eastern DRC (Feb. 17, 2024) (on file with author); Press Release, Ministère De L’Europe Et Des Affaires Étrangeres, Democratic Republic of the Congo – France condemns ongoing M23 offensives in eastern DRC in the strongest possible terms (Jul. 8, 2024) (on file with author); Press Release, SCOR, Security Council Press Statement on Democratic Republic of the Congo (Jun. 20, 2024) (on file with author SC/15739). [↑](#footnote-ref-35)
35. Under the overall control test, in order for a non-state group’s actions to be attributed to a nation-state, the nation-state’s support must be “of overall character,” extending beyond simply financing and supplying the group and including “coordinating or helping in the general planning of its military activity.” The Prosecutor v. Dusko Tadić, IT-94-1, Trial Chamber II, Judgement (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf [https://perma.cc/5RMN-LAM2]. [↑](#footnote-ref-36)
36. Press Release, South African Development Community, Office of the Secretariat, Deployment of the SADC Mission in the Democratic Republic of Congo (Jan. 4, 2024). [↑](#footnote-ref-37)
37. *Supra* note 36. [↑](#footnote-ref-38)
38. *Id*. [↑](#footnote-ref-39)
39. Legal Consequences of The Construction of a Wall In The Occupied Palestinian Territory, Advisory Opinion, ¶¶138-139 (Jul. 9, 2004), https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [https://perma.cc/4CN8-S7QL].  [↑](#footnote-ref-40)
40. Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 ICLQ 963 (2006), <https://www.cambridge.org/core/product/identifier/S0020589300069815/type/journal_article>. [↑](#footnote-ref-41)
41. *See* The Prosecutor v. Dusko Tadić, Case No. IT-94-1, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995), https://www.icty.org/x/cases/tadic/acdec/en/51002.htm [https://perma.cc/NE89-UH9Q]. (“We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”). *See also* International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, art. I ¶ 2, 1125 UNTS 609 (Jun. 8 1977). [↑](#footnote-ref-42)
42. International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 2, 75 U.N.T.S. 135 (Aug. 12 1949). [↑](#footnote-ref-43)
43. *Id*. [↑](#footnote-ref-44)
44. *See id*. While such privileges may apply to some belligerents in an NIAC under art. 4 of the Third Geneva Convention, M23 does not meet the strictly applied requirements for such status. [↑](#footnote-ref-45)
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46. Russell Buchan & Nicholas Tsagourias, *Intervention by Invitation and the Scope of State Consent\**, 10 Journal on the Use of Force and International Law 252 (2023), <https://www.tandfonline.com/doi/full/10.1080/20531702.2023.2270264> (last visited Oct 12, 2024) [↑](#footnote-ref-47)
47. *Id*. [↑](#footnote-ref-48)
48. P.H. Winfield, *The Grounds of Intervention in International Law*, 5 Brit YB Intl L 149, 156 (1924). See also Treaty of Peace with Germany (Treaty of Versailles) (June 28, 1919), Art 381, 2 Bevans 43, 226 (1969). [↑](#footnote-ref-49)
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50. *Supra* note 45. [↑](#footnote-ref-51)
51. *Id*. [↑](#footnote-ref-52)
52. *Id*. [↑](#footnote-ref-53)
53. Agata Kleczkowska, *The Meaning of Treaty Authorisation and* Ad Hoc *Consent for the Legality of Military Assistance on Request*, 7 Journal on the Use of Force and International Law 270 (2020), <https://www.tandfonline.com/doi/full/10.1080/20531702.2020.1785231>. [↑](#footnote-ref-54)
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58. *Supra* note 52. [↑](#footnote-ref-59)
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60. James D. Fearon, *Rationalist Explanations for War*, 49 Int Org 379 (1995), <https://www.cambridge.org/core/product/identifier/S0020818300033324/type/journal_article>. [↑](#footnote-ref-61)
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64. *Id*. [↑](#footnote-ref-65)
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66. *Supra* note 63. *See also* Thomas Wrießnig, Cyprus Is one of the oldest conflicts about to be resolved?, Security Policy Working Paper No. 5/2016, Federal Academy for Security Policy (2016); Turkey unleashes offensive – DW – 10/09/2019, dw.com, <https://www.dw.com/en/turkey-unleashes-offensive-against-kurds-in-northern-syria/a-50758501>; Claus Kreß, *A Collective Failure to Prevent Turkey’s Operation ‘Peace Spring’ and NATO’s Silence on International Law*, EJIL: Talk!, <https://www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/>; Svenja Raube, *An International Law Assessment of ECOWAS’ Threat to Use Force in Niger*, Just Security (2023), <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/>.  [↑](#footnote-ref-67)
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68. Svenja Raube, *An International Law Assessment of ECOWAS’ Threat to Use Force in Niger*, Just Security (2023), <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/>.  [↑](#footnote-ref-69)
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73. *Supra* note 69. [↑](#footnote-ref-74)
74. *Supra* note 63. [↑](#footnote-ref-75)
75. *Id*. [↑](#footnote-ref-76)
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79. *Supra* note 69. [↑](#footnote-ref-80)
80. *Id*. [↑](#footnote-ref-81)
81. *Id*. [↑](#footnote-ref-82)
82. *Id*. [↑](#footnote-ref-83)
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85. *See generally* James D. Fearon, *Rationalist Explanations for War*, 49 Int Org 379 (1995), <https://www.cambridge.org/core/product/identifier/S0020818300033324/type/journal_article>. [↑](#footnote-ref-86)
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