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Article

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# Consent and the use of force: an examination of ‘intervention by invitation’ as a basis for US drone strikes in Pakistan, Somalia and Yemen

Max Byrne

Drone strikes are becoming a key feature of the United States’ global military response to non-state actors, and it has been widely adduced that these strikes have been carried out with the consent of the host states in which such non-state actors reside. This article examines the degree to which assertions of consent (or ‘intervention by invitation’), provided as a justification for drone strikes by the United States in Pakistan, Yemen and Somalia, can be said to accord with international law. First the article provides a broad sketch of the presence of consent in international law. It then analyses in detail the individual elements of consent as provided by Article 20 of the International Law Commission Draft Articles of State Responsibility. These require that consent should be ‘valid’, given by the legitimate government and expressed by an official empowered to do so. These elements will be dealt with individually, and each in turn will be applied to the cases of Pakistan, Yemen and Somalia. Finally, the article will examine the breadth of the exculpatory power of consent, and the extent to which it can preclude the wrongfulness of acts carried out in contravention of international law other than the prohibition of the use of force under Article 2(4) of the Charter of the United Nations.

**Keywords:** consent; intervention by invitation; drones; use of force; *jus ad bellum*; state responsibility

## I. Introduction

The consent<sup>1</sup> of states in which non-state actors (NSAs) reside (hereinafter, ‘host states’) has been widely advanced as a justification for the United States’ programme of drone strikes. Such strikes have been carried out against NSAs in Pakistan, Yemen and Somalia. By virtue of its regular and wide invocation, the ‘intervention by invitation’ justification represents a key strand of the discourse of drone-based violence and international law and yet it has been largely overlooked by the literature on drones.<sup>2</sup> Often, consent is dealt with fleetingly, in favour of questions surrounding the *jus ad bellum sensu stricto* (and particularly the right of self-defence) which, though of vital importance, do not give a full picture. This work will examine in isolation the use of consent as a justification for drone strikes by the US, focusing specifically on those occurring in Pakistan, Yemen and Somalia. The aim is to assess whether and to what extent the consent of host states has historically provided a basis for the lawfulness of drone strikes and the degree to which it is a tenable justification in those particular instances.

Consent, in justifying foreign intervention, has the potential to be posited in a quasi-panacean manner which risks foreclosing debate both on the nature of the

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<sup>1</sup> It is submitted that the terms ‘consent’ and ‘invitation to intervene’ are synonymous when the former is applied to the use of force, as is the case herein. It is arguable that ‘invitation to intervene’ has temporal connotations that suggest it is necessarily given prior to a use of force, however there is no evidence that this is actually the case. As such, the two terms (and other permutations) will be used interchangeably throughout.

<sup>2</sup> A notable exception to this is the recent publication of an in depth study of drone use specifically in Pakistan, which contains a chapter dealing solely with consent. See Sikander A Shah, *International Law and Drone Strikes in Pakistan* (Routledge, 2015).

doctrine itself but also on the use of drones more generally. The invocation of consent can act to provide an apparent basis for uses of force with such persuasive power that critique is effectively precluded. Despite this, though perhaps because of it, the issue of consent and drone strikes has not received the level of analysis that it merits. Recognising this deficit, this article seeks to determine the degree to which consent can actually be understood to provide a lawful basis upon which drone strikes have been and continue to be carried out. The focus will be the US drone programme exclusively as it represents the sole example of consent being invoked as a legal justification for wide-scale extra-territorial drone use.

A doctrinal methodology has been adopted, as it is important at this stage (that is, the early examination of a hitherto underexplored issue) to consider how the use of drones fits within the legal framework. As such, attention is not given to the broader international relations implications of the consent to drone strikes, though these would similarly benefit from investigation. Nonetheless, an epistemological understanding of international law is present, in which the law as such is understood to be a discursive practice, a '[p]olitical struggle...waged...on the meaning of legal symbols'.<sup>3</sup> Law is recognised as being subject to competing interpretation by states, institutions and commentators, which impacts upon the way that it operates in a practical sense. By adopting this epistemological position, it is acknowledged that international law cannot be conceived of as a static and monolithic structure in which, for instance, the use of drones in a specific situation can be said with absolute certainty to be legal. International law is dynamic in a way that is not conducive to Herculean right answers. This approach is particularly necessary when examining a doctrine like consent, due to its inherent conceptual indistinctness.

The doctrine of intervention by invitation is not codified in any single place. A broad outline of the elements of consent, as *lex generalis*, is however provided by Article 20 of the Draft Articles of State Responsibility (DASR) and the accompanying commentary from the International Law Commission (ILC). Though relating to consent in international law in a general sense, Article 20 is directly applicable to the *lex specialis* of intervention by invitation. As such, the outline presented by the DASR will be used as an overall framework for analysis.

First, the article will consider the presence of consent as a basis for the use of force in international law. Second to be considered will be the primary specification of Article 20 DASR that consent should be 'valid' in order to preclude the wrongfulness of an act, which will then be applied to the use of drone strikes by the US. Building upon this (though arguably still within the framework of 'validity') is the requirement that consent can only be given by the 'legitimate' government,<sup>4</sup> so the third section will consider the nature of legitimacy and the degree to which various regimes consenting to drone strikes can be seen to be legitimate. The fourth section will examine the related requirement that consent should be given by an official authorised to represent the government<sup>5</sup> and how this applies to the consent given to drone strikes. The fifth and final section will discuss the fact that Article 20 couches consent in both positive and negative terms: consent is given 'to the commission of an

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<sup>3</sup> Martti Koskeniemi, 'What Should International Lawyers Learn from Karl Marx?' (2004) 17 *Leiden Journal of International Law* 229, 236.

<sup>4</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), General Assembly Official Records 56th session, supplement no. 10 (A/56/10), Article 20, para 5.

<sup>5</sup> Ibid, Article 20, paras 4 and 6.

act' but also 'to the extent that the act remains within the limits of that consent'.<sup>6</sup> This reference to the bounded nature of consent makes it necessary to consider the breadth of action rendered lawful by invitation and the debate around whether consent allows an intervening state to deviate from other rules of international law (for instance, international humanitarian law (IHL) or international human rights law (IHRL)).

## II. Consent in international law

### i. *Consent and the use of force*

Consent is a manifestation of the 'sovereign equality' of states, the underlying principle of the United Nations (UN) as enshrined in Article 2(7) of the UN Charter (UNC). In relation to this, consent is also the product of an international system that seeks to preserve the autonomy of states. This is evidenced in, *inter alia*, the Article 2(4) UNC prohibition on 'the threat or use of force against the territorial integrity or political independence of any state'. This provenance, particularly emphasising the autonomy of states' *internal* practices, enables the discussion of consent in terms of 'sovereignty', despite the conceptual difficulties sometimes attributed to this word.<sup>7</sup>

A logical corollary of the UNC's privileging of the sovereignty and autonomy of states is that a state may ostensibly govern all activity that is carried out within its own territory. As such, states *prima facie* have the capacity to invite interventions from third states. Therefore, consent from one state to another's use of force within its territory, as an exercise of sovereignty, removes that specific use of force from the *jus ad bellum* framework of the UNC. This is because, if valid, the use of force does not infringe the 'territorial integrity or political independence of any state',<sup>8</sup> but is instead a manifestation of that state's agency and political independence.<sup>9</sup> This has recently been emphasised by the International Law Association's Use of Force Committee, in its draft report on aggression and the use of force, in which it distinguished consent from the 'excused violations' of sovereignty, (self-defence and actions under Chapter VII UNC), as 'consent involves no violation of state

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<sup>6</sup> Ibid, Article 20, para 1.

<sup>7</sup> See, for example, Louis Henkin, 'The Mythology of Sovereignty' in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, 1994) 351.

<sup>8</sup> Charter of the United Nations (1945), Article 2(4).

<sup>9</sup> A possible issue with regard to consent in the specific context of the use of force arises when it is claimed that the prohibition of the use of force is a peremptory norm of international law. If this is so, it is arguable that regardless of consent, the use of force would remain unlawful as Article 26 DARS asserts that consent cannot preclude the wrongfulness of 'any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.' The debate as to the possibility that the prohibition of the use of force is *jus cogens* is far beyond the scope of the present article but nonetheless it can be addressed in brief in two ways. First, it is far from clear whether or not the prohibition is in fact *jus cogens*. The present writer is of the opinion that, though desirable, the prohibition has not met the requisite threshold for recognition as a *jus cogens* norm (for an informative discussion of this issue, see James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215). Second, if the prohibition were a peremptory norm it would nevertheless continue to have exceptions, in the form of self-defence and Chapter VII actions, but also by consent. See Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 *European Journal of International Law* 853, 860 (rightly stating that '[a] correct description of the norm would have to account for the fact that the principle of non-use of force does have exceptions'). In light of these two points, it is submitted that the possibility of the prohibition of the use of force being *jus cogens* does not impede the operation of consent in the manner analysed within this article.

sovereignty *ab initio*.’<sup>10</sup>

That a state can consent to acts otherwise contrary to its sovereignty is recognisable broadly within international law. Article 2(7) UNC states that ‘[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction* of any state’ emphasising the preservation of states’ capacity to govern themselves, which extends to inviting uses of force within their territory.<sup>11</sup> In a similarly implicit manner, consent features in the 1974 Definition of Aggression, which includes within the category of aggressive acts the ‘use of armed forces 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’,<sup>12</sup> thereby indirectly acknowledging the existence of consent as a self-evident part of the international legal framework.

The presence of the doctrine is made explicit in the DASR, in which consent is specifically posited as having the capacity to preclude the wrongfulness of acts otherwise contrary to international law.<sup>13</sup> Article 20 DASR specifically refers to consent ‘by a State’ and it is important though elementary to note that states are incapable of consenting to anything, rather their governments consent on their behalf. While states are ‘non-physical juridical entities’, governments are ‘the exclusively legally coercive organizations for making and enforcing certain group decisions.’<sup>14</sup> It is a ‘basic principle’ in international law that ‘the government speaks for the State and acts on its behalf’.<sup>15</sup> Indeed, Article 1 of the Montevideo Convention on the Rights and Duties of States specifically cleaves state and government.

This uncontroversial though fundamental point makes it clear why consent is structured as it is, hinging on the legitimacy of the consenting regime. It is crucial that a consenting government is legitimate (and that, in turn, consent is given by a requisite official), because it is, in the eyes of international law, the voice of the state. It is because of the representative capacity of the government *vis-à-vis* the state that consent to intervention cannot be given by a government embroiled in a civil war. Once a government has lost control to such a degree that it is merely one of two or several parties to a civil war, it can no longer be understood to speak on behalf of the state. In addition, intervention in civil wars is impermissible due to ‘the inalienable right of every state to choose its political, economic, social and cultural systems’.<sup>16</sup>

Though the state is distinct from its governmental voice, it is the sole prerogative of the state, *qua* its inhabitants, to choose that voice. If intervention is invited by a government that is a mere belligerent party then the right to choose would be effectively removed from the state. The right of a state to choose its own destiny is clearly present within international law. The UN General Assembly’s Declaration on Friendly Relations asserts that all states have ‘the duty to refrain from organizing,

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<sup>10</sup> International Law Association Committee on the Use of Force, Washington Conference ‘Report on Aggression and the Use of Force’ (2014), [www.ila-hq.org/download.cfm/docid/DA12E88E-5E44-4151-9540DC83D4A0EA78](http://www.ila-hq.org/download.cfm/docid/DA12E88E-5E44-4151-9540DC83D4A0EA78) B.4. Though this report remains a draft, yet to be agreed by the ILA, it nonetheless represents the considered opinions of over 30 of the world’s leading experts on the use of force in international law and, as such, possesses significant authoritative weight.

<sup>11</sup> Emphasis added.

<sup>12</sup> General Assembly Resolution 3314 (XXIX) Definition of Aggression (1974), Article 3(e) (emphasis added).

<sup>13</sup> DASR and Commentary (n 4), Article 20.

<sup>14</sup> Edward H Robinson, ‘The Distinction between State and Government’ (2013) 7/8 *Geography Compass* 556, 561.

<sup>15</sup> Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1986) 56(1) *British Yearbook of International Law* 189, 190.

<sup>16</sup> Christine Gray, *The Use of Force in International Law* (Oxford University Press, 3rd edn 2008) 81.

instigating, assisting or participating in acts of civil strife or terrorist acts in another State'.<sup>17</sup> Moreover, the International Court of Justice (ICJ) has stated that this is an obligation present in customary international law.<sup>18</sup> Thus, with regard to the doctrine of consent, there is a twofold prohibition on intervention during civil wars. While consent to intervention in limited conflicts is lawful, it is not lawful in conflicts of a more systemic nature characterised by a state's internal determination of its own government.

Not only is consent to intervention a principle of international law, it appears to have a foundational and preeminent character. Gray has asserted that the post-war right of states to request intervention has been 'taken for granted'<sup>19</sup> and the ILC has called consent a 'basic international law principle'.<sup>20</sup> Echoing this, Schmitt, writing specifically about drones, has touched briefly on consent, claiming that it is 'indisputable that one state may employ force in another with the consent of that state'.<sup>21</sup> Such assertions reflect the doctrine's genesis within the privileging of state sovereignty in international law. However, Schmitt's assertion incidentally reveals an important characteristic of consent within the discourse on drone strikes more generally: the notion of the 'indisputability' of consent is so privileged that it does not feature in Schmitt's analysis of drone strikes, which instead specifically focuses on 'operations...conducted without the [host] state's acquiescence'.<sup>22</sup> Consent viewed in this manner reveals its capacity to be understood as a principle with such exculpatory force that it acts like a trump card, vitiating the possibility of critical analysis once it has been posited. This epitomises the problematic theme within the discourse on consent referred to above, which has led to a lacuna in the literature.

Recalling the discursive and interpretive epistemology of international law, a consequence of the exculpatory potential of consent at one end of consent's hermeneutic spectrum is that interpretations of the doctrine lend themselves to the dichotomy of 'restrictionism' and 'expansionism', in terms of the degree to which it is understood to permit or proscribe the resort to force. This dichotomy is more immediately applicable to *jus ad bellum* than to consent—for instance, Jackson Moagoto has asserted its presence as a debate around self-defence<sup>23</sup>—but it is nevertheless an informative analytical tool for present purposes. Under a restrictionist interpretation, consent can be understood as providing a limited legitimisation for the use of force, which is open to rebuttal. Conversely, the expansionist interpretation creates a strong presumption of lawfulness that cannot easily be challenged. The

<sup>17</sup> General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), UN Doc A/RES/25/2625.

<sup>18</sup> In its *Nicaragua* decision, the ICJ asserted that the Declaration on Friendly Relations 'affords an indication of [states'] *opinio juris* as to customary international law': *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Reports 14, para 191. This has been affirmed subsequently by the Court, stating explicitly that the provisions 'are declaratory of customary international law': *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (merits) [2005] ICJ Reports 168, para 162.

<sup>19</sup> Gray (n 16) 85. Supporting the idea of consent as axiomatic, Gray refers to multiple examples of state practice in which force was used consensually with no international condemnation: France's interventions in Gabon (1964), Chad (1968), Côte d'Ivoire (2002) and Senegal's intervention in Guinea-Bissau (1998).

<sup>20</sup> DASR and Commentary (n 4), Article 20, para 1.

<sup>21</sup> Michael N Schmitt, 'Drone Attacks under the *Jus as Bellum* and *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law* 311, 315.

<sup>22</sup> *Ibid.*

<sup>23</sup> Jackson Moagoto, *Technology and the Law on the Use of Force* (Routledge, 2015) 12-13.

discourse on drones and consent has been dominated by expansionist understandings, which has resulted in a paucity of discussion of this area in favour of the apparently more controversial areas of *jus ad bellum* and *jus in bello*.

The presence of consent to foreign intervention is evident in the practice of states, confirming its continued acceptance as a doctrine of international law. The recent actions by the US and the UK against Islamic State of Iraq and the Levant (ISIL) in Iraq were based on the invitation of the Iraqi government.<sup>24</sup> Consent was the sole legal justification adduced by President Obama for the 2014 action in Iraq, rather than relying on alternatives like humanitarian intervention.<sup>25</sup> This has been restated recently by Stephen Preston, General Counsel of the US Department of Defence, who called consent ‘a firm foundation in international law’.<sup>26</sup> In similar fashion, the UK government stated that the ‘prohibition [on 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.’<sup>27</sup> It is noteworthy that this document interpreted consent as ‘provid[ing] a clear and *unequivocal* legal basis’ for the use of force,<sup>28</sup> demonstrating the power consent is seen to possess for engendering the use of force. The absence of equivocality gestures towards an expansionist interpretation, in which consent creates a strong presumption of lawfulness.

Echoing this understanding, the then Australian Prime Minister Tony Abbott described force used with consent as ‘perfectly, perfectly legal under international law’,<sup>29</sup> again emphasising the doctrine’s rhetorical power. Abbott’s depiction of consent as providing a ‘perfect’ justification for the use of force, with the implications of irrefutability that this carries with it, mirrors the UK’s reference to unequivocality, and further demonstrates the ability of consent to limit critique. These assured proclamations by states as to the nature of consent demonstrate both the doctrine’s presence in international law as virtually axiomatic but also its strength, emphasising the vital need for in-depth examination of consent, particularly in the case of drone strikes.

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<sup>24</sup> In meeting the threat from ISIL, states have also referred to collective self-defence under Article 51, though these invocations have related to action against ISIL in Syria (Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695; Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221). In contrast, it is consent that has been emphasised for uses of force in Iraq (Rob Page, ‘ISIS and the Sectarian Conflict in the Middle East’ (19 March 2015) Research Paper 15/16, *House of Commons Library* 54). This is a distinction made recently by the British member of parliament and chairman of the Defence Select Committee, Julian Lewis (Quoted in Frances Perraudin, ‘David Cameron Making up Syria Policy “on the Hoof”—Senior Tory’ (July 2015) *The Guardian*, [www.theguardian.com/politics/2015/jul/19/david-cameron-syria-policy-julian-lewis?INTCMP=sfl](http://www.theguardian.com/politics/2015/jul/19/david-cameron-syria-policy-julian-lewis?INTCMP=sfl)).

<sup>25</sup> Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (23 September 2014), [www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq](http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq).

<sup>26</sup> Stephen Preston, ‘The Legal Framework for the United States’ Use of Military Force Since 9/11’ (April 2015) Speech at the Annual Meeting of the American Society of International Law [www.defense.gov/Speeches/Speech.aspx?SpeechID=1931](http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931).

<sup>27</sup> 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](http://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).

<sup>28</sup> Ibid, (emphasis added).

<sup>29</sup> ‘Interview with Fran Kelly, ABC Radio National’ (16 September 2014) *Department of the Prime Minister and Cabinet*, <https://pmtranscripts.dpmc.gov.au/release/transcript-23831>.



## ii. Consent and drone strikes

The US has utilised consent to attest to the lawfulness of its drone programme together with the *jus ad bellum* doctrine of self-defence (this article will consider host states' expressions of consent throughout, rather than précising them in this first section). Immediately, the fact that consent *and* self-defence have been adduced in tandem is interesting as despite the understanding that states take of consent detailed above, which provides a strong presumption of exculpation in its bypassing of questions of *jus ad bellum* the US has nonetheless not relied on consent alone to justify its drone programme. Indeed, in Harold Koh's 2010 speech to the American Society of International Law, self-defence was the sole justification given for drone strikes.<sup>30</sup> Though the provision of multiple justifications is common practice in international law,<sup>31</sup> the resort to two legal claims by the US suggests a pragmatic equivocation which gestures towards the fallibility of consent as a principle justifying the use of force, in contrast to its cast-iron image that is presented rhetorically. This further demonstrates the necessity for critical analysis of consent to be undertaken, rather than for it to be accepted as akin to a panacean justification.

The invocation of consent by the US has primarily been through brief references. In a 2012 speech, US Attorney General Eric Holder stressed that extraterritorial uses of force were 'consistent with international legal principles if conducted...with the consent of the nation involved.'<sup>32</sup> He did not go further and discuss the nature or requirements of consent but his reference allows the inference that the US is prepared to rely on it to bypass the prohibition on the use of force. Similar sentiment was expressed by the US Department of Justice (in the context of targeting a US citizen<sup>33</sup>), which emphasised that extraterritorial force carried out with consent 'would be consistent with international legal principles of sovereignty and neutrality'.<sup>34</sup> In 2012, in the Obama administration's first acknowledgment of its covert drone programme, then-Homeland Security Advisor, John Brennan, referred specifically to consent as providing a basis for the lawful use of drones.<sup>35</sup> These references to consent make it clear that the doctrine has been key to the use of drones by the US. Nonetheless, it has been subject to far less stringent appraisal and analysis than self-defence. The subsequent sections of this article will consider in turn the key requirements of consent and will apply them to the specific contexts of drone strikes

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<sup>30</sup> See Harold Koh, 'The Obama Administration and International Law' (March, 2010) *Speech at the Annual Meeting of the American Society of International Law* (stating that the US 'may use force consistent with its inherent right to self-defence under international law'), [www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm).

<sup>31</sup> For instance, in justifying its intervention in Grenada in 1983, the US posited three bases, consent being one of them (the other two being protection of nationals and collective self-defence (see 'Letter dated 25 October 1983 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General', UN Doc S/16076)).

<sup>32</sup> Eric Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (2012), *United States Department of Justice* [www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law](http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law). See also John O Brennan (White House Counterterrorism Advisor), 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (April 2012) Prepared Remarks at the Woodrow Wilson International Center for Scholars, [www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy](http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy).

<sup>33</sup> US Department of Justice, White Paper 'Lawfulness for a Lethal Operation Directed Against a US Citizen who is a Senior Operational Leader of al-Qa'ida or an Associated Force' (2011), 1, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

<sup>34</sup> Ibid.

<sup>35</sup> Brennan (n 32).

in Pakistan, Yemen and Somalia, with the intention of providing a much needed and thus far absent examination.

### III. Consent must be ‘valid’

Article 20 DASR refers to the need for consent to be ‘valid’ in order for it to preclude wrongfulness. In essence this entire article deals with the validity of consent, as each requirement identified above cumulatively sits within the framework of ‘validly’ given consent. Nonetheless, to enable a more thorough analysis, these are considered separately below and in detail, while this section considers validity more broadly.

The ILC commentary to the DASR states that areas of international law other than state responsibility govern the concept of validity<sup>36</sup> but its provisions are nonetheless illuminating. The ILC interpretation of validly given consent requires that it:

...must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion.<sup>37</sup>

This understanding is similar to the definition of ‘request’ in the *Institut de Droit International* (IDI) Resolution on Military Assistance on Request, which must ‘[reflect] the free expression of will of the requesting State and its consent to the terms and modalities of the military assistance’.<sup>38</sup> Further illustration is provided by the ILC commentary on Article 45 DASR, governing the waiver of a state’s right to invoke state responsibility, which is analogous to consent as it provides state acquiescence to outside intervention after the fact—in effect, consent *ex post facto*. The commentary states that a waiver can be inferred through unilateral statements or conduct, but is firm in specifying that ‘the conduct or statement must be unequivocal.’<sup>39</sup> Finally, the vitiating power of fraud, corruption and coercion manifests elsewhere in international law, principally in the Vienna Convention on the Law of Treaties 1969 (VCLT) Articles 49 and 50—in which fraud or corruption can invalidate consent—and 51 and 52 which render treaties respectively without legal validity or void if agreement was procured by coercion, either against the state representative<sup>40</sup> or the state itself with the threat or use of force.<sup>41</sup>

Therefore it is clear that at a minimum consent must represent the true, voluntary and clear intention of a state. This emphasis on clarity and voluntariness is present in the jurisprudence of the ICJ, which asserted, in the *Armed Activities* case, that a state may withdraw consent with ‘no particular formalities’.<sup>42</sup> Though the Court left open the question of the level of renunciation required to retract consent, the fact that such severance is possible through inference (in the case itself, withdrawal of consent was inferred through the DRC’s accusation that Uganda had

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<sup>36</sup> DASR and Commentary (n 4), Article 20, para 4.

<sup>37</sup> Ibid, Article 20, para 6.

<sup>38</sup> Resolution on Military Assistance on Request (2011) Institut de Droit International, 10th Commission—Sub-Group C, Article 1(b).

<sup>39</sup> DASR and Commentary (n 4), Article 45, para 5.

<sup>40</sup> Vienna Convention on the Law of Treaties (1969), Article 51.

<sup>41</sup> Ibid, Article 52.

<sup>42</sup> *Armed Activities* (n 18) para 51.

invaded its territory<sup>43</sup>) demonstrates an underlying privileging of state sovereignty over the ability of states to resort to force and suggests a high threshold for consent to be valid. By setting such a threshold, the judgment in *Armed Activities* incidentally betrays a restrictionist thread in the ICJ's interpretation, distinct from the emphasis present in state practice that consent is unequivocal, thereby demonstrating that the Court resides in a distinct hermeneutic camp. This has the effect of evoking the indeterminacy of international law generally and the inherently indistinct nature of consent as a doctrine.

International law scholars have also posited interpretations of consent that vary in their requirements for validity. Like the ICJ, Mary Ellen O'Connell has adopted a view of valid consent that advocates sovereignty, though she goes further, arguing for the need for 'express, *public* consent'<sup>44</sup> suggesting that validity also requires publicity. In opposition to this, Sean Murphy has rejected a requirement of publicity. Emphasising the arbitral nature of international dispute settlement, Murphy has argued instead that even when secret, consent could ultimately be adduced in 'whatever venue is necessary' to confirm its presence and legality after the fact, thereby negating the need for publicity.<sup>45</sup> It is unclear from where O'Connell gets support for her publicity argument as such a requirement is not present in any international legal documents, nor does it appear to be a requirement of customary international law.

Sikander Shah has recalled the general principle promoting publicity arising out of League of Nations' prohibition on secret agreements to argue that secret consent is at best 'legally questionable in the context of international law'.<sup>46</sup> This is a persuasive line of reasoning but Article 18 of the Covenant of the League of Nations, to which Shah refers, relates to the agreement of treaties specifically. It is therefore only applicable by analogy to consent to the use of force, which is of a distinct character, and, as such, the Article does not resolve the issue.

Indeed, the possibility of non-public consent has been asserted by the then Special Rapporteur Roberto Ago in his report on state responsibility to the ILC, stating that 'like all manifestations of the will of a State...consent can be *expressed* or *tacit*, *explicit* or *implicit*'.<sup>47</sup> Furthermore, the (far from exhaustive) list of examples given by the ILC of activities that might be consented to includes, for instance, 'official investigations or inquiries' which could conceivably be consented to without publicity.<sup>48</sup> Though perhaps desirable, it appears to be a reality of the doctrine that there is no conflation between the clarity and publicity, the latter going quite a bit further than the former. Therefore, on balance it appears that though consent must represent the true intention of a state, it need not be public in order to be valid.

In his analysis of the lawfulness of drone use in Pakistan, Jordan Paust has utilised a very broad reading of self-defence under Article 51 UNC and early customary international law to come to the expansionist conclusion that, in the specific instance of a non-state actor (NSA) attacking a state other than its host, consent need not be valid in the sense of having been freely given for an intervention

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<sup>43</sup> Ibid, para 53.

<sup>44</sup> Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones' (2010) *Notre Dame Law School Research Paper*, 18 (emphasis added).

<sup>45</sup> Sean D Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2009) 85 *International Legal Studies* 109, 118.

<sup>46</sup> Shah (n 2) 102.

<sup>47</sup> Roberto Ago, 'Eighth Report on State Responsibility', UN Doc A/CN.4/318 and ADD.1-4 (1979) 2(1) *Yearbook of the International Law Commission* 3, 35 (original emphasis).

<sup>48</sup> DASR and Commentary (n 4) Article 20, para 2.

to be lawful. This is because, Paust argues, self-defence will *always* provide a lawful avenue of response, rendering consent unnecessary *per se*.<sup>49</sup> In this way, the validity of consent is beside the point, as justification for the use of drone strikes against NSAs will always come unquestionably in the form of self-defence. Paust's approach is thus opposed to that of the ICJ in terms of its balance between sovereignty and security by positing self-defence as the principal mechanism for responding to NSA violence. This is not to say that Paust sees no place for consent in the use of force—he refers to the ICJ's assertion in *Armed Activities* that consent need not be adduced when a state seeks to rely on self-defence<sup>50</sup> suggesting that he too is referring only to such situations of claimed self-defence, leaving open the possibility of a separate, consent-based justification outside of the *jus ad bellum*.

Nonetheless, it is noteworthy that consent does not play a part in Paust's analysis of drone strikes, as, by privileging security over sovereignty, it suggests implicit assumptions as to the agency of those states that (perhaps) are unwittingly harbouring NSAs. This is a problematic interpretation of consent for a number of reasons: first, it fails to take account of the many occasions in which force has been used with the consent of the host state, including those cases of (purported) consent to US drone strikes. Secondly, such a view does not account for the clear and fundamental existence of consent as a doctrine within international law. Finally, in failing to acknowledge the agency of states playing host to NSAs, this approach disempowers less powerful states internationally by ostensibly removing them from the process of responding to attacks by NSAs.

A similar approach to consent is proposed by Arnulf Lorca, who has produced an interpretation that is highly permissive of the use of force. This involves an analytical perspective of the 'semi-periphery', which involves 'balancing conflicting rules and policies from the standpoint of weaker states that are vulnerable to hostile non-state actor presences in their territory and, therefore, more likely subject to interventions.'<sup>51</sup> This perspective is used to develop an understanding of so-called 'cohabitant states' in which governments 'might be willing but might be too weak to effectively act against the non-state actor, as in the case of Yemen.'<sup>52</sup> In this situation, Lorca asserts that the cohabitant state can neither acquiesce nor object to intervention, removing consent as an avenue to the lawful use of force.<sup>53</sup> His suggestion is instead to *imply* consent in such situations, thereby permitting force in the absence of actual validly given consent, though he calls for the simultaneous implication of strict conditions upon the intervening state.<sup>54</sup> This concept of consent thereby transforms the nature of validity from that requiring free and clear intention, as envisioned by international institutions, to one based entirely around a state's capability to address a resident NSA. As with Paust's analysis above, this negates the agency of weaker states and can therefore be understood to represent an expansionist interpretation of consent, reducing the standing of host state sovereignty in order to

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<sup>49</sup> Jordan J Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2009-10) 19 *Journal of Transnational Law and Policy* 237, 249-50.

<sup>50</sup> Jordan J Paust, 'Operationalizing Use of Drones against Non-State Terrorists under the International Law of Self-Defense' (2015) 7 *Albany Government Law Review* 166, 175.

<sup>51</sup> Arnulf B Lorca, 'Rules for the "Global War on Terror": Implying Consent and Presuming Conditions for Intervention' (2012) 45 *NYU Journal of International Law & Policy* 1, 9.

<sup>52</sup> *Ibid*, 13.

<sup>53</sup> *Ibid*, 79.

<sup>54</sup> *Ibid*, 55 and 86. The implied conditions include involving the host state and affected communities in targeting decisions, creation of a guarantee fund for reparations for civilian deaths and strict liability for damage caused to civilians.

allow victim states to intervene with military force more readily.

Despite the presence of expansionist readings of consent, the interpretations emphasising validity through freely and clearly proffered intention are more reflective of the reality of international law. Therefore the need to determine the actual free and clear provision of consent by a host state's government is key to asserting the lawfulness of the resort to drone strikes. With regard to Pakistan, Yemen and Somalia, valid consent does appear to be present, or at least has been operative while many drone strikes have occurred. In Pakistan, consent has been apparently forthcoming in secret: leaked documents indicate that between 2007 and 2011 the government of Pakistan and the CIA cooperated closely,<sup>55</sup> strongly suggesting valid consent existed at that time.

However, in 2013, Prime Minister Nawaz Sharif unambiguously withdrew this consent, asserting that drone strikes were a violation of sovereignty,<sup>56</sup> a position more recently reiterated by the Pakistani foreign ministry.<sup>57</sup> Taking the restrictive approach of international institutions, and the ICJ decision of *Armed Activities*, in which retraction of consent can be made by inference, this statement represents a clear withdrawal of consent, removing it as a justification for drone strikes. Its clandestine nature does not undermine the existence and operation of consent prior to 2013, meaning that, if the other requirements for consent are satisfied, drone strikes carried out in that period will not be subject to *jus ad bellum*. However, once consent was withdrawn in 2013 the lawfulness of further drone strikes would be entirely a question of *jus ad bellum*.<sup>58</sup> Conversely, under Lorca's approach, this retraction would not automatically withdraw the ability of the US to carry out drone strikes. It would instead transform the question from one focusing on the fact of consent to one of the nature of Pakistan's ability to control al-Qaeda, the Taliban and associated forces, with the potential for valid consent to continue despite governmental protestations by implying consent if the government was unable to neutralise a threat.

In Yemen, consent has reportedly been given by President Hadi for each individual drone strike<sup>59</sup> though the presence of general consent to strikes has also been adduced.<sup>60</sup> There is no assertion that consent has not been freely given and, as such, Yemeni consent is *prima facie* valid. Similarly, consent from the government of Somalia has been given freely, with nothing to suggest that it was the product of fraud or coercion and as such has the appearance of validity. Nevertheless, validity is only the first necessary aspect of consent. Below, the nature of the consent given by each of these three states will be considered in detail, in relation to distinct aspects of

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<sup>55</sup> Greg Miller and Bob Woodward, 'Secret Memos Reveal Explicit Nature of US, Pakistan Agreement on Drones' (24 October 2013) *Washington Post*, [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](http://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)

<sup>56</sup> Ibid.

<sup>57</sup> Jon Boone and Stephanie Kirchgaessner, 'Pakistan Uses Hostage Killings to Underline Risk of US Drone Strikes' (April 2015) *The Guardian*, [www.theguardian.com/world/2015/apr/24/pakistan-us-hostage-killings-drone-strikes-weinstein-lo-porto](http://www.theguardian.com/world/2015/apr/24/pakistan-us-hostage-killings-drone-strikes-weinstein-lo-porto).

<sup>58</sup> Since consent was retracted there have been at least 38 drone strikes carried out within Pakistan. This figure is based on a dataset from The Bureau of Investigative Journalism, <https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HIGt09wgLZDSCP-BQaux51w/edit#gid=1436874561> (accessed 18 September 2015).

<sup>59</sup> Greg Miller, 'Yemeni President Acknowledges Approving US Drone Strikes' (29 September 2012) *Washington Post*, [www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf\\_story.html](http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html).

<sup>60</sup> Human Rights Watch, 'A Wedding that Became a Funeral: US Drone Attack on Marriage Procession in Yemen' (February 2014), [www.hrw.org/sites/default/files/reports/yemen0214\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf) 6.

the doctrine. This will enable a determination of whether or not consent can be understood as having been given.

#### IV. Consent must be given by the ‘legitimate government’

In her preeminent study of consent, Doswald-Beck demonstrated that a key test to establish the effectiveness of consent is to determine whether it was given by the ‘legitimate government’ of a state.<sup>61</sup> This is reiterated as a ground for questioning consent in the ILC commentary to Article 20 DASR.<sup>62</sup> Legitimacy of government is directly tied to the distinction between state and government discussed above. As the state cannot speak for itself, consent can only be given on its behalf by its actual representative. At the outset it should be noted that there is a manifest inability of consent to be given by rebels who, by their nature as the opposition to a state’s government, cannot themselves speak on behalf of that state, a principle confirmed by the ICJ in *Nicaragua*.<sup>63</sup> In order to ascertain the legitimacy of a government, the principal issue is control of the state, and the historically key question is whether a government must exert *de facto* or *de jure* control over a host state. Nonetheless, it is not immediately clear which of the two modes of control is determinative of legitimacy. This question is of vital importance in determining the validity of consent to drone strikes due to the distinct permutations of government in each of the three states in which the US has been carrying out drone strikes. Therefore this section will consider the current international law on legitimacy and consent, before going on to consider the question of governmental legitimacy in Pakistan, Yemen and Somalia to assert whether or not consent can be given in each of those cases.

In determining legitimacy, the relative dominance of *de jure* or *de facto* control is far from clear. Doswald-Beck draws evidence from pre-UNC arbitral decisions which firmly favoured a finding of legitimacy through *de facto* control. In the *Dreyfus* case it was held that ‘the usurper who *in fact holds power* with the consent express or tacit of the nation acts...validly in the name of the State.’<sup>64</sup> Similarly the *Tinoco* arbitration concluded that ‘...non-recognition for any reason...cannot outweigh...the *de facto* character of Tinoco’s government.’<sup>65</sup> Thus the interpretation by early arbitral bodies, speaking the law as its literal arbiters, firmly privileged *de facto* control, to the exclusion of considerations based on the legal nature of control.

State practice has been more equivocal and, at least in 1986 when Doswald-Beck’s study was published, *de facto* control (understood generally to be ‘effective control’<sup>66</sup>), though still the most important, was not the sole consideration in determining the legitimacy of the government. There were instances of consent being accepted from governments that had lost effective control of their states.<sup>67</sup> More

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<sup>61</sup> Doswald-Beck (n 15) 191.

<sup>62</sup> DASR and Commentary (n 4) Article 20, para 6.

<sup>63</sup> *Nicaragua* (n 18) para 246.

<sup>64</sup> *Dreyfus Case* [1901] *Traité du XXe Siècle*, 394. Translation provided in B Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006) 188.

<sup>65</sup> *The Tinoco Arbitration (Great Britain v Costa Rica)* [1923] 1 RIAA 375. As cited in ‘Decisions, Opinions and Awards of International Tribunals, 1924-5’ (1924-5) 6 *British Yearbook of International Law* 199, 202.

<sup>66</sup> *Per* British Foreign Secretary Lord Carrington: Hansard (28 April 1980), 408 *House of Lords* cols 1121-2, cited in Doswald-Beck (n 15) 194. This is also evident in the jurisprudence of the ICJ: see, for example, *Nicaragua* (n 18) para 115.

<sup>67</sup> Doswald-Beck (n 15) 197-8, citing, *inter alia*, Lebanon’s invitation to UNIFIL in 1978, despite the army having little control over the capital.

recently, the Use of Force Committee of the International Law Association has opined (in draft) that consent may be given by a government with either *de jure* or *de facto* control, apparently without privileging one or the other.<sup>68</sup> David Wippman, echoing the relaxation of the *de facto* control requirement, propounds a reading of legitimacy in which the loss of control does not vitiate a government's capacity to consent 'so long as [it] retains control over the capital city and does not appear to be in imminent danger of collapse'.<sup>69</sup> Despite this it is difficult to uphold such a specific formula in the light of Gray's examination of state practice, which, she has stressed, provides no uniformity in terms of the required nature of governmental control.<sup>70</sup> To add to the multitude of possibilities, Fox has suggested the emergence of a post-Cold War, governance-based approach, which asserts the legitimacy of those governments with a democratic mandate.<sup>71</sup> He nonetheless counsels caution with regard to this understanding, as all relevant practice has occurred within the narrow category of elections that were held subject to international monitoring.<sup>72</sup>

In addition to the above, Doswald-Beck concluded that prior recognition of a government is 'extremely important' and that 'recognition will rarely be withdrawn from an established regime, even once it has lost control, if there is no new single regime in control to take its place.'<sup>73</sup> Recognition plays a part in assessing the legitimacy of a government but it is not entirely determinative. In his thorough study of the recognition of governments, Stefan Talmon has illustrated the concept's dual and intersecting meanings. Recognition can mean one government's willingness to 'enter into official relations' with another or it can mean that the former recognises that the latter 'exists *as such*'.<sup>74</sup> As a result of this, non-recognition does 'not necessarily mean that...the unrecognised government does not exist as a government in the sense of international law. It may mean only that the recognizing government is unwilling to enter into normal...relations with it.'<sup>75</sup> Therefore it is conceivable that non-recognition will not always render a government unable to consent if it maintains *de facto* control.

Thus the situation remains ambiguous but it appears that the predominant interpretation is that a government can be legitimate, and may therefore consent to intervention, either by exercising effective control or, in the absence of such control, if it is recognised by the international community and has not yet been replaced by another entity. Nonetheless, even this broad requirement is questionable as recent state practice by Russia involved the use of its armed forces in Ukraine at the request of Ukrainian President Yanukovich *after* he had fled the country<sup>76</sup> and been replaced by an interim government<sup>77</sup> (though in a manner that did not accord with the

<sup>68</sup> ILA Use of Force Committee (n 10).

<sup>69</sup> David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke Journal of Comparative & International Law* 209, 220.

<sup>70</sup> Gray (n 16) 99.

<sup>71</sup> Gregory H Fox, 'Intervention by Invitation' in M Weller (ed) *The Use of Force in International Law* (Oxford University Press, 2015) 834

<sup>72</sup> *Ibid*, 837.

<sup>73</sup> *Ibid*, 199.

<sup>74</sup> Stefan Talmon, *Recognition of Governments in International Law* (Oxford University Press, 1998) 33 (emphasis in original).

<sup>75</sup> *Ibid*.

<sup>76</sup> Security Council Meetings Coverage, 7125th Meeting (PM) (3 March 2014), [www.un.org/press/en/2014/sc11305.doc.htm](http://www.un.org/press/en/2014/sc11305.doc.htm)

<sup>77</sup> Harriet Salem, 'Who Exactly is Governing Ukraine?' (4 March 2014) *The Guardian*, [www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexander-turchynov](http://www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexander-turchynov).



constitution<sup>78</sup>). However, the consequent condemnation by the US that the action was an act of aggression<sup>79</sup> maintains the notion of consent being available up to the point at which a government is replaced. It is intriguing to note the recent reference to the doctrine of consent and legitimacy, made by the UK defence select committee chairman Julian Lewis, who appears to have inverted the legitimacy requirement, stating that the UK government will not accept Syria's consent because it 'doesn't want to recognise the legitimacy of the Assad regime'.<sup>80</sup> In suggesting this, it appears that the act of accepting consent can serve to project legitimacy onto a government—a form of international recognition—as a consequence of accepting consent, rather than consent being a possibility as a consequence of legitimacy. This inversion has two potential results: first, it could suggest a reduction in the need for legitimacy *per se* within the doctrine of consent, as it is suggested inherently by the act of accepting consent in itself. This is unconvincing however as such a wholesale change to the doctrine is improbable with the proclamation of a single national Member of Parliament. A second, more plausible, inference is that this statement represents the increased reliance within the international community on *de jure* control and international recognition rather than effective control.<sup>81</sup>

After this brief examination of the current, somewhat occluded, state of the law surrounding governmental legitimacy for the purposes of inviting intervention, it is necessary to apply the law to the use of drone strikes in Pakistan, Yemen and Somalia individually, the idiosyncratic nature of government in each necessitating careful and distinct analysis.

### **i. Pakistan**

The need to determine the relative influence of *de jure* or *de facto* control is not immediately clear in the case of drone strikes in Pakistan. The state is represented by the elected government of Prime Minister Nawaz Sharif of the dominant Pakistan Muslim League Nawaz political party. The government has effective control over most of the country and possesses *de jure* legitimacy, holding power lawfully according to the Constitution. As such, it is apparent that the central government is legitimate insofar as it is necessary to consent to the use of force within its territory. Nonetheless, there is a potential objection to the possibility of such consent, which merits consideration presently: all but one of the drone strikes carried out in Pakistan have occurred in the Federally Administered Tribal Areas (FATA or the 'tribal

<sup>78</sup> James A Green, 'Editorial Comment: The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited' (2014) 1 *Journal on the Use of Force and International Law* 3, 6.

<sup>79</sup> 'Remarks: Secretary of State John Kerry at a Solo Press Availability' (4 March 2014) US Department of State, <http://london.usembassy.gov/europe160.html>.

<sup>80</sup> Quoted in Perraudin (n 24).

<sup>81</sup> A different conclusion, asserting the continued prevalence of effective control, is given by Olivier Corten, based on *inter alia* the international community's rejection of Russia's argument that its interventions in Hungary in 1956 and Czechoslovakia in 1967 were justified due to invitations extended by members of the national Communist Parties, as well as the French intervention in Côte d'Ivoire in 2011 which was by Security Council authorisation rather than an invitation from the ousted elected President. See Olivier Corten 'The Russian Intervention in the Ukrainian Crisis: was *Jus Contra Bellum* "Confirmed Rather than Weakened"?' (2015) 2 *Journal on the Use of Force and International Law* 17, 32-35. It is the position of this article that such a conclusion, though persuasive, does not reflect the reality of consent in light of recent practice. This is particularly so when considered against the examples of intervention by invitation in Yemen and Somalia as examined presently...



areas'), the vast majority in North and South Waziristan,<sup>82</sup> regions which exist in a state of semi-autonomy. Due to the nature of this schism between FATA and the rest of Pakistan, it is potentially arguable that the central government may lack control over that specific region and therefore be unable to consent to uses of force there.

FATA is part of Pakistan according to the Constitution,<sup>83</sup> and has a number of members within the National Assembly<sup>84</sup> and the Senate.<sup>85</sup> Nonetheless, under Article 247(3), acts of the National Assembly do not apply automatically to FATA, requiring first the direct approval of the President. Thus the tribal areas have a level of constitutional autonomy that could conceivably alter the operation of consent by the central government to third state uses of force. In light of the dual-nature of 'legitimacy' explored above, it is clear that this constitutional arrangement could be argued to have implications as to the Islamabad government's claim to exercise *de jure* control over the tribal regions. Nonetheless, Article 247(5) empowers the President to 'make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof'. Added to this, the tribal areas are represented in the Parliament, having 12 seats.<sup>86</sup> These facts are demonstrative of a level of constitutional integration and control over the tribal areas that is sufficient to be considered *de jure* control regardless of the region's autonomy. This is further emphasised through international recognition of the tribal areas as part of Pakistan as a corollary of states' practice in treating the Durand Line as the Western border between Pakistan and Afghanistan.<sup>87</sup>

There is, however, potential uncertainty as to the legitimacy of governmental consent when the tribal areas are considered in terms of *de facto* control. The tribal areas comprise 13 regions, inhabited mostly by indigenous Pakhtun tribes. In 1893 the region was included within British India, though it remained isolated, being 'severely left alone' by the British authorities.<sup>88</sup> This may be something of a simplification of the situation during that period, which has also been declared a time characterised by 'unceasing struggle against an imperial presence'.<sup>89</sup> Nonetheless, both accounts point to a situation of abstract *legal* control over the tribal areas but without actual *practical* control. Reflecting the constitutional situation in modern Pakistan, colonial-era treaties maintained the autonomy of the region within the state. A treaty exemplifying this asserted that the (British) Government of India 'has no intention of introducing...regular administration of a settled district, but...will administer it on tribal lines in accordance with tribal customs and usage'.<sup>90</sup> This situation of governed autonomy continued after the partition of India and Pakistan in 1947 and the constitutional situation has remained broadly static ever since.

It has been suggested, however, that since the fall of the Afghan Taliban in 2001 there have been significant increases in militancy in the tribal regions: fighters have

<sup>82</sup> The single occurrence outside of FATA was in Khyber Pakhtunkhwa Province. Information taken from a dataset from The Bureau of Investigative Journalism, <https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HlGt09wgLZDSCP-BQaux51w/edit#gid=1436874561>.

<sup>83</sup> The Constitution of the Islamic Republic of Pakistan (2010), Article 1(2)(c).

<sup>84</sup> Ibid, Article 51(3).

<sup>85</sup> Ibid, Article 59(1)(b).

<sup>86</sup> Ibid, Article 51.

<sup>87</sup> Brad L Brasseur, 'Recognizing the Durand Line: A Way Forward for Afghanistan and Pakistan?' (2011) *The East West Institute*, [www.ewi.info/sites/default/files/ideas-files/durandline.pdf](http://www.ewi.info/sites/default/files/ideas-files/durandline.pdf) 7-8.

<sup>88</sup> Theodore L Pennell, *Among the Wild Tribes of the Afghan Frontier* (Seeley & Co., 1909) 48.

<sup>89</sup> Akbar S Ahmed, *Resistance and Control in Pakistan* (Cambridge University Press, revised edn 2004) 29.

<sup>90</sup> Agreement Between British and Wana Wazirs no. XIX (1921), appended in Ahmed (n 89) 156-7.

crossed the border into Pakistan, and concomitantly local tribes have risen up to resist attempts by the central government to reform governance and administration in the region, leading to a dual tribal and militant insurgency.<sup>91</sup> Notably, the US government's understanding of the situation appears to conflate the tribal and militant groups, seeing them coalesce under the umbrella of Tehrik-e-Taliban, a group symbiotically related to al-Qaeda and engaged in attempts to usurp the central government.<sup>92</sup> Murphy has called this the 'Talibanization' of FATA, and concludes that the on-going insurgency has the capacity to restrict the ability of the central government to exercise effective control over the region, questioning its legitimacy and consequently its ability to give valid consent to uses of force.<sup>93</sup>

Nonetheless, this depiction of absent effective control is not definitive and despite the above pronouncements, a different interpretation of the situation in FATA can be made, adopting a postcolonial methodology, which asserts greater agency among indigenous tribes *vis-à-vis* non-indigenous militants. This consequently gives the counterintuitive result that US drone strikes can be lawful as it rejects the argument that the central government lacks effective control due to 'Talibanization.'

Farhat Taj posits the view that commentators in the West have uncritically adopted the view that Pakhtun tribes have willingly embraced militants, asserting instead that, in fact, tribes have been overpowered.<sup>94</sup> In addition to this, Taj refers to the 1901 Frontier Crimes Regulations (providing the government with sweeping powers over FATA, including the ability to detain all members of any tribes deemed 'unfriendly' towards the government,<sup>95</sup> collective punishment for individual crimes<sup>96</sup> and the removal of entire villages<sup>97</sup>) and their impact upon the indigenous tribes' willingness to act contrary to the government, stating that '[h]ospitality or refuge in FATA to someone wanted by the Pakistani state is out of the question.'<sup>98</sup> It is of note that this argument is made by a Pakhtun academic, giving it a degree of authority absent in the writings of many Western writers unable to access the region. The picture that emerges is a counterpoint to the idea of a 'Talibanization' of the region. It instead suggests a situation in which the central government continues to exercise the same degree of control that has been in place since the formation of the state and earlier.

In addition, regardless of the level of central control over the region, there is no state practice to suggest that a government is disempowered to consent to the use of force within a specific region in which its control is less clear, if it maintains control over the rest of the state.<sup>99</sup> This is unless the conflict has reached the level of a civil war in which case consent is unavailable, for the reasons discussed above.<sup>100</sup> In terms of consent to the use of force, the conflict between the government and Tehrik-e-

<sup>91</sup> US Department of State, 'Country Reports on Terrorism' (2010), [www.state.gov/documents/organization/170479.pdf](http://www.state.gov/documents/organization/170479.pdf) 162.

<sup>92</sup> Ibid, 239.

<sup>93</sup> Murphy (n 47) 119.

<sup>94</sup> Farhat Taj, *Taliban and Anti-Taliban* (Cambridge Scholars Publishing, 2011) 3.

<sup>95</sup> Federal Crimes Regulation (1901), Section 21.

<sup>96</sup> Ibid, Sections 22-3.

<sup>97</sup> Ibid, Section 32.

<sup>98</sup> Taj (n 94) 2.

<sup>99</sup> Indeed, the 2013 French intervention in Mali provides evidence of practice that asserts the opposite: that a central government retains the ability to consent to uses of force in regions in which its control has been vitiated. In this instance, intervention by France came at the invitation of the government of Mali, and related to the north of the country, which at the time was a region entirely outside of its control.

<sup>100</sup> See above, n 16 to n 18 and accompanying text.

Taliban in FATA does not fall into this classification. Wippman has suggested that in situations in which an incumbent government ‘exercises control over most of the state’, it ‘ordinarily retains full authority to request external assistance’.<sup>101</sup> This, coupled with the existence of a recognisable constitutional framework governing the relationship between FATA and Islamabad that provides *de jure* legitimacy, and the absence of a ‘new single regime in control’,<sup>102</sup> leads to the conclusion that, currently, the government of Pakistan is indeed the legitimate government of the tribal regions and that therefore it may exercise consent to drone strikes. Of course, the logical corollary of this is that the government also has the ability to *revoke* consent to drone strikes, which it has done.

## ii. Yemen

Conversely, the legitimacy of the government of Yemen is in question, due to the state’s continued instability. Consent to US drone strikes is purported to have been given freely and clearly, initially by President Saleh and is considered by his successor, President Hadi, to continue to be binding.<sup>103</sup> Both Presidents held power legally, taking office through elections according to Article 106(a) of the Constitution of Yemen and, as such, there is no real debate concerning the nature of the government’s *de jure* legitimacy. It is, however, highly questionable as to whether the government even remotely has the effective control necessary to be deemed legitimate with regard to consent. In illustrating this, a very brief history of the Yemeni government is necessary. The post-unification government of Yemen has historically had an at times tenuous level of control over parts of the country. Since 2004 Houthi rebels have been fighting the regime and in 2011 Ansar al-Shari’a Yemen (ASY), an umbrella group including al-Qaeda in the Arabian Peninsula (AQAP), took control of parts of the south of the country, maintaining control until June 2012 when they were retaken by government and local forces supported by US airstrikes.<sup>104</sup>

President Hadi came to power in a single-candidate election in the wake of the Arab Spring in 2012, though the nature of this poll (whether it can be said to be in any way democratic) has no bearing upon legitimacy as currently understood by international law.<sup>105</sup> Since the election, the Houthi rebellion has grown and now poses a serious challenge to the government’s effective *de facto* control. In January 2015 the Yemeni capital Sana’a was captured by rebels, who overran many government buildings<sup>106</sup> and subsequently the President and his cabinet resigned *en masse*.<sup>107</sup> Following this the President fled the country, suggesting *prima facie* a lack of effective control (particularly considering Wippman’s formulation, which bases legitimacy in part on control of the capital). Regardless, having fled, President Hadi

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<sup>101</sup> Wippman (n 69) 213-4.

<sup>102</sup> Doswald-Beck (n 15) 199.

<sup>103</sup> Human Rights Watch (n 60) 6.

<sup>104</sup> Aaron Y Zelin, ‘Know Your Ansar al-Sharia’ (21 September 2012) *Foreign Policy*, <http://foreignpolicy.com/2012/09/21/know-your-ansar-al-sharia/>.

<sup>105</sup> Fox (n 71), 837.

<sup>106</sup> Hakim Almasmari and Martin Chulov, ‘Houthi Rebels Seize Yemen President’s Palace and Shell Home’ (21 January 2015) *The Guardian*, [www.theguardian.com/world/2015/jan/20/houthi-rebels-seize-yemen-presidential-palace](http://www.theguardian.com/world/2015/jan/20/houthi-rebels-seize-yemen-presidential-palace).

<sup>107</sup> Hakim Almasmari and Martin Chulov, ‘Yemeni Government Quits in Protest at Houthi Rebellion’ (22 January 2015) *The Guardian*, [www.theguardian.com/world/2015/jan/22/yemeni-government-quits-houthi-rebellion](http://www.theguardian.com/world/2015/jan/22/yemeni-government-quits-houthi-rebellion).

rescinded his resignation<sup>108</sup> and subsequently invited the intervention of Saudi Arabia, which has since lead a coalition of Arab states in air strikes against the rebels.<sup>109</sup> Further, the President has more recently written to the Security Council requesting further intervention by ground troops.<sup>110</sup> Simultaneously, ASY has taken over large areas in the east of the country; previously the central government had been able to retake these areas using the armed forces but the Houthi uprising means that the army and air force are in disarray and, as such, may be unable quickly to regain control.<sup>111</sup>

The situation in Yemen cuts straight to the core controversy within the doctrine of consent and the use of force in international law. Arising out of the requirement of legitimacy, there is serious doubt as to whether a government with such a tenuous grasp over its territory can lawfully request the intervention of a third state. In a factual sense, it seems impossible that such a government can speak for the state any longer. As discussed above, this would certainly be the case if the state were undergoing a civil war, which is the apex of the loss of *de facto* control. However, the term ‘civil war’ is unclear in international law and lacks definition in the doctrine of consent. An internal armed conflict exists when there is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’<sup>112</sup> but it is submitted that this is not synonymous with a so-called civil war.

With regard to consent, the armed conflict threshold in *Tadić* is rather low, as it is easily conceivable that a government can maintain effective control of a state while engaged in protracted armed violence against organised armed groups. Thus the presence of an armed conflict will not *prima facie* foreclose intervention by invitation. Doswald-Beck has argued that consent becomes unavailable when ‘the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime’.<sup>113</sup> This stems from the duty of states not to ‘interfere in civil strife in another state’<sup>114</sup> and to refrain from ‘participating in acts of civil strife’,<sup>115</sup> the discussions surrounding which were characterised by ‘the idea that the principle of non-intervention was aimed at allowing certain changes of government and would thus entail the illegality of aiding either side in a revolution.’<sup>116</sup> Indeed, state practice supports a finding that consent continues to be available beyond this threshold. In 2013 France used force in Mali upon the invitation of the government which at the time had lost control of the north of the country to organised rebels.<sup>117</sup> More recently, international uses of force in

<sup>108</sup> AFP, ‘Yemen President “In Safety” as Rebels Advance’ (25 March 2015) *The Guardian*, [www.theguardian.com/world/2015/mar/25/anti-government-militia-captures-airbase-yemen](http://www.theguardian.com/world/2015/mar/25/anti-government-militia-captures-airbase-yemen).

<sup>109</sup> Dan Roberts and Kareem Shaheen, ‘Saudi Arabia Launches Yemen Air Strike as Alliance Builds Against Houthi Rebels’ (26 March 2015) *The Guardian*, [www.theguardian.com/world/2015/mar/26/saudi-arabia-begins-airstrikes-against-houthi-in-yemen](http://www.theguardian.com/world/2015/mar/26/saudi-arabia-begins-airstrikes-against-houthi-in-yemen).

<sup>110</sup> Kareem Shaheen, ‘Yemen’s Exiled Government Asks UN for Ground Troops to Halt Houthi Advance’ (7 May 2015) *The Guardian*, [www.theguardian.com/world/2015/may/07/yemen-president-un-ground-intervention-halt-houthi-rebel-aden-hadi](http://www.theguardian.com/world/2015/may/07/yemen-president-un-ground-intervention-halt-houthi-rebel-aden-hadi).

<sup>111</sup> Bill Roggio, ‘Al Qaeda Takes Control of Eastern Yemeni City’ (3 April 2015) *Long War Journal*, [www.longwarjournal.org/archives/2015/04/al-qaeda-takes-control-of-eastern-yemeni-city.php](http://www.longwarjournal.org/archives/2015/04/al-qaeda-takes-control-of-eastern-yemeni-city.php).

<sup>112</sup> *Prosecutor v Dusko Tadić* (2 October 1995) IT-94-1-A, para 70.

<sup>113</sup> Doswald-Beck (n 15) 251.

<sup>114</sup> General Assembly Resolution 2131 (XX) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965), UN Doc A/RES/20/2131.

<sup>115</sup> Declaration on Friendly Relations (n 17).

<sup>116</sup> Doswald-Beck (n 15) 210.

<sup>117</sup> ‘Mali Tuareg Rebels Declare Independence in the North’ (6 April 2012) *BBC*, [www.bbc.co.uk/news/world-africa-17635437](http://www.bbc.co.uk/news/world-africa-17635437).

Iraq against ISIL have been hallmarked by consent being given by a government without effective control of its territory and suffering a serious existential challenge, with that consent being generally accepted as a lawful justification for the force used.<sup>118</sup> This suggests that there is a large degree of latitude of interpretation in terms of the point at which a state will be unable to consent, mirroring the degree of effective control a government must exercise in order to remain ‘legitimate’.

In light of the above, the responses of states to the government of Yemen’s request for assistance appear to have affirmed the possibility of consent in circumstances of such systemic conflict. Saudi Arabia, Qatar, Kuwait, Bahrain and the United Arab Emirates specifically have referred to the Hadi regime as ‘the legitimate authorities’ in responding to the Hadi government’s invitation for intervention.<sup>119</sup> Iran has been the only state to protest foreign intervention as an infringement of Yemen’s sovereignty.<sup>120</sup> Furthermore, in April 2014, the Security Council passed a resolution in which it reaffirmed ‘its support for the legitimacy of the president of Yemen, [President] Hadi’.<sup>121</sup> Thus it is plausible to conclude that based on state practice and equivocal commentary, the international law on legitimacy has moved away from the privilege given to *de facto* control emphasised in, *inter alia*, the *Tinoco* arbitration. Consequently the current government of Yemen’s clear lack of effective control over its territory is not sufficient to remove its ability lawfully to consent to intervention, particularly as there is no new government in place to replace the recognised existing one.

It has been suggested that interventions by consent will be lawful if their objective is not ‘to settle exclusively internal political strife in favour of the established government’<sup>122</sup> which, at least with regard specifically to the US drone programme in Yemen, is not the case. The strikes have been occurring since 2002 with the sole purpose of counterterrorism, targeting al Qaeda and its affiliates. They have not been against the Houthi rebels and as such are unlikely to be determinative as to the outcome of the internal conflict. It is therefore submitted that the government of Yemen can be conceived of as the legitimate government and that, as such, its consent to US drone strikes is capable of precluding their wrongfulness under *jus ad bellum*.

### iii. *Somalia*

As with Yemen, the question of governmental legitimacy in the face of tenuous territorial control is highly pertinent in the case of Somalia. After the collapse of the regime of General Barre in 1991, Somalia has existed primarily without a functional

<sup>118</sup> Page (n 24).

<sup>119</sup> Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217, 3. It should be noted that this letter refers to an invitation to act under Article 51 and therefore the action is primarily one of collective self-defence, but the key point is that it demonstrates states’ recognition of the legitimacy of the beleaguered Hadi regime.

<sup>120</sup> Carol Morello, ‘Final Make-or-Break Moment for Iran Nuclear Talks’ (26 March 2015) *The Washington Post*, [www.washingtonpost.com/world/final-make-or-break-moment-for-iran-nuclear-talks/2015/03/26/835ac586-d25e-11e4-8b1e-274d670aa9c9\\_story.html](http://www.washingtonpost.com/world/final-make-or-break-moment-for-iran-nuclear-talks/2015/03/26/835ac586-d25e-11e4-8b1e-274d670aa9c9_story.html).

<sup>121</sup> Security Council Resolution 2216 (2015), UN Doc S/RES/2216. Further specific reference to the Hadi regime’s legitimacy was made again at Article 1(d).

<sup>122</sup> Theodore Christakis and Karine Bannelier, ‘French Military Intervention in Mali: It’s Legal But... Why? Part II: Consent and UNSC Authorisation’ (25 January 2013) *EJIL: Talk!*, [www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unscc-authorisation/](http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unscc-authorisation/).



central government and has been characterised by clan rivalries and ‘endless secessionism’.<sup>123</sup> In 2004 a Transitional Federal Government (TFG) was formed under President Abdullahi Yusuf Ahmed, though it faced a continual struggle against warring groups, including al-Shabab and regional factions. So weak was the ability of the government to exercise control over the country, it took until June 2007 before the President and executive were even able to enter the capital city, Mogadishu.<sup>124</sup>

Mary Harper has described the TFG as a ‘virtual’ government due to its near total lack of control over the country.<sup>125</sup> Concurrent with the continued impotence of the central government, a number of Somali regions had begun to operate autonomously, notably Somaliland and Puntland, each with its own government and administration;<sup>126</sup> indeed, Somaliland has been argued to have a ‘strong legal claim to international recognition’.<sup>127</sup> The picture that emerges is of a government, like that of Yemen, with no effective control of its territory, at times without even having a physical presence in the capital. Despite this, the Transitional Federal Charter, in place until 2012, asserted the indivisibility of Somalia,<sup>128</sup> reaffirming the country’s post-colonial borders.<sup>129</sup> This, coupled with the absence of recognition by third states of any self-proclaimed autonomous regions, points to *de jure* control by the central government, albeit of the most ephemeral variety. Furthermore, in 2012 the new Somali Federal Government (SFG) was inaugurated and a provisional constitution adopted which makes reference to the unity of Somalia as ‘inviolable’,<sup>130</sup> once again reaffirming the state’s existing borders.<sup>131</sup> The SFG has received wide international recognition,<sup>132</sup> which supports a conclusion that it possesses *de jure* control despite the fact that it has little effective control outside of Mogadishu and depends upon African Union troops for its continued existence.<sup>133</sup>

Drone strikes in Somalia have been carried out by the US since 2011<sup>134</sup> though consent appears to have been given as early as 2007; in relation to air strikes generally, President Mohamed stated that ‘[t]he US has a right to bombard terrorist

<sup>123</sup> Raphael C Njoku, *The History of Somalia* (Greenwood, 2013), 141.

<sup>124</sup> Ibid, 173.

<sup>125</sup> Mary Harper, *Getting Somalia Wrong* (Zed, 2012) 65.

<sup>126</sup> Ibid, 109.

<sup>127</sup> Christopher Clapham, ‘Long Walk to Statehood: Why Somaliland Deserves International Recognition’ (2015) *Georgetown Journal of International Relations*, <http://journal.georgetown.edu/long-walk-to-statehood-why-somaliland-deserves-international-recognition/>. Interestingly, Somaliland has received recognition from the UK cities of Sheffield and Cardiff: see Ruth Mosalski, ‘Cardiff Becomes Only Second UK Council to Recognise the Republic of Somaliland (26 March 2015) *Wales Online*, [www.walesonline.co.uk/news/wales-news/somaliland-recognised-by-cardiff-council-8930027](http://www.walesonline.co.uk/news/wales-news/somaliland-recognised-by-cardiff-council-8930027).

<sup>128</sup> Transitional Federal Charter of the Republic of Somalia (2004), Preamble.

<sup>129</sup> Ibid, Article 2(3).

<sup>130</sup> Provisional Constitution of the Federal Republic of Somalia (2012), Articles 1(3) and 7(2).

<sup>131</sup> Ibid, Article 7(5).

<sup>132</sup> Matt Bryden, ‘Somalia Redux? Assessing the New Somali Federal Government’ (August 2013) *Report of the CSIS Africa Program* 23. Recently the US announced that it would establish a diplomatic mission in Mogadishu: see John Kerry ‘Remarks in Mogadishu, Somalia’ (5 May 2015) *US Department of State*, [www.state.gov/secretary/remarks/2015/05/241902.htm](http://www.state.gov/secretary/remarks/2015/05/241902.htm).

<sup>133</sup> Ibid, 1.

<sup>134</sup> Greg Jaffe and Karen DeYoung, ‘U.S. Drone Targets Two Leaders of Somali Group Allied with al-Qaeda’ (29 June 2011) *Wall Street Journal*, [www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFzrH\\_story.html](http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFzrH_story.html).

suspects who attacked its embassies in Kenya and Tanzania'.<sup>135</sup> This statement is primarily in reference to the US's 1998 claim of self-defence in relation to the Kenya and Tanzania attacks<sup>136</sup> but it can also be understood to indicate President Mohamed's acceptance of and consent to US strikes in Somalia more generally. Though not the 'clearly established' consent envisaged by the ILC,<sup>137</sup> it is nonetheless demonstrative of an underlying approval.

Much more explicitly, Defence Minister Abdihakim Haji Mohamud Fiqi stated that drone strikes were 'welcome[d] against al-Shabab'.<sup>138</sup> These expressions of consent, which are far from definitive, came from the TFG, which, as demonstrated above, can in no way be said to have exercised effective control. Doswald-Beck's depiction of consent stated the importance of recognition for legitimacy and emphasised that such recognition would unlikely be withdrawn even in the event that a government had no control if there was no single alternative regime. Thus, despite the TFG's Somalia languishing for five of its eight years as the world's most failed state,<sup>139</sup> the groups vying to take over<sup>140</sup> were disparate and did not provide an alternative. As such, it appears that the TFG was the legitimate government by virtue of its precarious *de jure* control and that consequently its consent to US drone strikes was valid. This adheres with state practice in which governments without control of their territories have been able to validly consent to intervention.<sup>141</sup> The situation under the SFG is similar to that of the TFG but its claim to *de jure* control is stronger as it has greater international recognition.<sup>142</sup> As such, it too is in a position to provide valid consent as the legitimate government, and this has been done on a number of occasions. In 2013 President Mohamud asserted his support for US drone strikes against foreign fighters.<sup>143</sup> More recently the government has stated that it was at least 'pre-informed' of a drone strike, which, coupled with an apparently positive view of the attack, implies continued governmental consent.<sup>144</sup> Consequently, though an apparently improbable outcome due to the nature of the Somali government, the doctrine of consent as it appears presently allows the conclusion that it is the

<sup>135</sup> 'US Somali Air Strikes "Kill Many"' (9 January 2007) *BBC*, <http://news.bbc.co.uk/1/hi/world/africa/6243459.stm>.

<sup>136</sup> Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/1998/780.

<sup>137</sup> DASR and Commentary (n 4), Article 20, para 6.

<sup>138</sup> Robert Young Pelton, 'Enter the Drones' (7 June 2011) *Somalia Report*, [www.somaliareport.com/index.php/post/1096](http://www.somaliareport.com/index.php/post/1096).

<sup>139</sup> According to the Fund for Peace's annual fragile states index, [www.fsi.fundforpeace.org/data](http://www.fsi.fundforpeace.org/data).

<sup>140</sup> Including al-Shabab, the Islamic Courts Union, and the autonomous regions of Somaliland and Puntland.

<sup>141</sup> For instance, Lebanon's 1978 consent to UNIFIL intervention; the US's invasion of Grenada in 1983 which was in part based on the invitation of Governor-General Sir Paul Scoon, acting with no effective control which nonetheless 'constitute[d] a recognized basis under international law for foreign states to provide requested assistance'. See Marian Nash, *Cumulative Digest of United States Practice in International Law 1981-88* (Department of State Publication, 1995) Book III, 3399. See also consent by ousted Ukrainian President Yanukovych to Russian intervention in Crimea in 2014, discussed above, n 76 – n 79.

<sup>142</sup> Recognition has even come from the US, for the first time since 1991: see Hillary Rodham Clinton, 'Remarks With President of Somalia Hassan Sheikh Mohamud After their Meeting' (17 January 2013) *US Department of State*, [www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm](http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm).

<sup>143</sup> Josh Rogin, 'Somali President Asks for More American Help' (18 January 2013) *Foreign Policy*, <http://foreignpolicy.com/2013/01/18/somali-president-asks-for-more-american-help/>.

<sup>144</sup> 'Government Spokesman says they were Pre-Informed US Drone Strike against al-Shabab Commander' (18 January 2014) *RBC Raxanreeb*, [www.raxanreeb.com/2014/01/somalia-government-spokesman-says-they-were-pre-informed-u-s-drone-strike-against-al-shabab-commander/](http://www.raxanreeb.com/2014/01/somalia-government-spokesman-says-they-were-pre-informed-u-s-drone-strike-against-al-shabab-commander/).

legitimate government that has invited intervention, thereby satisfying that aspect of valid consent. Nonetheless, it must be remembered that due to the specific scope defined by President Mohamud targeting is a key issue to maintain the on-going lawfulness of drone strikes—any strikes directed against Somalis rather than foreign fighters will breach the extent of Somalia’s invitation and will require justification within the framework of *jus ad bellum*.

## V. Consent must be given by the requisite official

A concern related to the need for consent to be given by the legitimate government of a state is the requirement that consent be given by an official who represents that government. In its commentary to the DASR, the ILC advocates a contextual approach to consent, stating that ‘[w]ho has authority to consent to a departure from a particular rule may depend on the rule... Different officials or agencies may have authority in different contexts’.<sup>145</sup> As such, there is flexibility as to the particular official empowered to consent, which allows the doctrine to account for constitutional variation between states. According to the VCLT, officials considered to represent a state without the need for full powers are Heads of State, Heads of Government and Ministers for Foreign Affairs.<sup>146</sup>

One may therefore reasonably conclude that consent to foreign intervention can be given by one of these three officials, due to the nature of the act carried out. This is borne out by state practice and *opinio juris*: in 1958 it was King Hussein of Jordan who requested intervention from the UK;<sup>147</sup> President Kabila originally provided consent to the presence of Ugandan troops on the territory of the DRC;<sup>148</sup> and, most recently, force has been used in Iraq against ISIL at the request of the Iraqi foreign minister.<sup>149</sup> In addition to this, the Use of Force Committee ILA has asserted (in draft) that consent ‘from the military/intelligence services rather than highest echelons of current government, will not suffice’, subsequently stating that in order to be understood as being on behalf of the state itself, consent must ‘be freely given by the appropriately authorised *highest levels* of the lawful government’.<sup>150</sup> Thus, it is clear that in order to establish the validity of consent when authorising uses of force, it is necessary to determine its ultimate source.

### i. Pakistan

The need for consent to be given by the requisite official is of particular relevance with regard to the use of drones in Pakistan, due to the various political offices within the government and their cleaved nature. The existence of a distinct office of President, as head of state,<sup>151</sup> and Prime Minister, elected by the National Assembly,<sup>152</sup> has the potential to confuse the provision of consent. Under Pakistan’s

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<sup>145</sup> DASR and Commentary (n 4), Article 20, para 6.

<sup>146</sup> Vienna Convention on the Law of Treaties (1969), Article 7(2).

<sup>147</sup> Quoted in Doswald-Beck (n 15) 214. It should be noted that the UK invoked collective self-defence to justify this intervention, but it is nonetheless supportive as to who may give consent.

<sup>148</sup> *Armed Activities* (n 18) para 29.

<sup>149</sup> Martin Chulov and Spencer Ackerman, ‘Iraq Requests US Air Strikes as Isis Insurgents Tighten Grip on Oil Refinery’ (18 July 2014) *The Guardian*, [www.theguardian.com/world/2014/jun/18/iraq-request-us-air-strikes-isis-baiji-oil](http://www.theguardian.com/world/2014/jun/18/iraq-request-us-air-strikes-isis-baiji-oil).

<sup>150</sup> ILA Use of Force Committee (n 10).

<sup>151</sup> Constitution of the Islamic Republic of Pakistan (2010), Article 41(1).

<sup>152</sup> *Ibid*, Article 91(3).



constitution the President must be *kept informed* by the Prime Minister of ‘all matters of internal and foreign policy’<sup>153</sup> but is only empowered to act on the advice of the Cabinet or Prime Minister.<sup>154</sup> The President is thus symbolic, and the Prime Minister is the *de jure* principal official able to consent to uses of force by third states.

A further level of complexity is added through the office of Chief of Army Staff (COAS), appointed by the President on the advice of the Prime Minister,<sup>155</sup> who, though ultimately subsidiary to the President and Prime Minister, might reasonably be seen to act in their stead and have the capacity to consent to strikes by US drones.<sup>156</sup> Presently, although the current government of Pakistan has united in rescinding the previous regime’s apparent consent,<sup>157</sup> the COAS, Reheel Sharif, has been reported to view Pakistan’s bellicose NSAs as the most serious threat to the country’s security and has actively sought help from the US in addressing it.<sup>158</sup> This potential opposition between civilian and military authorities is similar to the situation in 2008 in which the then-Prime Minister Yousuf Raza Gilani publicly opposed drone strikes while the then-COAS, General Ashfaq Kayani, covertly called for a greater US drone presence within Pakistan.<sup>159</sup> It should be noted that in the 2008 instance, while Prime Minister Gilani publicly objected to US drone strikes he privately endorsed them, or at least asserted that the government would remain silent,<sup>160</sup> distinguishing that instance from the current situation insofar as there has been no suggestion that the rescission of consent by the current government is a veil over a continuing clandestine invitation. Likewise, it has been asserted by Shah that the historic tension between the government and the COAS has been resolved.<sup>161</sup>

This further demonstrates the difficulty in adducing consent, making a conclusion as to its presence as a basis for the use of force highly problematic. Nonetheless, in terms of officials empowered to represent the government, the strength of international institutional opinion appears to support the notion that only the highest officials, or those with specific authority can consent to uses of force from third states: as stated above, the VCLT reserves the inherent ability to consent to Heads of State, Heads of Government and Ministers for Foreign Affairs alone. Furthermore, considering the contextual approach advocated by the ILC in its commentary to the DASR, it is informative to refer to the 2013 report of Christof Heyns, then Special Rapporteur on extrajudicial, summary and arbitrary executions, in which he asserted that when it comes to invited intervention ‘[o]nly the [host] State’s highest government authorities have the power to give consent to the use of force’ and that ‘[w]here there is a difference of view between the highest authorities in the Government and lower-level officials, the view of the higher-level officials should be taken as determinative.’<sup>162</sup>

<sup>153</sup> Ibid, Article 46.

<sup>154</sup> Ibid, Article 48(1).

<sup>155</sup> Ibid, Article 243(1)(b).

<sup>156</sup> Murphy (n 45) 119.

<sup>157</sup> Miller and Woodward (n 55).

<sup>158</sup> ‘Old Problems, New Hope’ (13 December 2014) *The Economist*, [www.economist.com/news/asia/21636088-nato-lowers-flag-taliban-have-not-been-beaten-militarily-politically-they-have-been](http://www.economist.com/news/asia/21636088-nato-lowers-flag-taliban-have-not-been-beaten-militarily-politically-they-have-been).

<sup>159</sup> ‘Kayani Wanted More Drone Strikes in Pakistan’ (21 February 2013) *Wikileaks*, [https://wikileaks.org/gifiles/docs/30/3049919\\_-os-us-pakistan-mil-ct-wikileaks-kayani-wanted-more-drone.html](https://wikileaks.org/gifiles/docs/30/3049919_-os-us-pakistan-mil-ct-wikileaks-kayani-wanted-more-drone.html).

<sup>160</sup> Ibid.

<sup>161</sup> Shah (n 2) 90.

<sup>162</sup> Christof Heyns, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (13 September 2013) UN General Assembly, UN Doc A/68/382, para 82.

Though Murphy suggests that in the case of drones in Pakistan the COAS may be empowered to consent, he offers no evidence to support this claim, so it should be treated with caution in light of the trend favouring a restricted power of consent. Thus, without specific indications as to the respective powers of the Prime Minister, President and COAS, it is reasonable to conclude that outside states ought to defer to the emphasis within the doctrine that consent must come from the ‘highest echelons of current government’.<sup>163</sup> As a result, it is submitted that at present there is not enough evidence of consent available for any state to rely upon it to allow continued drone strikes in Pakistan. As stated above, Murphy adopts the perspective of international arbitral bodies to argue that secret consent is a sufficient basis for the use of force as if a claim was ever brought; such consent could be adduced in ‘whatever venue is necessary’ to confirm the legality of force after the fact.<sup>164</sup> Though plausible, (and analogous with the retroactive assertion of sovereignty that occurs with the waiving of a claim under Article 45 DASR) for present purposes such reasoning is too speculative to enable the conclusion that consent has been given. This is particularly the case in light of the explicit rescinding of consent by the Pakistani Prime Minister, the condemnation of drone strikes by the parliament<sup>165</sup> and the expulsion of the US from Shamsi airbase in 2011, from which drones had been flown.<sup>166</sup> It is consequently submitted that until such evidence to the contrary comes to light, these actions of the government of Pakistan should be taken to be indicative of an absence of on-going consent for drone strikes.

## ii. Yemen

The ‘requisite official’ aspect of Yemen’s consent is far less controversial than was the case in terms of the examination of the legitimacy of the government. It was concluded above that the Hadi regime is presently the legitimate government of Yemen insofar as consent to military intervention is concerned. It has been demonstrated that both Presidents Saleh and Hadi had been elected in accordance with the constitution and that as such, consent given by them can clearly be seen to come from a requisite official, in accordance with the DASR and VCLT.

General consent to the use of drones by the US was purportedly given by Saleh and consequently maintained by Hadi.<sup>167</sup> While the regime remains the legitimate government this consent will continue to be authoritative. Nonetheless, the recent Emmerson report stated that the government had asserted that ‘the United States routinely seeks prior consent, on a case-by-case basis...and that where consent is withheld, a strike will not go ahead.’<sup>168</sup> The report notes that this is contrary to the general consent referred to by President Hadi detailed by Human Rights Watch, and calls for clarification from the government. It is therefore worth noting that—in the view of the present author—if the case-by-case approach to consent is the prevailing

<sup>163</sup> ILA Use of Force Committee (n 10).

<sup>164</sup> Murphy (n 45) 118.

<sup>165</sup> Qasim Nauman ‘Pakistan Condemns US Drone Strikes’ (4 June 2012) *Reuters*, [www.reuters.com/article/2012/06/04/us-pakistan-usa-drones-idUSBRE8530MS20120604](http://www.reuters.com/article/2012/06/04/us-pakistan-usa-drones-idUSBRE8530MS20120604).

<sup>166</sup> Saeed Shah, ‘Pakistan Orders US to Leave Airbase in Row Over Deadly NATO Assault’ (27 November 2011) *The Guardian*, [www.theguardian.com/world/2011/nov/27/pakistan-orders-us-leave-shamsi-airbase](http://www.theguardian.com/world/2011/nov/27/pakistan-orders-us-leave-shamsi-airbase).

<sup>167</sup> Human Rights Watch (n 60) 6.

<sup>168</sup> Ben Emmerson, ‘Report of the Special Rapporteur on the Promotion and Protect of Human Rights and Fundamental Freedoms while Countering Terrorism’ (2014) Human Rights Council, UN Doc A/HRC/25/59, para 29.

method, it is necessary to determine which official within the government is providing this consent to determine that it is validly given.

### iii. *Somalia*

Similarly, when considering the need for consent to have been provided by the requisite official, the situation for Somalia is much more straightforward than might be expected, considering the problematic situation in terms of legitimacy. There have been statements by the Presidents of both the TFG<sup>169</sup> and SFG<sup>170</sup> providing evidence of consent to the US drone programme by officials who fall into the categories of officials required by Article 20 DASR, Article 7(2) VCLT and state practice. Under Article 39 of the Transitional Federal Charter the President is Head of State and commander-in-chief of the armed forces, therefore rendering the consent to airstrikes by President Abdullahi Yusuf Ahmed valid. Similarly, the 2012 Provisional Constitution reasserts the President as Head of State<sup>171</sup> and commander of the armed forces<sup>172</sup> and provides the office-holder with the ability to declare war<sup>173</sup> thereby confirming that the President is empowered to invite outside intervention. As detailed above, President Mohamud has referred to his own support for US drone strikes. This does not demonstrate the unequivocal and overt assertion of consent that would dispel confusion as to its existence but nevertheless allows for the inference that the invitation for US drone strikes has indeed come from the requisite official and is, therefore, likely to be valid.

## VI. Consent and breaches of international law

This final section will examine the breadth of the exculpatory potential of consent once its valid presence has been established. It has been discussed above that consent, as an exercise of sovereignty, removes specific uses of force from the *jus ad bellum* framework, but that is not where the debate over the power of consent ends. ‘Wrongfulness’ under international law can arise in relation to the forcible actions of states in many ways, not purely under the *jus ad bellum*. It will be recalled that Article 20 DASR only precludes the wrongfulness of an act ‘to the extent that the act remains within the limits of...consent’, which clearly demonstrates a bounded rather than unlimited understanding of consent. This refers to the need for conduct to remain within the terms imposed by the consenting government, in the manner envisaged by Article 3(e) of the Definition of Aggression and its focus on ‘contravention of the conditions provided for in the agreement’.<sup>174</sup> Nonetheless, the reference by Article 20 to the ‘limits of consent’ points to the presence of wider considerations of lawfulness, specifically whether actions that would otherwise be unlawful in international law, like breaches of IHL or IHRL can be rendered lawful through the operation of consent. As such, it is of critical importance to note the debate surrounding the scope of conduct carried out under the ambit of the consent, which concerns whether or not consent renders lawful *any* actions of an intervening state which would otherwise be contrary to international law.

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<sup>169</sup> BBC (n 136).

<sup>170</sup> RBC Raxanreeb (n 146).

<sup>171</sup> Provisional Constitution of the Federal Republic of Somalia (2012), Article 87.

<sup>172</sup> Ibid, Article 90(b).

<sup>173</sup> Ibid.

<sup>174</sup> General Assembly Resolution 3314 (XXIX) Definition of Aggression (1974), Article 3(e).

O'Connell maintains a restrictionist interpretation when considering this question, stating that '[e]ven where the US is using drones on the basis of consent from the [host] state, that state may not consent to use military force on its own, against its own people, except when it is engaged in armed conflict hostilities.'<sup>175</sup> In this way, she posits the classification of violence as a key caveat to the doctrine of consent: military force—which O'Connell argues hellfire missiles fired from a drone are an example of<sup>176</sup>—may only be resorted to once fighting has reached the threshold of an armed conflict. As a corollary of this, she concludes that drones cannot be used outside of an armed conflict (a 'law enforcement' paradigm<sup>177</sup>). Thus, as well as discerning the existence of consent, it would be vital to establish the nature of the violence in which force was being used because unless an armed conflict exists drone strikes could never be lawful, regardless of consent from the host nation.

In diametric opposition to this, adopting a very broad understanding of the capacity of consent to render conduct lawful, Henriksen has suggested that consent has the effect of 'preclud[ing] the unlawfulness of the use of force by one state in another state, even in cases where the use of force *would have been unlawful if carried out by the consenting state*.'<sup>178</sup> This interpretation thus appears to allow the recourse to drone strikes regardless of the nature of the paradigm in which they are used and, furthermore, seems to suggest that consent operates to foreclose other considerations of state responsibility under international law (principally in relation to IHL and IHRL). It could be that Henriksen is referring purely to unlawfulness under *jus ad bellum*, stating that 'valid consent from a host state will...always absolve the state from international legal responsibility under *jus ad bellum*'<sup>179</sup> but it is unclear whether he has in mind broader international law considerations. If his intention is simply to refer to *jus ad bellum*, then the conclusion that consent renders lawful uses of force that would otherwise be unlawful if carried out by the host state is puzzling because consent (as has been noted) removes uses of force from the *jus ad bellum* framework; unlike consent which does not infringe sovereignty, the *jus ad bellum* provides an 'excused violation' of sovereignty<sup>180</sup> and does not apply to internal uses of force.<sup>181</sup> As such, it would seem that Henriksen is suggesting that drone strikes that have been consented to will not be subject to the regimes of IHL or IHRL, which makes his position a radical one in which consent has almost total exculpatory power.

The two polarised understandings of the effect of consent represented by O'Connell and Henriksen are two ends of a spectrum and it is submitted that the reality falls somewhere in between. At least part of the intermediate area between the poles of interpretation is evident in Article 53 VCLT in which a 'treaty is void if...it conflicts with a peremptory norm of general international law' and, more specifically, by Article 26 DASR which affirms that wrongfulness cannot be precluded for 'any act...which is not in conformity with an obligation arising under a peremptory norm'. These two provisions demonstrate that consent cannot be viewed as providing total

<sup>175</sup> Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law' (2011) 39 *Denver Journal of International Law & Policy* 585, 597.

<sup>176</sup> *Ibid.*, 588.

<sup>177</sup> Paul Alston, 'Study on Targeted Killings' (2010) Human Rights Council, UN Doc A/HRC/14/24/Add.6, para 31.

<sup>178</sup> Anders Henriksen, 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism around the World' (2014) 19 *Journal of Conflict & Security Law* 211, 220.

<sup>179</sup> *Ibid.*

<sup>180</sup> ILA Use of Force Committee (n 10) B.4.

<sup>181</sup> See Noam Lubell, *Extra-Territorial Uses of Force against Non-State Actors* (Oxford University Press, 2010) 8 (arguing that in such instances the *jus ad bellum* 'loses its relevance').

exculpation for internationally wrongful acts *per se*. At the bare minimum consent will not render lawful force used in contravention of peremptory norms. Nonetheless, this clearly applies only to rules of *jus cogens* and, as such, does not apply to the majority of IHL or IHRL rules.<sup>182</sup> It is therefore necessary to consider whether or not consent renders lawful breaches of international legal norms that are not *jus cogens*.

Alston has emphasised the distinct characters of the different legal frameworks (and therefore the nature of force available to states) that operate within and without armed conflicts. Specifically, the lawfulness of state killing under the regime of IHL within an armed conflict (in which combatants or civilians directly participating in hostilities<sup>183</sup> may be targeted) is so manifestly different from that of IHRL, outside an armed conflict (in which killing may only be used when it is the sole means of protecting life<sup>184</sup>), that it is logical to conclude that states using force with governmental consent would nonetheless need to remain within those respective parameters. Alston asserts the continued application of these parameters to the activities of both the consenting and targeting states, recognising a positive obligation on the part of the consenting state to require the targeting state to demonstrate that force used will be lawful. Nonetheless, he also holds that this does not absolve the victim state from responsibility, stating that if breaches of IHL or IHRL have occurred the host state should ‘seek prosecution of the offenders and compensation of the victims.’<sup>185</sup> It must be noted that Alston asserts that within a law enforcement paradigm ‘it is never permissible for killing to be the sole objective of an operation.’<sup>186</sup>

Similarly, Heyns confirms that states cannot consent to interventions that breach IHL or IHRL and that they have an obligation to ensure this does not happen.<sup>187</sup> Larson and Malamud have also emphasised this interpretation of consent—as mandating an obligation upon both acting and consenting states to ensure force adheres to international law—by opining that ‘[i]f Pakistan has consented to the drone strikes, then the United States and Pakistan must still ensure the legality of the strike. A finding that the cross-border incursion is “legal” does not relieve States from their obligations to follow the Law of War.’<sup>188</sup> Consent conceived of in this manner is restricted to rendering lawful only the resort to force, having no impact upon broader international law obligations.

Schmitt has asserted that ‘[o]f course, the [host] state may only grant consent to operations that it could itself legally conduct’ and that, as a consequence, the host state ‘cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority.’<sup>189</sup> Likewise, Ashley Deeks is clear that consent should not ‘serve as a standalone basis for force

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<sup>182</sup> See Rafael Nieto-Navia, ‘International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law’ (2001) *Coalition for the International Criminal Court* [www.iccnw.org/documents/WritingColombiaEng.pdf](http://www.iccnw.org/documents/WritingColombiaEng.pdf). It has been suggested by Nieto-Navia that paragraphs (1) and (2) of common Article 3 of the Geneva Conventions can be seen as ‘truly peremptory in nature’, and, as such, there is a *prima facie* inability for consent to absent responsibility for any drone strikes that might have been carried out in contravention of this Article. However, questions of *jus in bello* are beyond the scope of the present article and must be left open at this stage.

<sup>183</sup> Geneva Conventions (1945), Common Article 3.

<sup>184</sup> Alston (n 178) paras 30–33.

<sup>185</sup> *Ibid*, paras 37–38.

<sup>186</sup> *Ibid*, para 33 (emphasis in original).

<sup>187</sup> Heyns (n 163) para 38.

<sup>188</sup> Kurt Larson and Zachary Malamud, ‘The United States, Pakistan, the Law of War and the Legality of the Drone Attacks’ (2011) 10 *Journal of International Business and Law* 1, 13.

<sup>189</sup> Schmitt (n 21) 315.

when the host state's consent exceeds what it could do under its own laws', asserting that this accords with the teleology of the UN Charter.<sup>190</sup> Deeks, like Alston, understands consent as creating responsibilities, though she places such responsibility principally with the acting state, proposing the recognition of a 'duty to inquire'.<sup>191</sup> This requires that states actively ascertain a consenting state's domestic law governing force and subsequently ensure compliance in the course of intervention,<sup>192</sup> non-compliance creating a situation she terms 'unreconciled consent'.<sup>193</sup> It is submitted that, particularly if considered with the arguments of Alston and others detailed above, this duty implicitly includes the requirement that force be used in accordance with international law. Indeed, due to the general application of much international law in this area it is not a stretch to suggest that in instances of intervention by invitation, the duty to inquire is vitiated in favour of a *presumption* of understanding in which states are expected to know and abide by international law—states conducting interventions have significant bureaucratic and legal resources which one would hope at the very least signify a knowledge (regardless of interpretation) of the applicable law governing uses of force.<sup>194</sup> The key point is that Deeks' interpretation of consent does not prohibit uses of force like drone strikes outside of an armed conflict, but nevertheless emphasises that such force operates within, and *is subject to*, the domestic and international legal framework, thereby confirming the impossibility of consent abstracting uses of force from the regimes of IHL and IHRL. These writers' positions all indicate that drone strikes may be difficult to justify in a law-enforcement paradigm, but they do not go as far as O'Connell's suggestion that they are *per se* unlawful outside of an armed conflict.

Additional insight as to the exculpatory nature of consent may be gleaned by considering statements made by governments with regard to invited interventions against ISIL in Iraq. As stated above, the intervention against ISIL is complex as it spans both Iraq and Syria. Article 51 has been invoked, citing the collective self-defence of Iraq which could replace consent as the justification for uses of force.<sup>195</sup> However, the invocation of Article 51 is for uses of force carried out in Syria rather than Iraq, as the Syrian government has not given its consent. Thus consent can still be seen to provide the primary justification for force in Iraq and, as such, the statements of intervening governments can provide authoritative interpretations of the remit of consent. In 2014, a senior White House official stated that 'any actions [taken in Iraq]...would be consistent with international law, as we have a request from the Government of Iraq'.<sup>196</sup> This assertion as to the consistency of force with international law suggests a wide understanding of the exculpatory power of consent but it does not go so far as to allow the conclusion to be reached that consent renders *all* conduct lawful, it seems likely to refer solely to legality under *jus ad bellum*. This

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<sup>190</sup> Ashley S Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 *Harvard International Law Journal* 1, 35.

<sup>191</sup> *Ibid*, 35.

<sup>192</sup> *Ibid*, 35.

<sup>193</sup> *Ibid*, 21.

<sup>194</sup> For the financial year 2016 the US Department of State, Office of the Legal Advisor has requested a diplomatic and consular service budget of nearly \$13.5mL: see 'Congressional Budget Justification: Department of State, Foreign Operations and Related Programs' (2016), [www.state.gov/documents/organization/236395.pdf](http://www.state.gov/documents/organization/236395.pdf), 15.

<sup>195</sup> See above, n 24.

<sup>196</sup> Background Briefing by Senior Administration Officials on Iraq (8 August 2014) *Office of the Press Secretary, The White House*, [www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq](http://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq).



appears to be the same understanding posited by the UK, which has stated that consent provides ‘a clear and unequivocal legal basis’ for the use of force, but nonetheless emphasised that such action would be taken ‘in accordance with applicable international law, including international humanitarian law’.<sup>197</sup> It is therefore clear that those states currently conducting forcible interventions by invitation understand themselves to be bound by international legal obligations other than those governing the recourse to force itself: that is to say that uses of force are understood to be subject to IHL and IHRL.

There is an absence of unanimity in this area but the majority of authors who have examined consent and the use of drones acknowledge that the exculpatory potential of consent is not absolute and that its power begins and ends with the removal of uses of force from the framework of *jus ad bellum*. Crucially, this accords with the practice and rhetoric of states, which supports a conclusion that consent has a purely gatekeeping role in allowing the use of force but has no bearing upon the *nature* of that force (a determination that is left to other legal frameworks). Therefore, when consent is adduced to allow the use of armed drones, and can be asserted without equivocation, such use is still subject to IHL and IHRL, it does not operate in a legal vacuum. Conversely, armed drone use outside of an armed conflict is not unlawful *per se*, regardless of consent, as argued by O’Connell: it simply operates subject to the frameworks of IHL and IHRL. It is possible that the magnitude of force delivered by a drone will never be lawful outside of an armed conflict paradigm but that is a consideration outside of consent and therefore beyond the scope of this article.

## VII. Conclusion

Untangling consent to intervention is a challenging task, due to its conceptual and practical complexity and indefinite structure. This is in large part due to its nature as a legal doctrine that operates in a distinctly political manner, the effect of which is to remove force from its legal framework and abstract it from its international context into a national one. As such, it is not characterised by the trail of artefacts of legal assertion present when force is justified by, for instance, self-defence—the US has acted with the consent of the governments in whose territory their drones fly but it has not been posited in the same manner as legal justifications under *jus ad bellum*. Despite this difficulty, it has been possible to adduce the presence of consent from each of Pakistan, Yemen and Somalia and to assert its validity when given, meaning that in each case it has been capable of rendering lawful the resort to armed drones.

Nevertheless, it is evident that consent in each of these instances (particularly in relation to the use of drones in Yemen and Somalia) remains highly problematic. The reality is that consent fails to live up to the billing that it receives as being a trump card for the extraterritorial use of armed drones. This analysis has highlighted the disconnect between the discursive employment of consent within the drone debate and its often tenuous operation in fact.

In Pakistan, leaked memos have provided evidence of the existence of consent by the legitimate government to the US drone programme, which is valid regardless of its secrecy, though this has subsequently been retracted. Despite this retraction, the

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<sup>197</sup> ‘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](http://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).

US has continued to carry out drone strikes, meaning that, at least since 2013, self-defence under *jus ad bellum* must act as justification. In Yemen and Somalia, consent has been given publicly and broadly given and has not been withdrawn at any point (indeed, in both cases it has been consistently reiterated by Heads of State). However, both states suffer from a significantly questionable claim to be the legitimate governments, as one is engulfed in a growing internal conflagration with little to no territorial control, while the other attempts to drag itself into legitimacy after 24 years of reputed state failure. As such, the use of drones by invitation in both instances is shaky and vulnerable to refutation; consequently, in neither situation should justifications of *jus ad bellum* be dispensed with. It is therefore important to recognise that though consent removes the use of force from the *jus ad bellum* framework, that framework cannot be ignored due to the problems inherent within a situation in which a state needs to invite intervention: the absence of control.

Regardless of consent's abstraction of the use of force by drones from its legal context, there are still many legal questions to be answered. Consent operates only in terms of the *gateway* lawfulness of drone strikes—the practicalities of their use are still very much embedded in international law. The legality of the resort to drone strikes says nothing about their methods of employment. As such, there remains important work to be done in terms of drones within the structure of IHL and IHRL, which must not be overlooked.

The fact that consent to drone strikes has been able to be adduced in each of Pakistan, Yemen and Somalia begs an obvious further question as to the nature of the doctrine of consent itself. That is whether consent in its present configuration—in which it is apparently possible for governments with no effective control of a state to consent to interventions—is desirable or even *tenable*. The doctrine of consent is subject to great conceptual and normative vagueness, allowing for a broad spectrum of interpretation, which manifests in its ability to provide a wide range of lawful justifications for uses of force. Works like that of Doswald-Beck and, more recently, Fox have attempted to map the doctrine in a systemic manner, but its indistinctness is present even within these depictions. Consent has the potential to be used not just for security but to assert the geopolitical dominance of powerful states, particularly those that possess the significant infrastructure necessary to fly armed drones. Consequently there is a pressing need for further critical analysis of this justification for the use of force.