CONSENT AS CONCEALMENT

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With very few exceptions, the Obama Administration has undertaken extraterritorial uses of force only with the consent of the state in which force is used.[1] Many would view this as a positive phenomenon. After all, a key goal of the U.N. Charter is to avoid inter-state conflict, and obtaining the consent of the state in which force is used helps advance that goal. But relying on consent to the use of force is not costless. The fact and quality of the consent may be weak or ambiguous, which may undercut domestic and international support for a given use of force. The use of consent also may obscure other legal questions raised by the forcible act. Finally, using consent slows the development of new customary *jus ad bellum* rules, and it limits criticism or discussion of the use of force by avoiding factual disclosures that might otherwise occur in situations of self-defense or Security Council action. As a result of its heavy reliance on consent, the Obama Administration's legacy in the use of force area likely will be a murky one.

I. THE VIRTUES OF CONSENT?

Consider the Obama Administration's most recent War Powers Report, which discusses active military operations in Afghanistan, Iraq, Syria, Somalia, Yemen, Niger, and central Africa.[2] Various news reports or public documents (and in some cases the Report itself) indicate that the United States conducts operations against non-state actors in these states with the express or tacit consent of the relevant governments. Indeed, the only military operations since 2009 that seem to have occurred without some form of consent by the host government are the incursion into Pakistan to capture or kill Osama bin Laden, NATO's use of force in Libya, and possibly the U.S. use of force in Syria against ISIS and al Nusra.

The fact that the Administration has sought and obtained consent in many use of force contexts is, at first glance, both unsurprising and untroubling. For an Administration that sought to appear more attentive than the Bush Administration to partner state equities and more interested in acting multilaterally, obtaining a partner's consent before using military force in the partner's territory seems natural.[3] Indeed, even though the Obama Administration reserved the right to engage in unilateral uses of force as necessary, it has rarely done so.[4]

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[1] To my knowledge, the only exceptions are the raid to capture or kill bin Laden in Pakistan, NATO's use of force in Libya, and, possibly, the use of air strikes in Syrian airspace against ISIS.

[2] *Letter from the President – Six Month Consolidated War Powers Resolution Report*, June 11, 2015, https://www.whitehouse.gov/the-press-office/2015/06/11/letter-president-six-month-consolidated-war-powers-resolution-report.

[3] *See, e.g.*, David Rohde, *The Obama Doctrine*, FOREIGN POLICY, Feb. 27, 2012 ("Just as importantly, the administration's excessive use of drone attacks undercuts one of its most laudable policies: a promising new post-9/11 approach to the use of lethal American force, one of multilateralism, transparency, and narrow focus.").

[4] *Id.* (quoting Ben Rhodes as stating, "We will use force unilaterally if necessary against direct threats to the United States").

Obtaining a host state's consent to the use of force in its territory has several advantages. Most obviously, obtaining such consent minimizes inter-state clashes that otherwise might occur absent consent, because the host state is on notice of the impending use of force and will be less likely to misinterpret the force as directed at it. The state receiving consent (the "acting state") can – and presumably does – coordinate with the host state to ensure that the host state is aware of when, where, and against whom the acting state intends to use force and, when necessary, can deconflict military missions with the host state. Even in Syria, where the United States is conducting strikes against ISIS without the express consent of President Assad, news reports suggest that the United States is deconflicting its strikes with the Syrian government.[5] Consent also minimizes the chance that the host state will raise political objections after the fact.

Additionally, obtaining host state consent allows the acting state avoid having to rely on more contested legal justifications, such as humanitarian intervention or the idea that a state may use force in self-defense in a host state's territory against non-state actors where the host state is unwilling or unable to suppress the threat.[6] Further, from the perspective of the acting state, obtaining consent from a single state incurs fewer diplomatic and transaction costs than obtaining U.N. Security Council authorization to use force in or against a state without its consent.

II. THE TROUBLES WITH CONSENT

Notwithstanding consent's advantages, the Obama Administration's use of consent in a number of *jus ad bellum* contexts poses difficulties as well. Concerns about consent fall into at least three baskets: the fact and quality of the consent; the ability of consent to obscure other legal questions about the intervention at issue; and the effect on the development of the *jus ad bellum* more broadly.

A. Fact and Quality of Consent

The first basket of concerns relates to the existence and quality of the consent itself. In some cases, it has been unclear whether the host government (or some part thereof) actually gave consent to the U.S. use of force. In the capture and transfer of al Liby from Tripoli to the United States to stand trial for his involvement in the 1998 Embassy bombings, for instance, Libya claimed that it did not know in advance about the operation, deemed it a "kidnapping," and argued that it violated Libyan sovereignty.[7] But unnamed U.S. officials suggested that Libya knew about the operation beforehand, gave

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[5] Anne Gearan, *U.S. Officials: Arab states have offered to fly air strikes against Islamic State in Iraq*, WASH. POST, Sept. 14, 2014 (quoting Secretary Kerry as saying that the United States could "de-conflict" attacks with the Assad government but that it would not formally cooperate or coordinate).

[6] *See, e.g.*, Ryan Goodman, *State Practice and the Use of Force: Iran Invokes the "Unwilling or Unable" Test against its Neighbors*, JUST SECURITY, Feb. 26, 2014 (describing debate about the "unwilling or unable" test).

[7] *Profile: Anas al-Liby*, BBC NEWS, Jan. 3, 2015, http://www.bbc.com/news/world-africa-24418327 ("Many saw the operation as a breach of Libyan sovereignty."); Ryan Goodman & Sarah Knuckey, *The Case of Abu Anas al-Libi*, JUST SECURITY, Oct. 9, 2013.

consent, and provided assistance to the United States.[8]

Likewise, it remains unclear whether President Assad has consented in some form to U.S. and coalition airstrikes against ISIS in Syria. Syria's foreign minister originally asserted that "[a]ny strike which is not coordinated with the government will be considered as aggression."[9] Some have pointed to the Assad government's subsequent statements (e.g., suggesting that the airstrikes were going "in the right direction" and describing the United States as fighting the same enemy as Syria) as indicating tacit consent to the strikes.[10]

In other cases, it has been unclear whether the government actor purporting to provide the consent was in a legal position to do so. The United States, for instance, is providing military assistance to the Saudi-led coalition that is conducting airstrikes in Yemen against the Houthi rebels. The coalition appeared to rely on Yemeni President Hadi's consent to use force in Yemen as its legal justification.[11] (It asserted no other justification and none is apparent.) Hadi wrote a letter to the Security Council asking it to authorize a military intervention to "deter Houthi aggression" and stated that he had asked members of the Gulf Cooperation Council and the Arab League to intervene militarily. At the time he wrote that letter, however, the Houthis had forced Hadi out of the country, and the previous month he had resigned and then revoked his resignation. His authority to consent to this force therefore was tenuous.

Sometimes the host state consents secretly, but then publicly objects to the acting state's use of force. The United States reportedly conducts drone strikes in Pakistan against members of al Qaeda and the Taliban, for instance. The government of Pakistan publicly objects to those strikes, and has brought its complaints to the United Nations.[12] At the same time, news reports describe how the CIA faxed notifications to Pakistan's Inter-Services Intelligence agency containing information about the airspace in which the United States planned to fly its drones. The United States interpreted Pakistani decisions to clear the relevant airspace and to not interfere with U.S. drones as tacit consent.

In sum, the strength of a given example of consent to the use of force will vary. Further, where consent is less than fully public or the leader giving consent has only a tenuous claim on power, reliance on that consent raises concerns about respect for democratic will. That is, where the consenting government is unwilling publicly to defend its grant of consent to the acting state, we should worry that the consent does not actually reflect

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[8] Michael Schmidt & Eric Schmitt, *U.S. Officials Say Libya Approved Commando Raids*, N.Y. TIMES, Oct. 9, 2013; Goodman & Knuckey, *supra* note 7 ("American officials said that although the Libyans had tacitly approved the Saturday raid, they had not played a role in the actual operation and had not been told in advance when it would happen.").

[9] *U.S. airstrikes on Syrian ISIS targets need permission: Syria*, AP, Aug. 25, 2014, http://www.cbc.ca/m/touch/news/story/1.2745775.

[10] Ryan Goodman, *Taking the Weight Off International Law: Has Syria Consented to U.S. Airstrikes?*, JUST SECURITY, Dec. 23, 2014.

[11] Ashley Deeks, *International Legal Justification for the Yemen Intervention: Blink and Miss It*, LAWFARE, Mar. 30, 2015.

[12] Adam Entous et al., *U.S. Unease Over Drone Strikes*, WALL ST. J., Sept. 26, 2012.

the will of the people. The relative military and diplomatic power of the United States also means that some of the consent it has received may be less than fully voluntary because the consenting state may feel that it has little room to decline to consent.

B. Consent as Ambiguation

The second basket of concerns about consent emerges from the legal ambiguity that the use of consent can create. This happens in two ways. First, as discussed above, it sometimes has been unclear whether the United States is relying on consent as its *jus ad bellum* justification. The existence of possible but uncertain consent has allowed the United States to remain silent about whether it has or is claiming alternative justifications for that use of force and what those justifications might be.

For instance, in the al Liby case, anonymous U.S. officials asserted that they had Libya's consent to his seizure. Assume this is true. If Libya had not consented, it is not clear what the U.S. legal theory for the capture would have been.[13] The United States might have a claim that it was acting in self-defense in response to the 1998 Embassy attacks, though that argument is hard to make given the length of time that elapsed between the attack and the transfer. The United States might have viewed al Liby as posing an imminent threat of attack, though it did not release information supporting that potential argument. Or the United States might have characterized al Liby as a member of al Qaeda who was subject to detention pursuant to the ongoing armed conflict between the United States and al Qaeda. In all three cases, the United States would have had to conclude that Libya was unwilling or unable to suppress the threat that al Liby posed. Some or all of those legal theories may be valid, depending on the underlying facts. But the public does not know which theory or theories on which the United States was relying. Absent non-attributed claims of consent, the United States likely would have had to articulate more publicly what its theory was.

Second, the United States rarely clarifies whether the host state has given consent to the U.S. use of force to assist the host state in fighting its own conflict, or whether the host state is allowing the United States to engage in forcible action to which the host state is uninvolved. In cases ranging from Yemen to Somalia to Mali, U.S. forces might either be assisting the host state in fighting a non-international armed conflict against rebel or terrorist groups or be fighting members of al Qaeda and associated forces in their conflict with the United States.[14] The existence of host state consent allows the United States to avoid pronouncing on the question.

It is possible that the United States might have different obligations and limitations depending on the scenario in which it finds itself.[15] In the "stand in the shoes of the host

[13] Goodman & Knuckey, *supra* note 7.
[14] Although French troops had the lead in fighting AQIM, news reports indicate that U.S. forces have engaged in clandestine missions in Mali as well. Craig Whitlock, *Pentagon deploys small number of troops to war-torn Mali*, WASH. POST, Apr. 30, 2013.
[15] *See* Ashley Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 16-18 (describing possible differences in legal obligations).

state" model, the United States might have to follow more restrictive international law limitations, to the extent that the host state is party to IHL or human rights treaties that the United States is not. In the "fight our own fight" model, the United States must only comply with U.S. law and those IHL obligations it has assumed. It remains unclear whether the United States needs any *jus ad bellum* rationale other than host state consent in the "fight our own fight" model.[16]

Somalia offers a good example of how this ambiguity plays out. News reports recently described a new U.S. approach to airstrikes in Somalia.[17] Instead of targeting individual members of al Shabaab who also were members of al Qaeda, the United States conducted broader airstrikes against al Shabaab members in defense of AMISOM troops on the ground.[18] The U.S. international legal theory is unclear, though. The United States may now view al Shabaab as an associated force of al Qaeda and be conducting strikes in self-defense, either with Somali consent or on the (reasonable) view that Somalia is unwilling or unable to suppress al Shabaab itself. It may be standing in the shoes of Somalia, assisting Somalia in its non-international armed conflict with al Shabaab. Or it may be defending AMISOM in an unprecedented form of collective self-defense, possibly with Somali consent.[19] Each of the three approaches warrants public discussion, internationally and domestically. The last option in particular would be novel and would merit a full airing. The fact that Somalia likely consented to the U.S. presence makes that discussion less likely to occur.

Another example recently arose when the United States needed to determine the disposition of Umm Sayyaf, an Iraqi national and ISIS member held by U.S. forces. Those forces detained Sayyaf in Syria, then brought her to Iraq. Iraq then asserted that under the Iraqi constitution it could not deport or extradite her to the United States to stand trial. It was not clear, however, whether the United States viewed itself as standing in the shoes of Iraq, such that the Iraqi constitution was relevant to Sayyaf's disposition, or whether the United States had detained Sayyaf under its own self-defense authorities, which would have rendered the Iraqi constitution inapplicable, regardless of where U.S. forces held her. The U.S. forces simply asserted that Sayyaf's transfer to the Kurdish regional government in Iraq "would be appropriate with respect to legal, diplomatic, intelligence, security, and law enforcement considerations."[20] It is difficult to extrapolate from this whether (a) the United States was not in a position to prosecute her domestically and so had no practical interest in bringing her to the United States for trial, regardless of its views on whether it could do so legally; or (b) the United States actually viewed its detention authority as being constrained by Iraqi law.

C. Consent in the Jus Ad Bellum *Landscape*

[16] *See id.* at 16 and notes 46-49 (collecting competing views about whether state may rely on consent alone as international legal justification).
[17] Paul McLeary, *Is There a New U.S. Airstrike Policy in East Africa?*, FOREIGN POLICY, July 24, 2015.
[18] Ashley Deeks, *Defending Broadened U.S. Strikes Against al Shabaab?*, LAWFARE, July 29, 2015.
[19] *Id.*
[20] Spencer Ackerman, *US transfers Umm Sayyaf, wife of suspected Isis member, to Iraqi Kurds*, GUARDIAN (UK), Aug. 6, 2015.

The third and related basket of questions raised by a heavy reliance on consent implicates the development of the *jus ad bellum*. In particular, consent to the use of force slows the development of new customary *jus ad bellum* rules. It does this in at least two ways. First, by treating consent as a more palatable justification for using force, the United States avoids having to rely as heavily on more controversial justifications, and thus has slowed the claim/counter-claim dynamic that helps shape international norms. Those who believe that the current state of the *jus ad bellum* is desirable may view this as a positive. But others who view the current *jus ad bellum* understandings as overly or insufficiently permissive will worry that the use of consent has suppressed *legal* debate and law development.

For example, the Obama Administration has obtained consent to use force in situations in which it otherwise would be justified under the U.S. view of international law in using force without consent – such as where the United States is acting in self-defense or pursuant to a transnational armed conflict and the host state is unwilling or unable to suppress the threat posed by the armed group at issue. Yet the United States has long asserted that the "unwilling or unable" test is a well-founded legal test. Reliance even on weak or vacillating consent has allowed the Administration to invoke the test less frequently and thus obscure whether particular uses of force constitute state practice supporting that test. This may affect not only how future U.S. Administrations view their options but also whether the "unwilling or unable" test becomes increasingly entrenched in international law.

Second, consent to the use of force reduces the level of *factual* disclosures and disputes, which also suppresses the claim/counter-claim dynamic. In situations in which the United States claims the right to act in self-defense, it files an Article 51 letter with the Security Council. That letter often contains certain facts explaining and defending that use of force.[21] Alternatively, where the United States seeks to act pursuant to a Chapter VII Security Council Resolution, the process of negotiating that resolution flushes out factual assertions, intelligence, and critiques. Where the United States has obtained consent to the use of force, however, it has been able to avoid making these types of factual disclosures, thus limiting criticism or discussion of the forcible act by others. The power dynamics of these interventions are such that the host state has limited incentives to object to U.S. action, even when it actually does not support it.

III. AN UNCERTAIN LEGACY

The prior two parts are intended to highlight some costs of relying extensively on consent to the use of force, as the Obama Administration has done. This does not mean, however, that states should not use consent or that consent always must be made public so that other states and scholars may test it. It does suggest that it may be desirable for the

[21] Ashley Deeks, *A Call for Article 51 Letters*, LAWFARE, June 25, 2014 ("Article 51 letters generally inform the Security Council of the military action taken, as well as the legal rationale for the action and the circumstances that prompted it. These letters give other states – as well as the Security Council itself – the opportunity to respond, whether by expressing concern about the initial action, condoning it, or raising additional questions about it.").

Administration to adjust the way it uses consent.

Further, although the lack of transparency has costs, clarity may not always be desirable or achievable. At times, ambiguity about consent seems necessary, as where the host state insists on strict secrecy as a condition of consent. (Here, one must weigh the costs of accepting consent that may not reflect the will of the people against the benefits of obtaining consent and, possibly, avoiding inter-state military conflict.) Some may embrace the fact that the force that the acting state undertakes in the face of consent might be more constrained than the level of force the acting state might undertake pursuant to a self-defense/unwilling or unable theory. (Others may bemoan this fact.) Yet others may take a practical approach, arguing that facts on the ground during military operations may change so rapidly that legal theories are necessarily fluid.[22] In addition, this group might argue that there is no general international law requirement that states disclose the legal theories under which they are acting.

Nor is this to suggest that the Obama Administration stands alone in preferring to obtain such consent; in a number of situations the Bush Administration did the same thing.[23] Recently, Saudi Arabia relied on Yemeni President Hadi's consent to use force in Yemen against the Houthis. France relied on Mali's consent to fight AQIM. The United Kingdom, like the United States, is relying on Iraq's consent to fight ISIS in Iraq. Nevertheless, the Obama Administration's focus on consent is of a piece with its broader willingness to leave ambiguous in many cases its domestic and international legal bases for using force.

The Obama Administration (and subsequent U.S. administrations) might take certain steps to ameliorate the costs of consent. First, the Administration might require higher quality consent whenever possible. That is, it might decline to rely on consent such as that given by President Hadi (who clearly was willing to make his consent public but whose authority to consent was quite tenuous), and might urge allies to decline such reliance as well. Second, it might more systematically provide public justifications for its uses of force, absent clear reasons to the contrary. In the AMISOM case, for example, there is no obvious reason not to articulate the U.S. legal justification. Third, the United States could establish a practice of preparing statements akin to Article 51 letters (and could submit them as letters to the President of the Security Council or Secretary-General) when it uses force in a host state with that state's consent and the consent is not secret.

The Obama Administration has been far more forward-leaning in publicly stating its

[22] For example, the United States continued to conduct airstrikes after Hadi's departure, which means that its theory may have shifted from one based primarily in consent to one based in self-defense. Alessandria Massi, *Suspected U.S. Drone Strikes On Al Qaeda In Yemen Continue After President Hadi's Resignation*, IBT, Jan. 26, 2015.

[23] The Bush Administration appears to have obtained consent from states in which it detained and transferred members of al Qaeda, such as Thailand, the UAE, Gambia, and others. Although its uses of force in Afghanistan from 2001-02 and in Iraq in 2003-04 were undertaken without host state consent, the U.S. posture thereafter was based on the consent of the Afghan government and, for Iraq, Iraqi consent reflected through U.N. Security Council Resolution 1546.

positions on international law in the cyber context, with the goal of playing a key role in law-development. The Administration should take similar care in the non-cyber context, so that it can leave a clearer legacy about when and where force is justified and more credibly distinguish its uses of force from those undertaken by less rule-adherent states.