

STRENGTHENING STANDARDS FOR CONSENT:
THE CASE OF U.S. DRONE STRIKES IN PAKISTAN

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I. INTRODUCTION

The public debate in the U.S. surrounding the C.I.A.'s drone program in Pakistan has largely concerned itself with the legality of the American aerial bombing campaign.¹ In particular, the question of whether drone

1. The legal controversy surrounding drone strikes is multi-faceted. A great deal of the legal controversy regarding the U.S.'s drone program and targeted killing policy has centered on the absence of declassified and publicly available information about the program, and the public's right to know. *See, e.g.*, Margaret Sullivan, Editorial, *Questions on Drones, Unanswered Still*, N.Y. TIMES, Oct. 13, 2012, at SR12, available at http://www.nytimes.com/2012/10/14/public-editor/questions-on-drones-unanswered-still.html?_r=0 (enumerating the numerous factual and legal questions that remain unanswered about the US's drone program); Naureen Shah, *Obama Has Not Delivered on May's Promise of Transparency on Drones*, GUARDIAN (Aug. 17 2013), <http://www.theguardian.com/commentisfree/2013/aug/17/obama-promise-transparency-drone-killing> (“[T]he question of whom the United States believes it can kill in drone strikes remains, as it ever was, full of unknowns.”); Ryan Goodman & Sarah Knuckey, *Why Drones Are Just a Sideshow*, ESQUIRE (Feb. 28 2013), <http://www.esquire.com/blogs/politics/drones-congress-terror> (arguing that publicly disclosed information on the drone program has “largely ignored some of the most troubling aspects of the U.S. killing program. U.S. officials are still yet to clarify or disown leading newspaper reports that ‘military aged males’ killed in the proximity of some aerial strikes have been counted as ‘militants’ absent exonerating evidence.”); Ryan Goodman & Sarah Knuckey, *What Obama's New Killing Rules Don't Tell You*, ESQUIRE (May 24, 2013), <http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413#ixzz2nKNtmmDC> (“President Obama outlined rules for the conduct of lethal operations abroad Many hoped this moment would herald a new era of transparency. To be sure, these steps bring clarity to some issues. But, the framework he presented also raises some troubling questions and leaves important older questions completely unanswered.”). Another aspect of the debate has centered on whether it is lawful under the U.S. Constitution. *See, e.g.*, Complaint at 2, *Al-Aulaqi v. Panetta*, No. 12-cv-01192-RMC (D.D.C. filed July 18, 2013), available at <http://ccrjustice.org/files/July-18-2012-Nasser-Al-Aulaqi-Complaint.pdf> (complaint bringing federal lawsuit against senior C.I.A. and military officials for authorizing the strikes that killed three United States citizens, Anwar Al-Aulaqi, his sixteen year-old son Abdulrahman Al-Aulaqi and Samir Khan in Yemen in 2011. Petitioners, the families and estates of the deceased alleged, inter alia, violations of their rights under Fifth Amendment Due Process Clause, and Fourth Amendment for unreasonable search and seizure). Finally, there is debate as to whether the U.S. drone program comports with international human rights and international humanitarian law. *See, e.g.*, Malik Noor Khan vs. Federation of Pakistan through Governor Khyber Pakhtunkhwa & 05 others,

strikes violate Pakistan's sovereignty has been debated.² President Obama has affirmed that U.S.'s military engagement is grounded in

(Argued Apr. 11, 2013) W.P.No. 1550-P/2012, Writ Petition No. 1551-P/2012 (Argued Apr. 11, 2013) (SC Peshawar) (Pak.) ("That the drone strikes, carried out in the tribal areas (FATA) particularly North & South Waziristan by the CIA & US Authorities, are blatant violation of Basic Human Rights and are against the UN Charter, the UN General Assembly Resolution, adopted unanimously, the provision of Geneva Conventions thus, it is held to be a War Crime. . .") (lawsuit brought by family members of deceased and survivors of drone strikes seeking Pakistani authorities to put an end to the U.S. strikes and provide redress victims); Rosa Brooks, *The Real Reason the Limits of Drone Use Are Murky: We Can't Decide What 'Terrorists' or 'Conflict' Mean*, THE ATLANTIC (Aug. 20, 2013),

<http://www.theatlantic.com/international/archive/2013/08/the-real-reason-the-limits-of-drone-use-are-murky-we-cant-decide-what-terrorists-or-conflict-mean/278739> (arguing that there current debates regarding the legality of the U.S.'s drone program stem from a foundational disagreement as to whether the US is engaged in legal armed conflicts in Pakistan and Yemen where strikes take place, and who constitutes a combatant); Vicki Divoll, Op-ed, *Drone strikes: What's the law?*, LOS ANGELES TIMES (Feb. 17 2013), <http://articles.latimes.com/2013/feb/17/opinion/la-oe-divoll-drones-hamdi-20130217>

(discussing legality of US targeted killing program in the context of Hamdi v. Rumsfeld, 542 U.S. 507 (2004), which recognized the right of U.S. citizen detainees to challenge their detention); *UN Special Rapporteur on Extrajudicial Killings, Philip Alston: Record AfPak Drone Attacks Under Obama May Violate International Law*, DEMOCRACYNOW! (Oct. 28 2009),

http://www.democracynow.org/2009/10/28/un_special_rapporteur_on_extrajudicial_killings (interview with former Special Rapporteur on Extrajudicial Killings, Philip Alston, who argued that US government's use of Predator drones may violate international law); *UP with Chris Hayes: The Legal, Political Arguments for Drones* (MSNBC television broadcast Feb. 10, 2013), available at

<http://video.msnbc.msn.com/up/50760344> (segment featuring Hina Shamsi of the American Civil Liberties Union, journalist Jeremy Scahill, Jennifer Daskal, professor of law at Georgetown University and Richard Epstein, professor of law at New York University).

2. See, e.g., Chris Woods, *CIA Drone Strikes Violate Pakistan's Sovereignty, Says Senior Diplomat*, GUARDIAN (Aug. 2, 2012),

<http://www.theguardian.com/world/2012/aug/03/cia-drone-strikes-violate-pakistan>

(Wajid Shamsul Hasan, the high commissioner to London and one of Pakistan's top ambassadors stated that drone strikes are a "clear violation of our territorial sovereignty and national integrity."). But see, Neha Ansari, *Drones Not a Violation of Our Sovereignty*, EXPRESS TRIBUNE (July 23, 2013),

<http://tribune.com.pk/story/580923/drones-not-a-violation-of-our-sovereignty> (arguing that drone strikes do not violate Pakistan's sovereignty).

“respect for sovereignty and territorial integrity.”³ Yet, Pakistani officials protest against these strikes as infringement on its territory.⁴ Nonetheless, leaked documents reveal a public relations charade orchestrated by the Pakistani leadership to protest the strikes in public, and but not to interfere in private, because of popular opposition to drone strikes.⁵ Still, the US strikes appear to create routine diplomatic rows

3. See, e.g., *Obama, Sharif Discuss Security Cooperation, Drones*, RADIO FREE EUROPE RADIO LIBERTY (Oct. 24, 2013), <http://www.rferl.org/content/pakistan-drones-sharif-obama/25146267.html>.

4. *Pakistan Summons US Ambassador to Protest Against Latest Drone Killings*, GUARDIAN (June 8, 2013), <http://www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings> (“Pakistan’s ministry of foreign affairs said the demand for an immediate halt to the attacks was repeated on Saturday. ‘It was conveyed to the US chargé d’affaires that the government of Pakistan strongly condemns the drone strikes, which are a violation of Pakistan’s sovereignty and territorial integrity,’ the ministry said in a statement.”).

5. See *US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas*, GUARDIAN (Nov. 30, 2010), <http://www.guardian.co.uk/world/us-embassy-cables-documents/167125> (Diplomatic cable between U.S. and Pakistan diplomats, dated 23 August 2008, leaked by the transparency organization Wikileaks that reveals a conversation between Interior Minister Rehman Malik, and the Prime Minister Yusuf Raza Gilani in which “Malik suggested we hold off alleged Predator attacks until after the Bajaur operation. The PM brushed aside Rehman,s [sic] remarks and said ‘I don,t [sic] care if they do it as long as they get the right people. We,ll [sic] protest in the National Assembly and then ignore it.”); *US Embassy Cables: XXXXXXXXXXXX PROVIDES GRIM ASSESSMENT OF SITUATION IN THE NWFP AND FATA*, GUARDIAN (Nov. 30, 2010), <http://www.theguardian.com/world/us-embassy-cables-documents/185598?uni=Article:in%20body%20link> (“XXXXXXXXXXXXXXXX said he wanted to say in an unofficial capacity that he and many others could accept Predator strikes as they were surgical and clearly hitting high value targets.”); See also Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASHINGTON POST (Oct. 23, 2013), 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_3.html (“Despite repeatedly denouncing the CIA’s drone campaign, top officials in Pakistan’s government have for years secretly endorsed the program and routinely received classified briefings on strikes and casualty counts, according to top-secret CIA documents and Pakistani diplomatic memos obtained by The Washington Post.”).

between the two countries,⁶ highlighting their precarious arrangement. But, the narrow debate over whether a few Pakistani officials, at one point the past nine years said “yes” eclipses more fundamental questions of about the contours of the consent doctrine in ongoing bilateral arrangements governing the use of force. Namely, how should the law weigh the legitimacy of these agreements, when challenged across branches of government and by the public at large, as in Pakistan’s case? And, where ought the law set the threshold for coercion in bilateral agreements, in the face of evidence of duress and differences in bargaining power between the states involved, such as between the US and Pakistan? The controversy over Pakistan’s involvement in the U.S.’s drone program offers a fertile case study through which to explore questions of coercion and legitimacy, and the role of each in the law of interstate force. Where we demarcate the contours of the consent doctrine ultimately reflects a negotiation of two competing discourses in international law—equality and hierarchy. In other words, how seriously we account for the possibility that one state may have been coerced into an agreement, and how seriously we consider its unpopularity is indicative of whether we are concerned with ensuring inter-state equality, and it’s close cousin, the promise of self-determination. As I argue, the arguments supporting a finding of continuing consent by Pakistan ignore these considerations.

Modern international law has since its inception been pulled in two opposing directions. Amongst other things, it has simultaneously promoted the equality of all sovereign states, while also preserving hierarchies between stronger and weaker states, which has had significant consequences for individuals’ right to self-determination. The debate over whether the strikes encroach on Pakistan’s sovereignty

6. See, e.g., Nick Paton Walsh & Nasir Habib, *Pakistani Leaders Condemn Suspected U.S. Drone Strike*, CNN WORLD (Mar. 21, 2011), <http://www.cnn.com/2011/WORLD/asiapcf/03/18/pakistan.drone.strike/index.html> (“Pakistan’s Foreign Ministry summoned the U.S. ambassador Friday to protest a drone strike as the death toll from that attack rose to 44, Pakistani intelligence officials said....The drone strike follows the controversial release of CIA contractor Raymond Davis, a U.S. agent acquitted of the double murder of two Pakistani men in Lahore after a total of \$2.3 million was paid to the relatives of his victims.”); *Pakistan Summons US Ambassador to Protest Against Latest Drone Killings*, *supra* note 4.

captures this internal tension. On the one hand, there are important indicia of consent, and a U.S. administration that insists its activities respect Pakistan's sovereignty. But, a close examination of the law of interstate force and the evidence available on the U.S.—Pakistan bilateral agreement governing drone strikes invites reconsideration of the worth of this presumed consent. As I argue, to find affirmative consent in the face of the full cauldron of facts effectively reduces principles of sovereign equality and self-determination to formalisms. Doing so replicates real inequalities between states in the fabric of the law. Such an adjudicative step is consistent with broader trends in international law, in which the norms of sovereign equality and self-determination has been compromised and limited in scope. Such trends have the consequence of magnifying inter-state inequalities, rather than regulating and reducing them, by cementing the power of stronger states.

This article situates itself at the intersection of two separate fields of inquiry. This article draws and hopes to contribute to an existing literature on the unique legal interpretations marshaled to explain and justify U.S. armed activities in the Global War on Terror and operationalize its global hegemony. While there is a great deal of work on the erosion of sovereign equality generally, and on how the law has served legal hegemony broadly, there is little attention to the nexus of the two—how sovereign equality is negotiated by the US as it pursues its foreign policy. This article seeks to illuminate the set of legal arguments put forth to support the US's armed activities in Pakistan, and their core assumptions and misconceptions with regard to sovereign equality. Additionally, this article also contributes to the multi-disciplinary literature on the nature of US-Pakistan relations by injecting a critical legal analysis of current bilateral relations. Indeed, drone strikes are the latest chapter of longer history of U.S. involvement in Pakistan, in which it has secured or supported domestic political arrangements favorable to the U.S.'s position and activities during the Cold War, and then during the Global War on Terror.⁷

7. Even if the bilateral relationship is now considered rocky, and Pakistan accused of duplicity, it ought to be properly viewed in the context of a long history of successive governments, both democratic and military executing the policy wishes of the U.S. government. The very accusation of duplicity suggests the expectation that another

II. BACKGROUND

Since 2004, there have been almost 400 drone strikes in Pakistan.⁸ Most strikes are concentrated to the Federally Administered Tribal Areas (FATA) of Pakistan. Since its beginning, the drone program, both the front on—the internal U.S. decision making process for waging war—and the back end—the human impact of these strikes has been mired in deliberate secrecy and opacity.⁹ From 2004 to 2011, there was no official explanation for these strikes. In recent months, speeches from the Obama administration officials and Obama himself provided some clarifications regarding the administration’s legal basis for using lethal force. Still, a great amount remains unknown about the government’s internal decision making process for determining targets, its strategic rationale, the

sovereign state is bound to remain faithful to another state and its agreements, even if it trumps its own best interests.

8. *Get the Data: Drone Wars*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/> (last visited July 20, 2014).

9. For example, the ACLU and news organizations, such as the New York Times have filed numerous Freedom of Information Act requests for information relating to the U.S. drone program, but their requests have been repeatedly denied by the executive agencies holding this information. *See, e.g.,* New York Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) (holding that the government did not violate FOIA by refusing to disclose information relating to targeted killing of persons tied to terrorism). In one request for information relating to the legal and factual basis for the U.S.’s use of predator drones to conduct “targeted killings” overseas, filed by the ACLU in 2010 with the Department of Defense, the Department of Justice (including the Office of Legal Counsel), the Department of State, and the CIA, the Departments of Defense, Justice, and State responded by releasing some records and withholding others. The CIA by contrast responded by refusing to confirm or deny whether the CIA drone strike program even exists, issuing what is known as the Glomar response. This position was challenged by the ACLU in the District Court for the District of Columbia, but the court upheld the agency’s determination. *See* Am. Civil Liberties Union v. U.S. Dep’t of Justice, 808 F. Supp. 2d 280 (D.D.C. 2011) *rev’d sub nom.* Am. Civil Liberties Union v. C.I.A., 710 F.3d 422 (D.C. Cir. 2013). In March 2013, the Court of Appeals for the District of Columbia reversed the trial court’s finding in favor of the CIA ruling that the CIA could no longer deny its interest in the program. The case has been remanded to the District Court, where the CIA has been ordered to produce responsive documents, and if not legal justifications for their continued withholding. *See* Am. Civil Liberties Union v. C.I.A., 710 F.3d 422 (D.C. Cir. 2013).

diplomatic negotiations with countries impacted by strikes, and the number that have died from the strikes.¹⁰ A full assessment of the drone program is beyond the scope of this paper, but most pertinent to the discussion is an overview of the government's articulation of questions of interstate force.

The U.S. government has put forward two sets of legal rationalizations to justify its engagement in hostilities around the world after September 11th, including the drone program.¹¹ It has asserted the need for self-defense against Al Qaeda and associated forces, as well as the existence of armed conflict with the Taliban and its associated forces. Hostilities in Afghanistan fall into the latter legal paradigm. And, in recent months, the Obama Administration has clarified that drone strikes in Yemen are not pursuant to an armed conflict, but is governed by the law of self-defense. It is unclear under which legal paradigm each target in Pakistan falls, as some militant groups that appear to be targeted are

10. U.N. Secretary-General, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 46, U.N. Doc. A/68/389 (Sept. 18, 2013) (“In the United States, the involvement of CIA in lethal counter-terrorism operations in Pakistan and Yemen has created an almost insurmountable obstacle to transparency. . . . Similarly, the conduct of covert targeting operations by United States special forces under the auspices of the Joint Special Operations Command is almost invariably classified.”); *id.* ¶ 47 (“[T]he United States has to date failed to reveal its own data on the level of civilian casualties inflicted through the use of remotely piloted aircraft in classified operations conducted in Pakistan and elsewhere, or any information on its methodology for evaluating this.”).

11. La Laurie Blank has illustrated how Obama administration has used both armed conflict, as well as self-defense, to justify its strikes without ever firmly committing to one paradigm in Pakistan in particular. Such vacillation, she argues, has served to obscure the weakness of each justification and left the public guessing as to which justification applies, since both cannot apply at the same time. See Laurie Blank, *Blurring the Legal Lines on Targeted Strikes*, JURIST (Feb. 1, 2012), <http://jurist.org/forum/2012/02/laurie-blank-targeted-strikes.php> (“The US may be seeking flexibility in using both legal justifications at the same time without careful delineation. Flexibility has its benefits, to be sure. But the failure to engage directly with the tough issues that lie at the heart of the distinction between where a state is acting as part of an armed conflict and where it is acting solely in legitimate self-defense against a terrorist or other threat is, ultimately, a wasted opportunity to promote greater development in the law going forward.”).

allegedly connected to hostilities in Afghanistan,¹² while others not directly.¹³

On the issue of interstate force, the Obama administration has maintained that the frequent strikes conform to international law,¹⁴ and respect Pakistan's sovereignty.¹⁵ By contrast, the Pakistani government has stated that these strikes violate its sovereignty. The American media frequently assumes that the Pakistan government has provided meaningful consent, by providing authorizing in back channels but protesting in public.¹⁶

As I will argue, drone strikes must be viewed in the context of a complex history of bilateral relations. Successive Pakistani governments have sought to fashion themselves into reliable allies of the U.S. government for geopolitical advantage, to offset the perceived Indian

12. This category of groups includes the Haqqani Network, a semi-autonomous component

of the Taliban. It operates both in the eastern provinces of Afghanistan, and the border region of South and North Waziristan in Pakistan. *See generally* Anand Gopal et al., *Inside the Haqqani Network*, FOREIGN POLICY GROUP (June 3, 2010) http://afpak.foreignpolicy.com/posts/2010/06/03/inside_the_haqqani_network_0.

13. In contrast to the Haqqani Network, the Tehrik-e- Taliban Pakistan does not have a sustained record of collaboration with the Afghan Taliban. Its militant activities are directed at Pakistani state targets and civilians. *See generally* Hassan Abbas, *A Profile of Tehrik-i-Taliban Pakistan*, CTC SENTINEL 2 (Jan. 2008), *available at* <http://belfercenter.ksg.harvard.edu/files/CTC%20Sentinel%20-%20Profile%20of%20Tehrik-i-Taliban%20Pakistan.pdf>.

14. *See* John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars, *Assistant* (Apr. 30, 2012), *available at* <http://www.lawfareblog.com/2012/04/brennanspeech> (entitled "The Ethics and Efficacy of the President's Counterterrorism Strategy") ("[I]n full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the United States Government conducts targeted strikes against specific al-Qa'ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.").

15. *See Obama, Sharif Discuss Security Cooperation, Drones, supra* note 3.

16. *See, e.g.,* Ken Dilanian & David S. Cloud, *U.S. Seeks New Bases for Drones Targeting Al Qaeda in Pakistan*, LOS ANGELES TIMES (Feb. 16, 2014), <http://www.latimes.com/world/asia/la-fg-drone-bases-20140216,0,2170648.story#ixzz2tWnvZzIy> ("Pakistan consents through back channels, while formally protesting the strikes in diplomatic forums and at the United Nations.").

threat.¹⁷ In some ways, the Pakistan—U.S. relationship is a paradigmatic patron client relationship, one that is defined by “dependence based on a mutual exchange of favors between two parties with an unequal distribution of resources.”¹⁸ The U.S. has regularly exploited this access, permitting it to carry out a series of interventions, whether diplomatic or armed, by relying on Pakistan’s intercession. From arming the mujahidin to repel the Soviet invasion of Afghanistan, with strong U.S. backing in the 1980’s, to capturing, detaining and rendering men with suspected links to terrorism in the U.S.’s Global War on Terror, there is a pattern of collaboration, with Pakistan acting as regional proxy for the U.S. The Pakistan military has continually benefited from this arrangement, getting much needed international support for staging recurrent military coups as well as aid. There are important incidents that have frayed relations that reveal a lack of bilateral coordination, such as the discovery of the Osama Bin Laden’s in the town of Abbottabad, Pakistan, or the rogue CIA officer, Raymond Davis who killed two Pakistani civilians.¹⁹ But, the historically close relationship between the two states has bred a proclivity for clientism in Pakistan’s military and civilian governments, and an aversion to direct confrontation and or a permanent freeze in relations, when interests do not align.²⁰ This continuing legacy helps to

17. *See generally* TARIQ ALI, *THE DUEL: PAKISTAN ON THE FLIGHT PATH OF AMERICAN POWER 196-204* (2008) (discussing attempts by each generation of Pakistan’s leaders from Mohammad Ali Jinnah, Pakistan’s founder and first prime minister (1947-1948) to General Ayub Khan, military president (1958-1969) through Zulfikar Ali Bhutto, civilian prime minister (1973-1977) to persuade US officials of Pakistan’s loyalty in return for military aid, defense agreement, and a strategic counterweight to India).

18. Christophe Jaffrelot & Ashley J. Tellis, *Containing or Engaging Pakistan? An American Dilemma*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Nov. 18, 2011), <http://carnegieendowment.org/2011/11/18/containing-or-engaging-pakistan-american-dilemma/7m5s>.

19. In January 27, 2011, CIA contractor Raymond Davis killed two civilians in Lahore. He was arrested but eventually released in March of 2011, conditioned on compensating the victims’ families. Later that year, on May 2nd, 2011, the U.S. Navy captured Osama Bin Laden from a compound in Abbottabad, Pakistan, which prompted a diplomatic row after suggestions that Pakistan had been protecting Bin Laden, despite an international manhunt.

20. *See generally* ALI, *supra* note 17.

explain the peculiar posture both countries have adopted with regards to the U.S. strikes.

III. A LIMITED EQUALITY

To better understand how sovereign equality is being contested in the legal debates over Pakistan's consent to drone strikes, it's worth exploring how sovereign equality has been construed historically in modern international law.

The guarantee of equality between sovereign states is a foundational aspiration in international law, and yet it has been consistently unfulfilled. Equality has always been contested and negotiated, just as it is being redefined in the current moment between the U.S. and Pakistan over the use of interstate force.

At once emancipatory, modern international law placed all states on the same footing, accountable to the same laws. Yet, in practice, international law has not prevented stronger states from exerting their will against weaker states and their people, its institutions have reinforced interstate inequality, and been silent to subtler forms of imperialism and hegemony. Both sovereign equality and self-determination, the two key units of the analysis here, suffered from international law's accommodations to stronger states, although in different but interrelated ways.

The persistence of sovereignty in modern international law as a notion worth defending was itself a concession made by early advocates of international human rights. A more radical vision of international human rights that failed to carry the day envisioned a moral order resting on the fulfillment of certain obligations to rights bearing individuals unmediated by the nation state.²¹ And yet, even the compromised vision of an international order rooted in sovereignty, that was settled on partly because it was deemed more realistic, has never be able to be realized.

21. See Samuel Moyn, *The Last Utopia*, 178-211 (2010) (narrating the reincorporation of state sovereignty by international human rights in the early 20th century seeking to establish the field and this new area of law despite an avowed commitment to right bearing subjects and self-determination).

In what follows, I try to outline the broad contours of this dialectic relationship between equality and hierarchy in the fabric of the law, and the consequences of this kind of dynamic for weaker states in our global order and their inhabitants.

A. Defining Equality

Sovereign equality can be broken into its constituent components. “[S]overeign equality refers to a distribution of a bundle of immunities, rights and privileges, capable of being exercised at the level of the law.”²² The principle of equality itself has three manifestations according to Jerry Simpson; it exists in the formal sense, at a legislative level, and at an existential level.²³ Our discussion of the consent doctrine implicates all three dimensions of sovereign equality. Each is discussed in turn.

1. Formal Equality

Formal equality is the equality accorded to states before judicial organs of the international legal system. Specifically, it is the idea that:

[N]o state can be barred on the basis of its status from bringing a claim in international law that its rights have been violated, and in bringing such a claim international law that it’s rights have been violated, and in bringing a claim the state will be treated equally before the law.²⁴

Nonetheless, despite formal equality, states may have varying capacity to enforce those rights. Under international law, self-help is the primary mode of enforcement, in contrast to domestic law that relies on courts. “Self-help is dependent on the vagaries of power, will and capacity. Larger states have a greater capacity to vindicate their legal claims through the projection of power than do their smaller counterparts.”²⁵ Thus in so far as self-help is a central institution of

22. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES 39 (2004).

23. *Id.*

24. *Id.* at 43.

25. *Id.* at 46.

international law, “there can be significant variance in the actual rights possessed.”²⁶ This reality similarly conditions Pakistan’s involvement and reaction to the US’s drone program in its territory, as will be discussed in next sections.

2. Legislative Equality

In addition to formal equality, Simpson identifies a second form of equality, legislative equality. “The most important ingredient of sovereign equality has long been the power of States to participate in the creation of their legal obligations and not to be subject to rules to which they have not agreed.”²⁷ Legislative equality confers validity onto the law, such that rules of conduct and rights govern the community of states only if each state consents to their enactment.²⁸ Nico Krisch notes that the principle was interpreted as requiring that each state consents to the laws governing them, and that each state have equal capacity to consent to laws, regardless of their content.²⁹ But paradoxically, “[s]tates can contract out of equal relations by virtue of the prime facie equality they already possess.”³⁰ Equality was thus reduced to a procedural safeguard rather than a substantive norm that mandated certain minimum commitments.³¹ This narrowing of consent in the legislative process

26. *Id.* at 44.

27. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 142 (Michael Byers ed., 2003); *See also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (“The rules of law binding upon States . . . emanate from their own free will”); *See* Louis Henkin, INTERNATIONAL LAW: POLITICS AND VALUES 27 (1989) (“State consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy.”).

28. *Id.*

29. *See* Krisch, *supra* note 27, at 138.

30. *See* SIMPSON, *supra* note 22, at 44.

31. *See* Krisch, *supra* note 27, at 139; *See* Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUR. J. INT’L L. 651, 667 (2001) (identifying a trend in the international legal system that favors procedural requirements over substantive principles).

mirrors the same in the bilateral negotiations, such as agreements relating to the use of force, which will be discussed in the next sections.

In addition, the principle has suffered from a limited scope of application in international law bodies and mechanisms. A stronger version of the principle would also encompass equally weighed voting and representation in decision-making processes within international legal bodies.³² However, the institutions of international law carve out special law making powers afforded to stronger states, such those accorded to the five permanent members of the U.N Security Council. Simpson terms these privileges afforded to stronger states as instances of “legalized hegemony,” which undermine the realization of true legislative equality.³³

In conveying greater decision-making power to stronger states, in particular, to the Great Powers, there is a noted tendency for those more powerful states to use their position to enforce a view of the law that is in their favor. For example, the:

United States has used its position on the Security Council to prohibit other states from using force, such as in the conflict between Bosnia-Herzegovnia and between Eritrea and Ethiopia, whereas it has expanded the opportunities for itself. These increased opportunities in conjunction with its military superiority means that it can take advantage of these opportunities for political and military reasons.³⁴

The U.S. has tried to reserve the right to define self-defense and has done so in expansive ways,³⁵ and yet in its position on the Security Council it has limited other states from asserting self-defense.

3. Existential Equality

The third type of equality that Simpson identified is existential equality. Simpson identifies the norm by its offense, namely the “legal

32. SIMPSON, *supra* note 22, at 44.

33. *Id.* at 52-53.

34. *See* Krisch, *supra* note 27, at 149.

35. *Id.*

hierarchies that operate as modes of exclusion or that classify states according to culture or civilization or democracy rather than power . . . existential equality, then, is the foundation of a pluralist conception of international legal order.”³⁶ In other words, that each state has right to organize its internal matters in the way it sees fit. It encompasses the right to territorial integrity, political independence and the right to participate in the international system.

The corollary of these three rights according to Simpson is the “norm of non-intervention and the right to choose one’s own form of government free from external interference.”³⁷

The concept of existential equality shares important links with the concept of self-determination. The right to self-determination has “always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be ‘human rights.’”³⁸ Indeed, from both precepts, we derive the norm of non-intervention. However, “the connection between sovereignty and self-determination has generated relatively little comment in legal doctrine.”³⁹ But, as will be shown, more expansive notions of self-determination have important consequences for how we conceptualize sovereign equality. By consequence, the foreshortening of existential equality has significant implications for the right to self-determination, and its scope of application.

First, briefly some contours to this right.⁴⁰ The status of self-determination in international law is unclear. Arguments have been made

36. See SIMPSON, *supra* note 22, at 53.

37. *Id.* at 54.

38. Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 628 (2011).

39. *Id.* at 631.

40. *Id.* at 625 (identifying a debate in international law as to whether self-determination is a legal rule of legal principle and arguing that it is both. “[T]he position that it is both a legal principle, which posits that ‘[p]eoples must be enabled freely to express their wishes in matters concerning their condition’, and serves as an umbrella principle for a collection of more specific legal rules, seems accurate.”). Self-determination is also considered by some scholars to be a fundamental principle of international law which informs the development of

that it is *jus cogens*.⁴¹ It is also recognized in the International Covenant for Civil and Political Rights (ICCPR), which has been signed and ratified by Pakistan and the US. Article 1 of ICCPR: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” At its most basic level, the right is said to accord people the ability to “determine their political status and freely pursue their economic, social and cultural development.”⁴² However, there is no resolution on which groups count as peoples and the contents of the right that such peoples enjoy.⁴³ And, the obligations imposed on the international community and its member states towards fulfilling the rights have been nominal, in part because the norm of self-determination has remained vague.⁴⁴ In the ICJ’s Advisory Opinion on Western Sahara, self-determination was construed as a right conferred on peoples to a particular process to give shape to their particular national aspirations.⁴⁵ But the ICJ left the contours and substance of that right to the General

other aspects of international law. See REIN MÜLLERSON, ORDERING ANARCHY INTERNATIONAL LAW IN INTERNATIONAL SOCIETY 166 (2000).

41. See Saul, *supra* note 38, at 634.

42. International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3.

43. See Saul, *supra* note 38, at 611; United Nations Educational, Scientific and Cultural Organization, *International Meeting of Experts on the Further Study of the Concept of the Rights of Peoples*, ¶19, U.N. Doc. SHS- 89/CONF.602/7 (1989), available at

<http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>. §23-24 (providing some guidance on what characteristics of a group engender a people with a right to self-determination). See also JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 373 (2007) (discussing whether Article 1 of the International Covenant on Cultural and Political Rights (ICCPR) entitled distinct peoples the right to democratic government.).

44. See Saul, *supra* note 38, at 632.

45. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 70 (Oct. 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf> [hereinafter Western Sahara] (“In short, the decolonization process to be accelerated which is envisaged by the General Assembly in this provision is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will.”).

Assembly to define,⁴⁶ while recognizing that the right ought to be exercised through “informed and democratic process.”⁴⁷

The notion that people can choose to self-govern, generally in the form of a nation state, gaining international recognition is characterized as external self-determination. Whereas internal self-determination is the range of political entitlements within the state granted to its citizens.⁴⁸ Generally, international instruments have been concerned with external self-determination, and the international community has not sought to mandate “the realization of internal self-determination within existing states.”⁴⁹

In the context of decolonization, (external) self-determination was tantamount to Simpson’s definition of existential equality, including “the right to exist—demographically and territorially—as a people;” “the right to territorial integrity;” “the right to permanent sovereignty over natural resources;” “the right to cultural integrity;” and “the right to economic and social development.”⁵⁰

But self-determination can mean more than the existential equality of states.⁵¹ Suggestions have been made that the internal dimension to self-determination mandate that states be democratic,⁵² and not merely be

46. *Id.* ¶ 71 (“The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.”).

47. *Id.* ¶ 57.

48. See Saul, *supra* note 38, at 614.

49. *Id.* at 637.

50. Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUR. J. INT’L L. 651, 663 (2001).

51. *But see id.* at 658 (“Beyond colonialism, the right of self-determination is plagued by an excess of indeterminacy both in terms of scope and content.”).

52. Western Sahara, *supra* note 45, at ¶ 57. See also Drew, *supra* note 50, at 662 (discussing UN practice of organizing plebiscites and referendums in the decolonization context as a concrete mechanism by which the will of the people has been given expression in formal nation building processes). *But see* Jure Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?* 10 HUM. RTS. L. REV. 239, 268 (2010) (arguing that the right self-determination does entail the right to democratic governance).

limited to a procedural right.⁵³ Self-determination defined in this way would be significant shift from the nominal and negative commitments it requires. This interpretive shift would find kinship in more expansive notions of existential sovereignty, namely the notion of popular sovereignty.⁵⁴ Popular sovereignty forges an explicit link between two of international law's foundational principles. Popular sovereignty alters the traditional formulation of sovereignty, one that is predicated on a government's effective control over a particular territory. Popular sovereignty, by contrast, posits that a government's authority emanates from the people.

Self-determination can thus provide grounds "for arguing that popular sovereignty has now been legalized."⁵⁵ Both principles mandate that a people, however defined, collectively and independently control and manage their own affairs and territory. However, this conceptualization of popular sovereignty, and its linkage with self-determination is not firmly established in international law.⁵⁶

Just as internal self-determination may require democracy, popular sovereignty similarly imagines that people are endowed with a continuous right to "freely determine their political status and freely pursue their economic, social and cultural development, and, in so doing, provides an ethically more convincing explanation for sovereignty, than the traditional explanation based on effective control of territory."⁵⁷ Such a conceptualization of sovereignty finds support in Article 21(3) of the U.N. Declaration on Human Rights, which states, "[t]he will of the people shall be the basis of the authority of government; this will shall be

53. Drew, *supra* note 50, at 665 (noting the tendency to elevate self-determination as a process over self-determination as substance).

54. There is support for the notion that popular sovereignty has been legally recognized as a human right. See Universal Declaration on Human Rights, G.A. Res. 217A (III)A, U.N. Doc. A/RES/217 (III), at 21(3) (Dec. 10, 1948) ("The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."). However, popular sovereignty is not the conventional construction of sovereignty.

55. Saul, *supra* note 38, at 628-29.

56. *Id.*

57. *Id.* at 629 (internal quotation marks omitted).

expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁵⁸ Thus, existential sovereignty, in its more humanistic and expansive iterations, could thus recognize not merely the right of a state’s right to self-rule, but also, the right of its peoples to manage their affairs within that state without external interference and consonant with their own wishes. A military coup or unpopular policies would thus violate popular sovereignty.⁵⁹ Thus, defined, existential equality would guarantee equality of people across and within states. It could thus provide a safeguard against state clientism, the existence of puppet regimes, or other arrangements in which the formal representatives of one state are unaccountable to the people they ostensibly serve.

And yet, at times these norms of self-determination and existential sovereignty can also be in conflict. For example, if a more expansive notion of self-determination required a democratic form of government,⁶⁰ it would undermine the international community’s pluralism that has been deemed normatively desirable. A more expansive construction of self-determination might also tolerate foreign interference within that country so long as it promoted democracy.⁶¹ The designation of outlaw

58. Universal Declaration on Human Rights, *supra* note 54.

59. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 872 (1990) (“International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors. . . . In modern international law, sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner. Sovereignty can be liberated as much by an indigenous as by an outside force. As in the interpretation of any other event in terms of policy, context and consequence must be considered.”).

60. See Saul, *supra* note 38, at 631.

61. Steven R. Ratner, *The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 267 (Lori Fisler Damrosch ed., 1993). See also W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*,

or pariah states within the international legal order, and its subsequent military interventions, in Kosovo and in Afghanistan, under the banner of humanitarianism, exemplify instances in which pluralism and the norm of non-intervention have been subordinated to an aggressive neo-liberalism, which imagines and forcefully imposes a particular internal domestic order on other states.⁶²

Depending on how we construe the principles of existential equality and self-determination, their relationship towards each other can shift, and as will be shown in Pakistan drone case study. Conventionally, both have been construed narrowly and formally. But, more expansive interpretations of self-determination can engender significant changes in how we understand sovereignty.

4. (In)equality of Influence

As has been illustrated, formal, legislative and existential equality have all been undermined by various compromises, exceptions and bloodspots within the fabric of the law and its derived institutions. Additionally, material inequalities between states impede with the realization of these norms. Nothing in international requires material equality of states.⁶³ And, the persistence of material inequalities cuts at every level in international law. As detailed in the earlier discussion about formal equality, in a system largely based on self-help,

18 FORDHAM INT'L L.J. 794, 796, 804-05 (1995) ("It is encouraging that the international community, as a whole, has made a clearer commitment to democracy, and that so many actors have come to the realization that democratic government enhances protection of human rights and reduces the likelihood of aggression. . . . A corresponding doctrine of unilateral humanitarian intervention to prevent or reverse violations of the fundamental human right to popular government continues to be less certain, as if this right were somehow less important or urgent than other rights. . . . Democracy is a right guaranteed by international law and the condition sine qua non for the realization of many other internationally prescribed human rights. Democracy may also be the sine qua non of international peace, for the evidence is mounting that democratic countries do not attack each other. Democracy will not take root in many new states if outsiders do not commit themselves to doing what is necessary to sustain it. The doctrine of humanitarian intervention allows such action.").

62. See SIMPSON, *supra* note 22, at 197-222.

63. See *id.* at 56.

“inequalities in the capacity to affect legal solutions or to exact compliance with legal norms” are inherent.⁶⁴ Stronger states will have greater capacity than weaker states to vindicate their rights, despite the equality of their entitlements in theory. Similarly, legislative equality is eroded by the inequalities of influence that certain states enjoy over others in the law making process. These permissible “[i]nformal applications of raw power can have an enormous impact on the eventual content of legal rules and such influence is impossible to write out of any system of governance.”⁶⁵ Existential equality has equally been eroded by strong currents of anti-pluralism, which has emanated from the First World and is projected towards smaller states that lie outside of the gates of geopolitical power.

5. Consequences of Unequal Order

The cumulative consequence of these various forms of inequalities, whether formally condoned or simply ignored, is that stronger states can violate the law and suffer few repercussions as compared to their weaker counterparts.

This result is in large part due to the reliance on self-help in international law as the primary means of enforcement, but is exacerbated by the instances of legalized hegemony mentioned earlier. Because self help is the means of enforcement, and because states enjoy different capacities to enforce their rights, the repercussions of non-compliance are inherently varied. Indeed, a state whose rights have been violated will have to consider whether seeking enforcement or remedies for the violation is feasible, and balance the potential negative consequences in bilateral relations, and in its position in the international community at large. By corollary, a potentially law-breaking state will weigh the consequences of non-compliance, but compliance with international law is but *a* factor in a state’s calculus. Where an aggrieved state does not resort to self-help or where it is not the appropriate measure—for example, the offense is against the international

64. *Id.* at 57.

65. *Id.* at 49.

community as whole—the most likely outcome is a condemnation. Only in exceptional circumstances, does a military intervention take place, as briefly mentioned in our discussion of anti-pluralism on behalf of the international community.

In the face of condemnation, stronger states can better sustain such violations because there are other significant ways that it can retain its status in the world community, independent of the institutions of international law, by relying on economic advantage. Stronger states, whether economically or militarily are able to survive their own violations of international law relatively unscathed. Furthermore, and importantly, permanent members of the Security Council can control or influence the international community's reaction to particular violations, which creates the chance for inconsistent or self-interested decisions.

This backdrop puts into view the active tension between equality and hierarchy within international law, and the numerous ways in which inequality is tolerated or facilitated, through institutional arrangements or particular interpretive trajectories. The law thus makes forms of imperialism and hegemony possible and lawful. This tendency in the application of international law to accommodate power is replicated in official U.S. analyses regarding the legality of drone strikes in Pakistan. Instead, I hope to offer a corrective that challenges conventional conceptualizations of sovereignty, and by consequence self-determination, and the particular interpretive trajectories detailed above.

IV. THE LAW OF INTERSTATE FORCE

Just as within international law more broadly, the reality of intra-state inequality remains underappreciated in the literature on the law of interstate force. Yet, consent is at the heart of whether one state can use force within the territory of another, and inevitably power imbalances will undoubtedly affect the conditions under which consent is secured. But as will be suggested in this section, the law of interstate force, while cognizant of the possibility of coercion, offers little elaboration of its contours. Instead, a close factual examination of the U.S.-Pakistan arrangement over drone strikes, if there is one at all, can help put into view that boundary line between consent and coercion, and as such offers

insight into what the law ought to consider if it is to take to issues of inter-state inequality and imperialism seriously.

Similarly, the legitimacy such interstate agreements may or may not enjoy domestically, across branches of government and within the public at large has also been underappreciated in the law of interstate force, and its resultant implications for the right of self-determination. The domestic debate within Pakistan surrounding drone strikes exemplifies the crisis of legitimacy from which some interstate agreements may suffer, and the role of popular dissent is underappreciated in the literature.

A. Role of the Law of Interstate Force

First, a brief introduction to the role of the law of interstate force within the laws of war more broadly. Under Article 2(4) of the UN Charter, states are forbidden from using force in the territory of another state. But, there are important exceptions—self-defense being the most important one. The law of interstate force helps to determine whether the use of force in the territory of another is lawful. It is invoked only where neither the states themselves nor groups existing within either state are already engaged in a pre-existing armed conflict,⁶⁶ and determines whether outside of an established armed conflict, state X can use force within the territory of state Y. This use of force may be against state Y itself or groups contained within state Y. Furthermore, the law of interstate force judges the legality of such extraterritorial use of force only with regards to the rights of the attacked state and its sovereignty.⁶⁷ An entirely separate analysis must be conducted to determine whether the use of lethal force is permitted against the target(s) in question. The states concerned are still obligated to adhere to either human rights law or international humanitarian law when using lethal force.⁶⁸

66. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 34, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter Alston, *Study on Targeted Killings*] (citing U.N. Charter art. 51.).

67. NILS MELZER, *TARGETED KILLINGS IN INTERNATIONAL LAW* 75 (Vaughan Lowe, ed., 2008).

68. Alston, *supra* note 1, ¶ 37.

B. Consent

The role of consent within the law of interstate force has been under-theorized,⁶⁹ and there is a lack of consensus on how it relates to other justifications for the use of force, in particular self-defense.⁷⁰ As Ashley Deeks summarizes, “[i]nternational law today does not clearly prohibit states from using consent as a partial or complete rationale for their forcible actions in another state’s territory, even where that consent purports to authorize an activity that the host state legally could not undertake.”⁷¹ She argues that states may exploit this ambiguity in how the consent doctrine operates, in particular use force in ways that ignore domestic laws of the host state in its use of force. Deeks’s concern about how ambiguity may be exploited is equally applicable to the present discussion.⁷²

Deeks helpfully provides a review of current thinking on the role of consent, which is summarized here; one camp of scholars suggests that consent provides an independent basis for the use of force in other state’s territory.⁷³ Another camp views consent as only addressing questions of sovereignty but insufficient by itself for justifying the use of force.⁷⁴ And, yet another camp rejects the use of consent entirely for a particular set of circumstances.⁷⁵

69. Ashley Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT’L L.J. 1, 4 (2013). See also MELZER, *supra* note 67, at 51 (“To the knowledge of the present author, however, no detailed analyses have been conducted as to potential limits imposed by the law of interstate force specifically on the authority of States to consent to targeted killings on their territory . . .”).

70. David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209, 210 (1996) (stating consent is a well-established and widely accepted grounds for justifying extraterritorial military intervention by one state in the territory of the consenting state, but conceding that the theoretical basis for consent is not clear).

71. Deeks, *supra* note 69, at 26-27.

72. *Id.* at 27.

73. *Id.*

74. *Id.*

75. *Id.*

Thus in summary, there are at most two circumstances in which lethal force can be applied within the territory of another state.⁷⁶ Either state X consents to state Y using force inside its territory, or state X has not consented, but is unwilling and unable to diffuse this threat to state Y and thus state Y is acting in self-defense.⁷⁷ The analysis here focuses on the first prong—consent to the application of lethal force within the territory of another state, because this is one of the justifications the Obama administration relies on for its strikes in Pakistan. The alternative basis for lawful interstate force, “unwilling unable,” which is also central to the U.S.’s rationale for war is beyond the scope of this article.⁷⁸

76. Melzer, *supra* note 67, at 75 (“UN Security Council authorization is not an independent exculpatory clause, but it is based on prior consent of all member States of the United Nations as to the extent of the conventional powers bestowed upon the Council in the Organization’s Charter. The Security Council cannot lawfully, therefore, extend its powers beyond that consent. . . . [A] targeted killing which cannot be justified based on an exculpatory clause recognized in international law would fall under the peremptory prohibition of aggression.”).

77. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, submitted in Accordance with Assembly Res. 67/108, transmitted by Note of the Secretary-General*, ¶ 91, U.N. Doc. A/68/382 (Sept. 13, 2013) [hereinafter Heyns Report] (by Christof Heyns). Christof Heyns summarizes the unwilling or unable standard and its relationship to self-defense.

(“It has been argued that self-defence against an armed group on the territory of another State is permissible only if the host State is unable or unwilling to act against that group. This follows from the requirement that action taken in self-defence must be necessary. The test of unwillingness or inability can therefore not refer to an independent justification for the use of force on foreign soil, but at best constitute part and parcel of a claim to self-defence.”). *Id.*

78. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, submitted in Accordance with G.A. Res. 66/171 and Human Rights Council Res. 15/15, transmitted by Note of the Secretary-General*, ¶ 55, U.N. Doc. A/68/389 (Sept. 18, 2013) [hereinafter Emmerson Report] (by Ben Emmerson) (“The International Court of Justice has held that in the absence of consent the use of force in self-defence by one State against a non-State armed group located on the territory of another State can be justified only where the actions of the group concerned are imputable to the host State. This may extend to situations in which a non-State armed group is being harboured by the host State. In this analysis, however, absent such a connection, extraterritorial use of force against a non-State armed group in another State

Article 20 of the Draft Articles on State Responsibility provides non-binding guidance on the role and contours of consent in inter-state relations. Functionally, consent is an exclusion from liability. If state X gives valid consent to state Y to perform a particular act, it precludes state X from asserting that the act was wrongful.⁷⁹ Consent, once obtained, makes conduct lawful that would otherwise be unlawful without permission.⁸⁰

1. Coercion

The Commentary accompanying the Article as well as the Eighth Report on State Responsibility provide some limited insight into the impact of coercion in bilateral agreements and how states and tribunals have considered the legitimacy of the consenting government, and of the content of its agreement. In theory, protections are available to protect weaker states, but seem to be rarely invoked.

Generally, the Commentary leaves it to substantive law—that is the law outside of state responsibility to determine whether consent was obtained.⁸¹ Still, it identifies the possibility of coercion, requiring that consent be “*valid*.”⁸² The Commentary makes clear that while consent may come in many forms, including implicit, it may not be presumed,

is an unlawful violation of sovereignty, and thus potentially an act of aggression, unless it takes place with the host State’s consent or the prior authorization of the Security Council.”); *see also id.* ¶ 56 (“On the other hand, the United States and some other countries take the view that, subject to particular conditions, the law of self-defence entitles States to engage in non-consensual military operations on the territory of another State against armed groups that pose a direct and immediate threat of attack, even where those groups have no operational connection with their host State.”).

79. *See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53 U.N. GAOR Supp. No. 10, at 72, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n 20, pt. 2, U.N. Doc A/CN.4/SER.A/2001/ Add.1 (Part 2) Art. 20 [hereinafter *DARS*], available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Oct. 10, 2014).

80. *Id.* art. 20 cmt. n. 2.

81. *Id.* art. 73 cmt. n. 4.

82. *Id.* art. 20.

and it “may be vitiated by error, fraud, corruption or coercion.”⁸³ The Special Rapporteur on Extrajudicial Executions, Christof Heyns’s most recent report on the use of lethal force through armed drones reiterates the Draft Articles’ standards.⁸⁴ Elaborating on its requirements, Heyns states that consent need not be public, but it must be “actually expressed,” and its parameters must be clearly stated.⁸⁵

The example of coercion referred to in the Commentary is the occupation of Austria by German troops in March of 1938, which before International Military Tribunal at Nuremberg. The Tribunal asked whether Austria had given Germany consent, and concluded “that Austrian consent had not been given; even if it had, it would have been coerced and did not excuse the annexation.”⁸⁶ Unfortunately, no further examples are provided, nor any elaboration on the permissible incentives and pressures that a state may apply to secure consent, nor where the threshold for coercion lies in inter-state agreements.

Since the publication of the Draft Articles on State Responsibility, it is clear from debates on the legality of foreign interventions that the existence or absence of consent is always politicized and cannot be removed from the geopolitical context, and the history of relations between the host state, and the attacking state, and their relationship with concerned onlookers.

Both France and Britain used “consent to justify periodic armed interventions in former colonies to support friendly governments against small-scale rebellions or palace groups.”⁸⁷ In particular, the UK used force in Taganyika upon the invitation of President Nyerere to quash a mutiny, in 1964. And although Nyerere had made the request, there was

83. *Id.* art. 73 cmt. n. 6 (emphasis added).

84. *See* Heyns Report, *supra* note 77, ¶ 108.

85. *Id.* ¶ 83. (“While there is no requirement that consent be made public, it must nevertheless be clear between the States concerned that consent is being given to a use of force, and the parameters of that consent should also be made clear. Consent must be given in advance. Moreover, consent 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.”).

86. *DARS*, *supra* note 79, art. 73 n.321.

87. Wippman, *supra* note 70, at 210.

domestic backlash for this unpopular invitation.⁸⁸ In 1979, French paratroopers forcibly removed Emperor of the Central African Empire, Jean Bedel Bokassa. Other governments protested its actions at the Security Council, alleging an unlawful violation of the sovereignty of the Central African Republic. Proponents of the intervention cited to Bokassa's poor human rights record. The French incursion was deeply unpopular in the Central African Republic, but received little attention from the international community.⁸⁹

By contrast, the USSR's invasion of Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1979, each justified by consent were "met with widespread criticism on the ground that the invitations at issue were either manufactured or coerced."⁹⁰ Similarly, the American interventions in Dominican Republic 1965 and to Grenada in 1983 were condemned and the legal basis for intervention, namely the alleged invitation, was questioned.⁹¹ None of these debates led to judicial determinations of coercion.

2. Legitimacy of the Substantive Agreement and of its Negotiators

In this section, I examine the way in which the law of interstate force grapples with questions of legitimacy. Namely, to what extent does popular support for the foreign intervention, and the popularity of the domestic government consenting to the intervention impact the latter's legality.

Conventionally, without consent to foreign intervention, neither the popularity of foreign intervention, nor the popularity of the leader giving consent carries much weight, with one important caveat.⁹² Debates

88. KEESING'S CONTEMPORARY ARCHIVES 19, 963 (Keesing's Publications Ltd. 1963-64); see also Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794, 796 (1994).

89. Wippman, *supra* note 70, art. 216 n.35.

90. *Id.* art. 211.

91. *Id.*

92. The one exception is that a state cannot authorize a foreign state to suppress a movement opposing racist or colonial domination, since the state would not be able to do this itself under international law because the right to resist colonial domination is *jus*

regarding consent have thus centered on whether the government providing consent exercises effective territorial control over the state where the armed activities are set to occur, and whether this government is recognized as such at the international level.⁹³ The authority to confer consent is based on a government's territorial control, not their domestic popularity or legitimacy, which we might expect if popular sovereignty were firmly established as law.⁹⁴

Nonetheless, arguments have been made to shift the legal inquiry onto the legitimacy and popularity of the intervention and the host government who is party to the agreement, and to displace the importance paid to the acts of authorization provided by the government in power. These innovative arguments balance three factors when considering whether the extraterritorial use of force is justifiable: (1) whether representatives of the foreign and host state formally agreed on the intervention; (2) whether the foreign armed intervention is domestically popular—i.e., could arguably be justified as an expression of the people's right to self-determination; (3) whether the government consent or refusal is domestically popular and/or democratic.

cogens. Special Rappoeteur on the Internationally Wrongful Act of the State, Source of International Responsibility, *Eighth Rep. on State Responsibility*, Int'l Law Comm'n, ¶ 75, U.N. Doc. A/CN.4/318 and Add.1-4 (June 15, 1979) (by Roberto Ago) [hereinafter *Eighth Rep.*] (“[R]ules of *jus cogens* are rules whose applicability to some States cannot be avoided by means of special agreements. In other words, by their very nature they defeat any attempt to replace them by others, even in the relations between two States. Consequently, they can also not be affected by the special type of agreement concluded between the State which adopts conduct not in conformity with an obligation created by a peremptory rule and the State which consents to it.”); see also Wippman, *supra* note 70, at 215 (“This exception represents a specific application of the more general principle that a state may not lawfully authorize a foreign state to take any action that would be illegal under international law if undertaken by the authorizing state itself.”). Similarly, the content of the bilateral agreement has been regulated in one other important way, in that “[s]tates cannot consent to violations of international human rights law or international humanitarian law on their territory.” Heyns Report, *supra* note 77, ¶ 84.

93. Wippman, *supra* note 70, at 211-12; see also Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, BRIT. Y.B. INT'L L. 189, 191-93 (1985).

94. See Emmerson Report, *supra* note 78, ¶ 51.

Ideally, these three variables are aligned, so that a government is actually representative, and makes a decision about permitting foreign intervention that reflects the wishes of the people. But there are at least nine other combinations each of which raise unique questions about the desirability, politically and legally of such armed interventions.

1. Intervention is unpopular + host government is unpopular + no consent
2. Intervention is popular + host government is popular + no consent
3. Intervention is popular + host government is unpopular + no consent
4. Intervention is unpopular + host government is popular + no consent
5. Intervention is unpopular + host government is popular + no consent
6. Intervention is popular + host government is popular + consent
7. Intervention is popular + host government is unpopular + consent
8. Intervention is unpopular + host government is popular + consent
9. Intervention is unpopular + host government is unpopular + consent

An intervention under scenario six, thus would find itself on the most stable grounds, because it conforms to the formal consent requirement, while also being popular and democratic. By contrast, foreign interventions taking place under scenarios one through five, would be conventionally illegal because of the absence of consent. But these interventions are not unlawful in the same or equal way. An intervention that were to take place under circumstances captured by situation number four would be hard to justify on any grounds, because the government denying consent would have the mandate of its people to do so. By contrast, numerous arguments made to advance the legality of option number three—namely interventions that for example were

democratically supported, but opposed by the formal government, which was itself unpopular. In other terms, there have been arguments to justify ignoring consent by a host government, when the intervention would vindicate the wishes of the people, and unseat unpopular and undemocratic government. The Responsibility to Protect (R2P) is one example of this line of justification. The NATO intervention in Libya is another instance in which consent was overlooked, and the intervention was justified based on the benefits to the people. Nonetheless, international tribunals have been reluctant to embrace scenario three as lawful grounds for intervention. In *Nicaragua v. United States*, the ICJ held that intervention is not allowed against the will of an effective government, even if solicited by groups within the state who characterize themselves as “freedom fighters.”⁹⁵ Similarly, the U.S. invasion of Panama was condemned, in spite of the fact that “the invasion ousted a dictatorial regime and replaced it with a democratically elected one.”⁹⁶ The consensus remains that foreign intervention without consent cannot be rationalized by its results not matter how legitimate it is perceived to be by the citizens of a country. This is because as between sovereign states, there is a strong norm of non-intervention.

In addition, the way in which the government came into power does not influence whether it can seek or oppose external intervention.⁹⁷ And while arguments have been made that a military coup should also be deemed a violation of sovereignty, specifically a conception of popular just as unauthorized foreign intervention would,⁹⁸ these have not become firmly entrenched in law. In other words, an official act of consent or lack of consent still rules.

Nonetheless, in spite of prevailing legal orthodoxy, agreements have been challenged as non-consensual, whether because contracting

95. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27).

96. Wippman, *supra* note 70, at 215.

97. *Id.*

98. Reisman, *supra* note 61, at 795 (“Military coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights. Violations of the right to popular government are not secondary or less important. They are very, very serious human rights violations.”).

government violated domestic law, or because it was deeply unpopular or because it was the puppet of a foreign government. That is to say, in spite of consent, interventions under scenarios seven through nine have been challenged as unlawful. Scenario nine is most susceptible to challenge because although there is formal consent, it is on unstable footing, relying on an unpopular agreement made with an unpopular government. Under scenario nine, the formal acquisition of authorization to use force violates popular sovereignty and the citizenry's right to (internal) self-determination. These arguments were at play during the Third Emergency Special Session of the General Assembly and in the Security Council on the interventions in Lebanon and Jordan. The representatives of Bulgaria, Albania, and Poland "questioned the legitimacy of the Governments of the countries in question, which in their view were simply political puppets of a foreign Government, and maintained that in giving their consent to the entry of foreign troops those Governments had acted against the expressed wishes of their peoples."⁹⁹ Similarly, in the context of the U.S. and Belgium's intervention in Congo both Ghana and Algeria both challenged the validity of consent because the intervention lacked popular support, and was secured by a local government that had been imposed by foreigners and rejected by the Congolese people.¹⁰⁰ "Many States argued that the Tshombe government was not the 'legal' government of Congo, but a mere puppet regime imposed by force. The so-called 'rescue operation' was again considered a pretext for intervening in Congolese politics."¹⁰¹

These arguments raised by states in U.N. debates are different than the typical consent challenges that are concerned with whether the government providing consent exercised effective control at the time, or whether the intervention exceeded the scope of authorization. Rather,

99. *Eighth Rep.*, *supra* note 92, art. 36 n.162 (citing to arguments set forth by the representatives of Bulgaria, Albania, and Poland).

100. *Id.* n.163 (citing to Official Records of the Security Council, Nineteenth Year, 1173rd meeting, ¶ 73, and 1183rd meeting, ¶ 69); *See also* Tom Ruys, *The 'Protecton of Nationals' Doctrine Revisited*, 13 J. CONFLICT & SEC. L. 233, 241 (2008) ("Belgium and the USA both justified their actions on a 2-fold basis, i.e. on the one hand, the consent of the legitimate Congolese authorities, and on the other hand, the responsibility to protect their nationals abroad.").

101. Ruys, *supra* note 100, at 241.

these are challenges focus on the popular legitimacy of the government providing consent and the substance of the agreement. The singular importance conventionally paid to whether an agreement exists is displaced, and equal attention is paid to the context in which agreement was secured, and whether corroborating circumstances exist to lend to its legitimacy. In the absence of democratic support, the agreement is deemed insufficient, and consent called into question. Under this more demanding rubric, only an intervention under scenario six would be lawful.

But, aside from arguments made by a few states in U.N. debates a more expansive consent inquiry that extends beyond the binary of whether a formal agreement exists or not has not been applied. Nonetheless, it creates a more ethically sound ground for consent, ensuring that both territorial sovereignty and popular sovereignty are respected. As will be made clear, the drone program in Pakistan is an intervention that may fall into scenario nine—i.e., while there may be some formal indications of authorization from the government with effective control over the territory, the substance of the agreement is deeply unpopular, making the domestic government widely mistrusted. The instability of scenario nine in real life challenges us to rethink the central role afforded to formal acts of consent in justifying interstate force, and invites us to think of other metrics with which to anchor our legal analyses of extraterritorial uses of force.

V. THE QUESTION OF PAKISTAN'S CONSENT TO STRIKES

While there is increasing consensus that Pakistan does not provide continuing consent to U.S. drone strikes,¹⁰² there a bulk of empirical evidence that suggests Pakistani officials facilitate or stand silent in the face of what otherwise would seem to be encroachments on sovereignty. And, documents leaked also reveal moments of explicit approval.¹⁰³ Similarly, the Obama Administration, has not disclosed any specific

102. See Emmerson Report, *supra* note 78, ¶ 54.

103. Miller & Woodward, *supra* note 5.

legal guidance of the question of Pakistan's consent to drone strikes.¹⁰⁴ But by allusion and indirection has stated that the U.S.'s relationship with Pakistan is founded on "the principles of respect for sovereignty and territorial integrity."¹⁰⁵ And, that its killing program complies with international law, presumably including questions of interstate force.¹⁰⁶ To help make sense of these conflicting signals, I turn to the broader historical, political and geopolitical context. Upon deeper examination, it becomes clear that an affirmative finding of consent erases the instability of the bilateral arrangement, the strong popular opposition to the U.S. bombing campaign, and the opaque relationship it sets up between citizens and their state. The extreme case of Pakistan puts into relief how unsatisfactory it can be to resort to formal acts of consent between governments, regardless of their popularity and perceived legitimacy.

104. In fact, there are persisting questions about the Obama legal justifications for its drone program, whether in Pakistan, Yemen or elsewhere, including questions of interstate force and the sovereignty of states hosting the groups targeted. The New York Times and the American Civil Liberties Union sought to compel the CIA to disclose an opinion by the Office of Legal Council, which provides a legal justification for the Obama administration's targeted killing program. The Second Circuit ruled that the legal opinion must be disclosed. *See* New York Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 515 (S.D.N.Y. 2013) (granting the government's motion for summary judgment, holding that the opinion may be lawfully withheld from plaintiff's under the National Security Act, 50 U.S.C. § 403-1(i)(1)) *rev'd*, 752 F.3d 123 (2d Cir. 2014) (ruling that the government waived the secrecy and privilege of the legal analysis contained in the Office of Legal Counsel's memorandum and that the portions of explaining legal reasoning were not protected from release pursuant to FOIA exemption for records specifically authorized under criteria established by Executive order to be kept secret).

105. *Obama, Sharif Discuss Security Cooperation, Drones*, *supra* note 3.

106. Barack Obama, President, Remarks by the President at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> ("Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—war waged proportionally, in last resort, and in self-defense.").

A. Pakistan's Ambiguous Consent

In what follows, I discuss the core, publicly available factual propositions that are dispositive for a finding of consent and elaborate on their implications in turn. Because of the secrecy of the program, and the mendacity that has characterized officials "disclosures," I rely on journalistic accounts to provide details of the drone program.

1. At Some Point, Pakistan Explicitly Authorized These Strikes...

Since the first strike in 2004, drone strikes have taken place over the course of a military dictatorship and two civil administrations, which have governed Pakistan for the past ten years. Strikes were first launched when former military dictator President Pervez Musharraf's was in power. Since stepping down, Musharraf has admitted to providing authorizing for a few strikes. But, he stopped short of affirming the corollary—that the remaining strikes under his watch lacked authorization.¹⁰⁷

Pulitzer prize winning journalist Mark Mazzetti, who has spent his career covering Pakistan, and the country's relations with the U.S. has uncovered details about the first CIA strike in Pakistan in 2004. According to his reporting, the first drone strike's target was Nek Muhammad, who was not a member of Al Qaeda, but an ally of the Afghan Taliban, and who had allegedly orchestrated attacks against Pakistan. "In a secret deal, the C.I.A. had agreed to kill him in exchange for access to airspace it had long sought so it could use drones to hunt down its own enemies."¹⁰⁸ Under this initial 2004 agreement, between

107. Nic Robertson & Greg Botelho, *Ex-Pakistani President Musharraf admits secret deal with U.S. on drone strikes*, CNN, <http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharraf-drones/index.html> (last updated Apr. 12, 2013) (Interviewer: "You are saying that on occasion there was agreement [to drone strikes].") Pervez Musharraf: "[O]nly on very few occasions, where the target was absolutely isolated and there was no chance of collateral damage.").

108. Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. TIMES, (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=2&ref=markmazzetti&pagewanted=all>.

the CIA and Pakistan's intelligence Agency, the ISI, Pakistani officials were said to have been given the opportunity to approve targets. Strikes were to be confined to the tribal regions.¹⁰⁹ In addition, Mazetti states that the US "would never acknowledge the missile strikes and that Pakistan would either take credit for the individual killings or remain silent."¹¹⁰

Mazetti's reporting and Musharraf's admission are corroborated by Special Rapporteur Ben Emmerson's investigation into the same issue. He concluded that between June 2004 and June 2008:

there is strong evidence to suggest that . . . remotely piloted aircraft strikes in the Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures.¹¹¹

But, the evidence that the heads of state in more recent years have actively participated in the drone program is less compelling, a point which that I will return to shortly.

2. At Another Point, Pakistan Opposed the Strikes in Public, but Not in Private...

From 2004-2008, the existence of covert U.S. drone strikes in Pakistan remained largely unknown. By 2009, the acceleration of these strikes drew greater scrutiny from the media and the Pakistani and American publics. Once the issue entered public debate, the Pakistani government, which after Musharraf was a civilian administration lead by Yousuf Raza Gilani, protested the strikes. However, an American Senator in response stated that the US relied on access to Pakistan airbases in order to conduct strikes.¹¹²

109. *See id.*

110. *Id.*

111. Emmerson Report, *supra* note 78, ¶ 53.

112. *Pakistani Bases Not Being Used for Drone Attacks: FM*, DAILY TIMES, (Feb. 16, 2009), http://www.dailytimes.com.pk/default.asp?page=2009\02\16\story_16-2-

A diplomatic cable from August 28th 2008 recorded by then U.S. Ambassador Anne Patterson reveals that at that point, the Pakistan government could not in public admit it authorized the strikes. In the cable, then Interior Minister Rehman suggests that Predator drone attacks be postponed until after the Pakistan military's own offensive in Bajaur, FATA. In response, however, then Prime Minister, Yousuf Raza Gilani apparently brushed off the suggestion, and said, "I don't care if they do it as long as they get the right people. We'll protest in the National Assembly and then ignore it."¹¹³

2009_pg7_4 ("[Foreign Minister Shah Mahmood] Qureshi told journalists before flying to the federal capital that US drone attacks were affecting Pakistan's sovereignty, and clarified that the drones were not being flown from bases inside Pakistan. He said Pakistan had always condemned the drone attacks over which no understanding or agreement existed."). *Pakistan for Review of US Drone Attacks*, THE NATION (Feb. 27, 2009),

<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/27-Feb-2009/Pakistan-for-review-of-US-drone-attacks> (quoting Shah Mahmood Qureshi, "What I'm asking for is that they have to review the strategy vis-a-vis drones . . . The US missile strikes . . . are counterproductive and have fanned an Islamist insurgency across northwest Pakistan If they are a necessity, then we are suggesting that the technology be transferred to Pakistan and that will resolve quite a few issues with the people of Pakistan."). See also Issam Ahmed, *Oops! Pakistan Condemns US's Drone Attacks (But Also Hosts Them)*, CHRISTIAN SCI. MONITOR (Feb.18, 2009), <http://www.csmonitor.com/World/Global-News/2009/0218/oops-pakistan-condemns-uss-drone-attacks-but-also-hosts-them>; see also Declan Walsh, *WikiLeaks Cables: US Special Forces Working Inside Pakistan*, THE GUARDIAN (Nov. 30, 2010), available at <http://www.theguardian.com/world/2010/nov/30/wikileaks-cables-us-forces-embedded-pakistan>; See also Mark Mazzetti and Souad Mekhennet, *Qaeda Planner in Pakistan Killed by Drone*, N.Y. TIMES (Dec. 11 2009), http://www.nytimes.com/2009/12/12/world/asia/12drone.html?_r=0.

113. *US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas*, THE GUARDIAN (Nov. 30 2010), <http://www.guardian.co.uk/world/us-embassy-cables-documents/167125> (diplomatic cable from U.S. Ambassador to Pakistan Anne Patterson, dated August 23, 2008). See also *US embassy cables: XXXXXXXXXXXXXXX PROVIDES GRIM ASSESSMENT OF SITUATION IN THE NWFP AND FATA*, THE GUARDIAN (Nov. 30, 2010),

<http://www.theguardian.com/world/us-embassy-cables-documents/185598?uni=Article:in%20body%20link> ("XXXXXXXXXXXX said he wanted to say in an unofficial capacity that he and many others could accept Predator strikes as they were surgical and clearly hitting high value targets. He mentioned that fear among the local populace in areas where the strikes have been occurring was lessening

More recently, in 2013, then current Pakistani ambassador to the US, Sherry Rehman tried to dispel rumors of the existence of a secret agreement between the two countries: “There is no policy of quiet complacency, no wink and nod.”¹¹⁴ It is unclear whether Rehman’s refutation applies to only the Gilani administration’s position, and when this position was adopted. More cynically, her statement could also be consistent with Pakistan’s policy of saying one thing in public and one in private.

Yet, putting aside Rehman’s refutation, even Pakistan’s policy double speak—authorizing in private yet protesting in public, itself weakens the case for consent. Pakistan’s ambiguity in its position is widely viewed as strategic. The Pakistan government is compelled to double-speak because of the widespread public condemnation of drone strikes by the Pakistani public,¹¹⁵ and by elected leaders. It has not been politically

because ‘everyone knew that they only hit the house or location of very bad people.’ He wondered why the strikes did not seem to target more of the [T]aliban which he reasoned was needed. He said ‘our house is on fire and we need to take drastic actions.’”

114. *Pakistani Ambassador Opposes Drone Strikes*, UPI (Feb. 6, 2013), http://www.upi.com/Top_News/US/2013/02/06/Pakistani-ambassador-opposes-drone-strikes/UPI-65341360132626/#ixzz2hA50TO8i.

115. According to a survey conducted by the New America Foundation, in the Federally Administered Tribal Areas (FATA), “[n]early nine out every ten people . . . oppose the U.S. military pursuing al-Qaeda and the Taliban in their region. Nearly 70 percent of FATA residents instead want the Pakistani military alone to fight Taliban and al-Qaeda militants in the tribal . . . More than three-quarters of FATA residents oppose American drone strikes.” New America Foundation and Terror Free Tomorrow, *Public Opinion in Pakistan’s Tribal Regions* 1-3 (2010), available at <http://www.newamerica.net/sites/newamerica.net/files/policydocs/FATApoll.pdf>.

Similarly, only “17% of Pakistanis support the U.S. conducting drone strikes in conjunction with the Pakistani government against leaders of extremist organizations.” *Little Support in Pakistan for American Drone Strikes Targeting Extremist Leaders*, PEW RESEARCH CENTER (June 29 2012),

<http://www.pewresearch.org/daily-number/little-support-in-pakistan-for-american-drone-strikes-targeting-extremist-leaders>. But see C. Christine Fair et al., *You Say Pakistanis All Hate the Drone War? Prove It*, ATLANTIC (Jan. 23 2013),

<http://www.theatlantic.com/international/archive/2013/01/you-say-pakistanis-all-hate-the-drone-war-prove-it/267447> (challenging the conclusions of the Pew Research Center mentioned above, stating “Pakistanis are not united in opposition to drone strikes. In fact, many Pakistanis support the drone strikes. . . . There is not a wall of opposition to drone strikes in Pakistan but a vocal plurality that merely gives that impression.”).

possible for the Pakistani officials to admit to providing consent to the strikes. There are significant indicia of public opposition to drone strikes.¹¹⁶ And, there are recurring protests against these strikes. Given the public's discourse around strikes in Pakistan, it is not tenable for Pakistan's leaders to publicly support the US's bombing campaign. While secrecy may be a common characteristic to bilateral agreements regarding to the use force, in Pakistan, the agreement, if one exists, is veiled in opacity because the Pakistani public views it as illegitimate. Pakistan's compulsion to be strategically ambiguous about the extent of its involvement in the drone program raises questions about the unsettled role of legitimacy in the consent doctrine. If and how should the law consider bilateral agreements governing the use of force which are profoundly unpopular? Is democratic legitimacy a value that the consent doctrine ought to embrace?

3. More Recently, Pakistan's Role in the Drone Program Has Been Less Direct...

According to Mazetti, by July 2008, Pakistan would no longer receive advance warning from the US before strikes in the tribal regions.¹¹⁷

116. See *supra* note **Error! Bookmark not defined.**

In addition, to the polls previously mentioned, the editorial pages of Urdu language newspapers similarly reflect resounding opposition to the strikes. For example, an editorial published by *Mashriq* argues, Pakistan is facing intractable problems because of the drone attacks. On the one hand, precious lives are lost, and on the other, the stability of the country is endangered. In fact, the federal government has repeatedly asked the United States to stop the drone attacks, but it appears that the US Administration has no realization, whatsoever, about the problems and hardships of its ally and is bent on going ahead with its policies at all costs.

See Juan Cole, *Urdu Editorials Condemn US Predator Strikes on Pakistan*, INFORMED COMMENT (Mar. 28, 2009), <http://www.juancole.com/2009/03/urdu-editorials-condemn-us-predator.html> (excerpting translations of editorials published by Pakistani Urdu newspapers condemning U.S. drone strikes).

117. Mark Mazzetti, *How a Single Spy Helped Turn Pakistan Against the United States*, N.Y. TIMES (Apr. 9, 2013),

“From that point on, the C.I.A. officers told Kayani, [Pakistani Army chief] the C.I.A.’s killing campaign in Pakistan would be a unilateral war.”¹¹⁸ An article by Wall Street Journal corroborates Mazetti’s timeline, and reports that since 2011, Pakistan’s ISI receives a monthly fax from the U.S., which notifies the ISI Pakistan of the broad areas where the U.S. intends to conduct strikes, but without any mention of any specific targets.¹¹⁹ The ISI does not respond to the substance of the message providing only confirmation of receipt, together this act and omission is construed as consent by the U.S. government.¹²⁰

Similarly, the Abbottabad Commission Report, which published the findings of the investigation to explain how Osama Bin Laden was able to live undisturbed in Abbottabad, corroborates this same evolution of diplomatic relations:

Regarding any understanding between the US and Pakistan on the American drone attacks, the DG said there were no written agreements.

http://www.nytimes.com/2013/04/14/magazine/raymond-davis-pakistan.html?pagewanted=all&_r=0. See also Adam Entous et al., *U.S. Unease Over Drone Strikes*, WALL ST., J. (Sept. 26, 2012), <http://online.wsj.com/news/articles/SB10000872396390444100404577641520858011452> (“In the early days of the Afghan war, lists of specific individuals to be targeted on Pakistani soil by U.S. drones were approved by both the U.S. and Pakistan, in what was called a “dual-key” system. Starting about four years ago, the U.S. began increasingly to go it alone.”).

118. See *id.*

119. See also Entous et al., *supra* note 117 (“About once a month, the Central Intelligence Agency sends a fax to a general at Pakistan’s intelligence service outlining broad areas where the U.S. intends to conduct strikes with drone aircraft, according to U.S. officials. The Pakistanis, who in public oppose the program, don’t respond. On this basis, plus the fact that Pakistan continues to clear airspace in the targeted areas, the U.S. government concludes it has tacit consent to conduct strikes within the borders of a sovereign nation, according to officials familiar with the program.”).

120. *Id.* (“The Pakistanis, who in public oppose the program, don’t respond. On this basis, plus the fact that Pakistan continues to clear airspace in the targeted areas, the U.S. government concludes it has tacit consent to conduct strikes within the borders of a sovereign nation, according to officials familiar with the program. . . .The ISI would send back a fax acknowledging receipt. The return messages stopped short of endorsing drone strikes. But in U.S. eyes the fax response combined with the continued clearing of airspace to avoid midair collisions—a process known as ‘de-confliction’—represented Pakistan’s tacit consent to the program.”).

There was a political understanding. The Americans had been asked to stop such attacks on a number of occasions as they resulted in civilian casualties. However, it was easier to say no to them in the beginning, but ‘now it was more difficult’ to do so. Admittedly the drone attacks had their utility, but they represented a breach of national sovereignty. There were ‘legal according to American law but illegal according to international law.’¹²¹

The change in the terms of the engagement, from explicit involvement to non-interference, coincided with a transition from a military to a civilian government. Prime Minister Yusuf Raza Gilani took power in March 2008, after the first election since Musharraf’s resignation. 2008 is also when President Obama came into office. The Obama administration is responsible for the majority of the drone strikes in Pakistan. Thus, piecing together the elements from Mazetti and Emmerson’s chronology, the bulk of strikes seem to have been conducted unilaterally, without direct involvement by Pakistan’s civilian government. The Wikileaks cable and the Abbottabad Commission Report suggest that while there may have been no direct involvement, the government has at some points maintained a policy of non-interference.

The reasons for non-interference are not clear, and may have varied over the years: tacit support, indifference or a practical inability to stop. The first two grounds for non-interference would be deeply unpopular in Pakistani political landscape, and so each is consistent with a policy of double speak, which as noted in the previous section raises questions about the value of legitimacy in bilateral force agreements. But non-interference because of inability raises other legal questions, discussed in the next paragraphs.

121. Abbottabad Commission Report § 477, *available at* <http://www.aljazeera.com/indepth/spotlight/binladenfiles/2013/07/201378143927822246.html>.

4. Drone Strikes Have Been Temporarily Suspended in Response to Diplomatic Crises...

The media is frequently abuzz with the tense nature of U.S.-Pakistan relations.¹²² And, drone strikes are the central point of contention between the U.S. and Pakistan. In spite of Pakistan's practice of non-interference, in that Pakistan's armed forces do not shoot down drones, for example, Pakistan government's rhetoric has been consistently and clearly in opposition to strikes.¹²³ With the transition to a civilian government, and the escalation of strikes under Obama, the executive branch has been forced to develop a palatable public position on the strikes that reflects the views of its constituents and peers, even though it may be at odds with its own actions, though it not clear whether this is duplicity persists.

Since February 2009, there have been at least nineteen instances in which the Foreign Ministry has condemned drone strikes, and U.S. diplomats summoned to lodge formal complains.¹²⁴ The grievances

122. See generally *Pakistan-United States relations*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pakistan%E2%80%93United_States_relations (last visited Feb. 20, 2015).

123. See, e.g., Ben Farley, *Drones and Pakistan, Consent and Sovereignty*, D.C. EXILE (Mar. 16, 2013), <http://dcexile.blogspot.com/2013/03/drones-and-pakistan-consent-and.html> ("Not only has Pakistan not taken such steps in response to U.S. drone strikes, at least until the Wall Street Journal report at the end of September 2012, Pakistan continued to clear the parts of its air space in which the CIA indicated it would conduct drone strikes. That is to say, not only is Pakistan not intervening to prevent drone strikes, it is taking affirmative steps to facilitate those strikes. Thus, Pakistan's behavior at least renders its public statement ambiguous and, more likely, supersedes those statements altogether. Again, consent must be clearly stated but clearly stated to the recipient of that consent not the outside world.")

124. See, e.g., Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in Mir Ali Area (Apr. 29, 2012), <http://mofa.gov.pk/pr-details.php?prID=198>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns Drone Attack (May 5, 2012), <http://mofa.gov.pk/pr-details.php?prID=201>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Drone Attacks in N. Waziristan (Aug. 18, 2012), <http://mofa.gov.pk/pr-details.php?prID=277>; Press Release, Ministry of Foreign Affairs Gov't of Pak., U.S. Embassy Conveyed Protests Against Drone Strikes (Aug. 23, 2012) <http://mofa.gov.pk/pr-details.php?prID=278>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Spokesperson's Response to U.S. Newspaper Report on

Drone Attacks, (Sept. 28, 2012) <http://mofa.gov.pk/pr-details.php?prID=330>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Protest Lodged with U.S. Embassy Against Drone Strikes, (Oct. 11, 2012), <http://mofa.gov.pk/pr-details.php?prID=341>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in Mir Ali Area, (Aug. 31, 2013), <http://mofa.gov.pk/pr-details.php?prID=1395>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike, (Sept. 6, 2013), <http://mofa.gov.pk/pr-details.php?prID=1415>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in S. Waziristan, (Sept. 22, 2013), <http://mofa.gov.pk/pr-details.php?prID=1442>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike Near Miranshah, (Sept. 29, 2013), <http://mofa.gov.pk/pr-details.php?prID=1483>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in N. Waziristan, (Sept. 30, 2013), <http://mofa.gov.pk/pr-details.php?prID=1484>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in Miranshah, (Oct. 31, 2013), <http://mofa.gov.pk/pr-details.php?prID=1513>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. drone strike in N. Waziristan, (Nov. 1, 2013), <http://mofa.gov.pk/pr-details.php?prID=1517>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in Hangu, (Nov. 11, 2013), <http://mofa.gov.pk/pr-details.php?prID=1565>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns the U.S. Drone Strike in Miranshah, (Dec. 26, 2013), <http://mofa.gov.pk/pr-details.php?prID=1631>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in Miranshah, (June 12, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2034>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in Miranshah, (June 18, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2046>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in N. Waziristan, (July 11 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2090>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in N. Waziristan, (July 19, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2097>. *See also Pakistan Summons US Ambassador to Protest Against Latest Drone Killings*, GUARDIAN (June 8, 2013), <http://www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings> (“The prime minister of Pakistan has summoned the US ambassador in anger after an American drone attack killed nine people in North Waziristan.”). After Hakimullah Mehsud’s death, the leader of the Pakistan Taliban, another formal complaint was lodged and US diplomats were summoned. Jalil Abbas Jilani, then Foreign Secretary stated, “[w]e consider drones as illegal, non-productive and accordingly unacceptable.” *See also Kamran Yousaf, Pakistan Lodges Formal Complaint over N Waziristan Drone Attack*, EXPRESS TRIB. (Apr. 30, 2012), *available at* <http://tribune.com.pk/story/372224/pakistan-lodges-formal-complaint-over-n-waziristan-drone-attack> (“The Predator attack was the first since the Parliament approved new terms of engagements that seek an immediate halt in the CIA-piloted campaign. During recent high-level talks, Pakistan had categorically told the US that drones are totally

lodged mirror those submitted when NATO forces in Afghanistan have encroached on Pakistan's sovereignty.¹²⁵ In addition, senior officials have spoken against the strikes, such as Sherry Rehman, former ambassador to the U.S.¹²⁶

In the spring of 2013, Nawaz Sharif's party, the PML-N won the election, became prime minister. Within his first months in office, he issued a public statement against the drone strikes, after the second strike since his election killed at least 7 and up to 9 people.¹²⁷ In November 2013, after a drone strike was alleged to have killed leader of the Tehrik-e-Taliban Pakistan, Hakimullah Mehsud, Sharif's Interior Minister Chaudhry Nisar Ali Khan criticized the US's actions for derailing pending talks with the Pakistan's main militant group.¹²⁸ In response to the same strike, PTI, the ruling party of Pakistan's northwestern province, Khyber-Pakhtunwa, which is adjacent to FATA, threatened cutting off access routes for NATO supply trucks if strikes were not halted.¹²⁹

unacceptable."); Declan Walsh & Ismail Khan, *Pakistani Party Votes to Block NATO Supply Lines if Drones Persist*, N.Y. TIMES (Nov. 4 2013), http://www.nytimes.com/2013/11/05/world/asia/pakistani-party-votes-to-block-nato-supply-lines-if-drone-strikes-persist.html?_r=0.

125. See, e.g., *Islamabad Urges Kabul to Stop Border Incursions*, EXPRESS TRIB. (June 27, 2012), <http://tribune.com.pk/story/399762/islamabad-urges-kabul-to-stop-border-incursions>.

126. See *supra* note 114.

127. See *Pakistan Summons US Ambassador to Protest Against Latest Drone Killings*, THE GUARDIAN (June 8, 2013), <http://www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings> ("The prime minister of Pakistan has summoned the US ambassador in anger after an American drone attack killed nine people in North Waziristan."); *Pakistan drone strike kills seven in North Waziristan*, BBC NEWS (June 8, 2013), <http://www.bbc.com/news/world-22820208>.

128. See *Hakimullah Mehsud Drone Strike: 'Death of Peace Efforts'*, BBC NEWS (Nov. 2, 2013), <http://www.bbc.co.uk/news/world-asia-24787637>.

129. Declan Walsh & Ismail Khan, *supra* note 124, at A7 ("The ruling party in a northwestern province of Pakistan voted Monday to block NATO supply lines by Nov. 20 unless the United States stops its drone strikes in the nearby tribal belt.")

And in some instances, in response to political crisis, strikes seem to have been suspended.¹³⁰ Two of the longest pauses to an otherwise regular pattern of drone strikes in the tribal belt occurred when relations between countries were at their weakest: first, when Raymond Davis, a U.S. government employee, working for the CIA, whose activities were undisclosed to the Pakistan government, shot two people in Lahore,¹³¹ and second when Pakistani soldiers were killed by NATO soldiers in Afghanistan.¹³²

130. There was a twenty-day break from drone strikes when floods hit Pakistan in August of 2010, but the longest have been in response to political crises. Furthermore, the stay in strikes did not last into the recovery and reconstruction of the floods, which left affected 20 million people, covering one fifth of the country's landmass. See Chris Woods, *Secret CIA Drone Attacks in Pakistan Suspended, as Obama Seeks to Free Imprisoned 'Diplomat'*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 18, 2011), <http://www.thebureauinvestigates.com/blog/2011/02/18/secret-cia-drone-attacks-in-pakistan-suspended-as-obama-seeks-to-free-imprisoned-diplomat> (reporting on the frequency of U.S. drone strikes in Pakistan, noting that "[e]ven during Pakistan's flood crisis of summer 2010, the campaign was suspended for just 20 days.").

131. From January 23 to February 14, 2011, not a single drone strike was reported in Pakistan, which is in contrast to an otherwise steady pattern of a strike every four days, which has abated in late 2013 and 2014. See *id.* ("One hundred and eighty lethal US drone strikes have been made inside Pakistan since Barack Obama became president: a deadly attack every four days or so.... Yet no drone attack has been reported in Pakistan since January 23rd. Not since June 2009 has the drones campaign seen such a long pause—26 days having passed.").

132. This political crisis led to a six-week reprieve from strikes. See *U.S. Drone Strike in Pakistan Ends Six-Week Pause; 4 Dead*, L.A. TIMES (Jan. 11 2012), http://latimesblogs.latimes.com/world_now/2012/01/drone-strike-in-pakistan-ends-six-week-pause.html#sthash.0EDSPk3C.dpuf ("[T]he U.S. air strikes[, which] mistakenly killed two dozen Pakistani soldiers along the Afghan border Nov. 26 incensed the Pakistani military and government, which viewed the attack as deliberate and unprovoked. In retaliation for the airstrikes, Islamabad shut down the use of Pakistan as a transit country for NATO shipments bound for Western forces in Afghanistan. The U.S. was forced to vacate an air base in southern Pakistan that the CIA had used to launch drone flights into Pakistan's volatile tribal areas, though Washington still can carry out drone flights from bases in Afghanistan.... Since the Nov. 26 incident, drone strikes in Pakistan have stopped. Current and former U.S. officials recently told The Times that the CIA had suspended drone missile strikes on gatherings of low-ranking militants suspected in attacks on U.S. troops in Afghanistan. The move, they said, was an attempt to patch up steadily eroding ties between the two countries.").

More recently, from December 25 to June 11, there was a pause in drone strikes, which is to date the longest.¹³³ Reports suggest this pause was due to a Pakistan government request to suspend strikes during the pendency of talks with the Taliban, which had been in part frustrated by continued U.S. bombing.¹³⁴ The first strike in six months on June 12 preceded by three days the Pakistan military's own offensive in the tribal areas following an attack by the TTP on the Karachi Airport. Yet, despite what might appear as bilateral military coordination, the Foreign Ministry issued a condemnation of the June 12 strikes, and subsequent strikes.¹³⁵

While the sample size is small, some inferences can be drawn, even if tentative. The suspension of strikes in response to political crisis complicates the narrative that Pakistan unambiguously endorses these strikes in private. The pause in strikes is a reflection of the US's recognition that Pakistan is not supportive of the U.S.'s bombing campaign, and its continuance comes at high political cost. Seemingly, any other dispute, on top of the drone issue can tip an already precarious balance between the two countries. The strikes in the summer of 2014, which appear to be in coordination with the Pakistani military highlight

133. Charlie Mole, *Pakistan Military Air Strikes Kill hundreds, Including Civilians, Over Past Six Months*, THE BUREAU OF INVESTIGATIVE JOURNALISM (June 23, 2014), <http://www.thebureauinvestigates.com/2014/06/23/pakistan-military-air-strikes-kill-hundreds-including-civilians-over-past-six-months>.

134. See Karen DeYoung & Greg Miller, *U.S. Curtails Drone Strikes in Pakistan as Officials There Seek Peace Talks with Taliban*, WASH. POST (Feb. 4, 2014), http://www.washingtonpost.com/world/national-security/us-curtails-drone-strikes-in-pakistan-as-officials-there-seek-peace-talks-with-taliban/2014/02/04/1d63f52a-8dd8-11e3-833c-33098f9e5267_story.html.

135. See, e.g., Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in Miranshah, (June 12, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2034>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in Miranshah, (June 18, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2046>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in N. Waziristan, (July 11 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2090>; Press Release, Ministry of Foreign Affairs Gov't of Pak., Pak. Condemns U.S. Drone Strike in N. Waziristan, (July 19, 2014), <http://www.mofa.gov.pk/pr-details.php?prID=2097>.

how the existence of consent is based on a political climate that is ever shifting, depending on the military establishment's tenuous relationship with the militant groups in the northwest. Such fragility illustrates that contractual agreements, whether between states and parties are not singular instances, but are continually negotiated, and affirmed. Given the fragility of U.S.—Pakistan relationship, at which drones are the center, should we infer consent in the face of such instability? Should stability be required for continuing consent to the use of interstate force?

The obvious question from these facts is why the Pakistani government does not put an end to these strikes, given the high political cost of the continuing strikes and its fraught relationship with the U.S. And how should the law interpret its non-interference? Pakistan's policy of non-interference in spite of its rhetorical opposition can be explained by the different bargaining positions between it and the U.S. and the historical terms of these countries relationship.

Historically, Pakistan has fashioned itself into a client state to the U.S., which has created a political dependence in Pakistan government. The close government and military relationship has been cause for regular frictions and breakdowns. But, the U.S. has maintained the upper hand, determining the terms of the relationship. The Pakistan government has relied on whatever U.S. support provided as an essential crutch for geopolitical strength. In addition, in recent decades the country has developed a dependence on foreign aid in particular on IMF loans,¹³⁶ and U.S. aid, as the largest donor.¹³⁷

136. In 2009, Pakistan received US\$ 3,297 million in foreign aid. Approximately 60% of this aid is used to service debts. See Muhammad Javid & Abdul Qayyum, *Foreign Aid and Growth Nexus in Pakistan: The Role of Macroeconomic Policies*, 72 PIDE WORKING PAPERS 1, 7 (2011), available at <http://www.pide.org.pk/pdf/Working%20Paper/WorkingPaper-72.pdf>.

("Due to enormously large accumulated foreign debt, most of the aid is being used for debt servicing.... Each successive government in Pakistan relied on foreign aid to finance a significant proportion of investment and import requirement for self-sustaining economic growth.... Significance increase in aid inflow took place during sixties although after the 1965 war with India slowed down.") *Id.* at 6.

137. Javid & Qayyum, *supra* note 136, at 6:

Aid inflow to Pakistan has a strong association with geo-political interest of donors. The increases in aid inflow in decade of 1960s in connect with

In line with a carrot and stick approach to diplomacy, Pakistan's involvement in the War on Terror was secured by threat and gifts. Pervez Musharraf reported that he was given two options after 9/11 by Richard Armitage, then deputy Secretary of State: Pakistan could cooperate with the U.S. or else risk "being bombed back to the Stone Age."¹³⁸ Although, Armitage has disputed those words, he has not denied sending a strong message to Pakistan.¹³⁹ In return, for cooperation, Pakistan would be rewarded for its cooperation in the form of aid, after years of sanctions for its nuclear program.¹⁴⁰

During Nawaz Sharif's November 2013 visit to the U.S., Pakistan's dependency on aid was in clear tension with its other goals as a sovereign state. While protesting drone strikes, Sharif also accepted a disbursement of \$1.6 billion in security assistance, that had been frozen as a result setbacks in bilateral relations, including the Raymond Davis affair, the raid on Osama bin Laden's compound in Pakistan, and the

Pakistan's signing of mutual defense assistance agreements with United State in cold war era. Aid inflow of 1980s can be visualized in perspective of Afghanistan war. In 1990s economic assistance to Pakistan was cut off by USA and other multilateral donor's when Afghan war ended. Aid inflow to Pakistan was further dropped down after nuclear test in 1998 and military takeover in 1999. Most recent aid inflow is a result of Pak-US closer ties after 9/11.

138. U.S. 'Threatened to Bomb' Pakistan, BBC NEWS (Sept. 22, 2006), http://news.bbc.co.uk/2/hi/south_asia/5369198.stm.

139. See Pakistan's Musharraf: U.S. Official Promised Bombing Country Back to 'Stone Age', FOX NEWS (Sept. 21, 2006), <http://www.foxnews.com/story/2006/09/21/pakistan-musharraf-us-official-promised-bombing-country-back-to-stone-age>.

140. John King & Andrea Koppel, *Bush Administration Puts Pressure on Pakistan*, CNN (Sept. 13, 2001), <http://edition.cnn.com/2001/WORLD/asiapcf/central/09/13/pakistan.us.bush> ("The United States has little leverage to use against Pakistan, with a host of sanctions already in place against the country. But Powell indicated that the United States could help Pakistan if the government is willing to cooperate. 'They're sanctioned up to the eyeballs and they don't have that much aid now,' Powell said. 'But I think we have been exploring with the Pakistani government many ways that we can move forward in the relationship and we want to do so.'"). See also Christophe Jaffrelot, *La relation Pakistan – Etats-Unis: Un Patron et Son Client au Bord de la Rupture?*, 187 LES ETUDES DU CERI 9 (2012), available at <http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/Etude%20187.pdf>.

death of Pakistani border guards killed by NATO forces.¹⁴¹ Pakistan is not unique in its aid foreign aid dependence and its clientism, which in turn makes it vulnerable to certain concessions that favor the donor's interests.¹⁴²

The question therefore is whether it is realistic to assume that poorer client states can meaningfully negotiate agreements with the U.S.? It is of course logically possible for Pakistan to end or modify the current terms of the bilateral relationship. And there are notable instances when Pakistan has acted in ways that complicate a simplistic client state theory.¹⁴³ It is not inevitable that Pakistan consistently follow US foreign policy prerogatives. But at this moment, the private acquiescence that may exist should be viewed in the context of a long history of collaboration and patron-client relationships.¹⁴⁴ And what this history suggests is that the choice of shooting down the drones, which would be the clearest manifestation that the strikes are non-consensual would entail such a clear break from history and the legacy of collaboration, that it is unlikely. As scholars of the Pakistan's political economy have noted, the collaboration with the US, largely through the armed forces

141. Warren Strobel, *As Ties Warm, U.S. Restarts Security Assistance to Pakistan*, REUTERS (Oct. 20, 2013), <http://www.reuters.com/article/2013/10/20/us-usa-pakistan-security-idUSBRE99J08H20131020> (quoting State Department spokeswoman Marie Harf as stating: “As part of our annual funding process, throughout the course of this past summer the State Department notified Congress of how it planned to program funds from several different accounts for various programs in Pakistan[.]’...’While this is part of a long process of restarting security assistance cooperation after implementation was slowed during the bilateral challenges of 2011 and 2012, civilian assistance has continued uninterrupted throughout....”). See also Declan Walsh & Ismail Khan, *supra* note 124.

142. Bruce Bueno de Mesquita & Alastair Smith, *Political Survival and Endogenous Institutional Change*, 42 COMP. POL. STUD. 167, 167 (2009) (arguing that whether democratic freedoms are suppressed in a country depends in part on the government's sources of revenues. “Empirical tests show that governments with access to revenue sources that require few labor inputs by the citizens, such as natural resource rents or foreign aid, reduce the provision of public goods and increase the odds of increased authoritarianism in the face of revolutionary pressures.”).

143. This includes Pakistan's support for the Haqqani Network, a Taliban affiliated group in Afghanistan, and its development of nuclear weapons.

144. Jaffrelot, *supra* note 140.

has created deep-seated structural arrangements that are not easily unmoored.¹⁴⁵

Pakistan—U.S. arrangements regarding drone strikes are neither clearly consensual nor clearly coercive. And, there is an absence of law to guide us in this terrain. To what extent ought the law be sensitive to questions of agency, volition and duress in these bilateral arrangements in relation states material and political advantages and disadvantages? Or should the law be blind to inequalities between states, and ignore the costs and pressures of decisions, taking at face value the decisions of states as volitional? If not, what forms of pressures and incentives are acceptable in securing bilateral agreements? At the very least, the case study here puts into relief the value of sustainable bilateral relations. Where so much pressure is needed to secure official acquiescence that it results in periodic breakdowns of diplomatic relations, some pause may be required before reflexively finding consent, merely because the formal indicia of consent may be present.

5. The Judiciary and Legislature Oppose the Continuing Drone Strikes...

Making echo to the executive branch condemnation of strikes, the courts and the legislature have taken clear positions against drone strikes. In 2012, Pakistan's Parliament has issued a series of condemnations of the attacks as infringements on its territory.¹⁴⁶ One such resolution stated, *inter alia*:

145. See, e.g., AYESHA SIDDIQA, *MILITARY INC. INSIDE PAKISTAN'S MILITARY ECONOMY* (Oxford Univ. Press, 2007).

146. "On April 12, 2012, a resolution was unanimously adopted by a joint session of both Houses [of parliament,] [] entitled *Guidelines for Revised Terms of Engagement with the USA/NATO/ISAF and General Foreign Policy*. The resolution begins with a statement that relations between Pakistan and the USA should be based upon mutual respect for the sovereignty, independence and territorial integrity of each other, and *inter alia* (a) calls for an immediate cessation of drone attacks inside the territorial borders of Pakistan; (b) reaffirms Pakistan's commitment to the elimination of terrorism and combating extremism in its own national interest; (c) provides that neither the Government nor any of its component entities may enter into verbal agreements with any other foreign Government or authority regarding national security; (d) provides that any

a) [The parliament] calls for an immediate cessation of drone attacks inside the territorial borders of Pakistan; (b) reaffirms Pakistan's commitment to the elimination of terrorism and combating extremism in its own national interest; (c) provides that neither the Government nor any of its component entities may enter into verbal agreements with any other foreign Government or authority regarding national security[. . .].¹⁴⁷

This resolution was passed unanimously by Pakistan's Parliament and sets out the framework for regulating the use of force by foreign states inside Pakistan's territory.¹⁴⁸ It cancels prior any oral authority that may be been granted to foreign states, and requires that consent in the future be given in in writing, subject to approval from Parliament.¹⁴⁹

In addition, the Peshawar High Court has ruled that the drone strikes violate international and domestic US law, and without Pakistan's consent, in a case was brought by drone strike survivors and their families. On this second point, the Court found that the strikes amount to a "clear & naked aggression on sovereign territory/airspace of Pakistan."¹⁵⁰ The Court determined that these strikes are carried out without input or advice from the Pakistan government or its intelligence agencies.¹⁵¹ After taking note of the different occasions on which

such agreements previously entered into should forthwith cease to have effect; and (e) provides that any such agreements should, in the future, be subject to scrutiny by specified Ministries and Parliamentary bodies and then announced through a Ministerial statement in Parliament. The resolution also calls on the international community to recognize the human and economic losses caused to Pakistan by the so-called "war on terror" and affirms that "[i]n the battle for hearts and minds an inclusive process based on primacy of dialogue" which "respect[s] local customs, traditions, values and religious beliefs" should be adopted."

Id.; Emerson Report, *supra* note 78.

147. *Id.*

148. Emmerson Report, *supra* note 78, ¶ 53-54. "The effect of the resolution was to clarify the process by which consent may lawfully be given in Pakistan for the deployment of another State's military assets on its territory or in its airspace." *Id.* ¶ 54.

149. *Id.*

150. Khan v. Fed'n of Pak., W.P.No. 1550-P/2012, Writ Petition No. 1551-P/2012, § 16 (Argued Apr. 11, 2013) (Peshawar High Court) (Dost Muhammad Khan).

151. *Id.*

members of Pakistan's government have condemned the strikes, the Court concludes that the "only option left out is to give effective rejoinder to such naked aggression made on sovereign state territory/airspace" and to ask the Security Forces to defend against these strikes.¹⁵² The directions issued by the High Court's decision have not been heeded, prompting the petitioners to move to file a contempt petition against the current prime ministers and other officials.¹⁵³

And, unlike the executive branch condemnations, these legislative and judicial pronouncements are less susceptible to the same corrupting forces. Indeed, even sustaining the contention that the executive says one thing in public and another in private, legislative and judicial condemnations of these strikes, in particular suggest that these strikes are done without the full support of other branches of government. Any agreement between the U.S. and Pakistan that may not exist is not only viewed as illegitimate by the wider public, but by other branches of government.

The reality of civilian casualties, the frequent retaliations by militant groups against the Pakistani civilians for U.S. strikes and populist anti-imperialist sentiment have solidified public opinion against these strikes, mirrored by recent legislative and judicial pronouncements.

[T]herefore, it is held that these [strikes] are absolutely illegal & blatant violation of the Sovereignty of the State of Pakistan because frequent intrusion is made on its territory / airspace without its consent rather against its wishes as despite of the protests lodged by the Government of Pakistan with USA on the subject matter, these are being carried out with impunity.

See also id. at 18.

152. *Id.* § 17.

153. Ansar Abbasi, *Contempt Petition Being Moved Against Nawaz Govt in PHC*, THE NEWS INTERNATIONAL (Nov. 4, 2013), <http://www.thenews.com.pk/Todays-News-13-26452-Contempt-petition-being-moved-against-Nawaz-govt-in-PHC>.

6. Yet, There Has Been Continuing Intelligence and Logistical Support for the Strikes...

Despite condemnation by all three branches of government, there is evidence to suggest that intelligence agencies and segments of Pakistan's armed forces facilitate the execution of strikes.

Special Rapporteur Emmerson recognized that there may be continued authorization and support from Pakistan's ISI.¹⁵⁴ In addition, it is undisputed that the Pakistan military provides the airbase from which at least some UAV's take off and land.¹⁵⁵ And, it has been revealed that the ISI receives notification of the broad areas where strikes may take place. Since May 2011 when the U.S. conducted raid on the Abbottabad compound, which housed Osama Bin Laden, the ISI no longer sends acknowledgement of receipt.¹⁵⁶

Yet, as a factual matter, the actions of an agency or members of an executive agency do not necessarily represent other branches or agencies of government. Indeed, the facts discussed above highlight the strong inter-governmental dissent on the matter. The parliamentary resolution,

154. *Lawfare Podcast Episode #31: Special Edition: Ben Emmerson Discusses His Investigation*, LAWFARE (May 14, 2013), <http://www.lawfareblog.com/2013/05/lawfare-podcast-episode-31-special-edition-ben-emmerson-discusses-his-investigation>.

155. Chris Woods, *CIA Drones Quit One Pakistan Site—but US Keeps Access to Other Airbases*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Dec. 15, 2011), <http://www.thebureauinvestigates.com/blog/2011/12/15/cia-drones-quit-pakistan-site-but-us-keeps-access-to-other-airbases>.

156. Entous, *supra* note 117 (“After the May 2011 bin Laden raid, which the U.S. did without Pakistani permission or knowledge, the ISI stopped acknowledging receipt of U.S. drone notifications, according to U.S. and Pakistani officials. Replies were stopped on the order of the ISI chief at that time, said an official briefed on the matter. ‘Not responding was their way of saying ‘we’re upset with you,’ this [unidentified U.S.] official said. The official said the ISI chief chose that option knowing an outright denial of drone permission would spark a confrontation, and also believing that withdrawing consent wouldn’t end the strikes.”). Jane Perlez, *U.S. Push to Expand in Pakistan Meets Resistance*, N.Y. TIMES (Oct. 5, 2009), <http://www.nytimes.com/2009/10/06/world/asia/06islamabad.html> (“American officials have said that Blackwater employees worked at a remote base in Shamsi, in Baluchistan, where they loaded missiles and bombs onto drones used to strike Taliban and Qaeda militants. The operation of the drones at Shamsi had been shifted by the Americans to Afghanistan this year, a senior Pakistani military official said.”).

the High Court's decisions demonstrate that if there is continued authorization or even logistical support offered in aid of US strikes, particularly since 2012, it is offered by state agency that it is largely unaccountable. These facts raise the question as to who is the proper state agent and proper process for negotiating consent. Can consent be obtained by an individual or groups in power through illegal or tenuous constitutional authority or through an agency that is not directly politically accountable?¹⁵⁷ Furthermore, should the consent doctrine take into consideration intergovernmental dissent?

Special Rapporteur Emmerson clarifies that under current constitutional law in Pakistan, only the “democratically elected Government is the body responsible for Pakistani international relations and the sole entity able to express the will of the State in its international affairs.”¹⁵⁸ But international law does not require that a particular arrangement regarding interstate force comply with the host state's domestic law.¹⁵⁹ Still, he does not regard the assistance offered by individual Pakistani state agencies to the CIA and the U.S. over drone strikes as tantamount to consent. He stops short of setting forward a clear rule for when consent has been obtained, but concludes that *currently* Pakistan does not consent.

But Emmerson's report does not discuss whether there was consent historically, in particular before the parliamentary resolution was passed. While there may have been official *authorization*, as Musharraf himself admitted,¹⁶⁰ there is still a question of whether there was legal consent at that time, because of who gave consent—a military dictator and under what circumstances—without Parliamentary approval, and with great pressure from the U.S. Furthermore, Pakistan's peculiar fact pattern also raises the question of whether without explicit authorization, continuing consent can surmised, tacitly from other behaviors by the Pakistani state and its officials. On the one hand, we see continued logistical support to

157. Deeks, *supra* note 69.

158. Emmerson Report, *supra* note 78, ¶ 54.

159. Deeks, *supra* note 69, at 4.

160. *Lawfare Podcast Episode #31: Special Edition: Ben Emmerson Discusses His Investigation*, *supra* note 154.

U.S. drones, and on the other popular outcry and inter-governmental dissent.

B. Legal Implications

In summary, although there may have been a clear agreement between the two states to collaborate at one point, it seems to have degenerated into Pakistan's tacit policy of non-opposition, which then perhaps morphed into an explicit policy of opposition. Yet, there is some logistical support offered by Pakistan, and no evidence of any direct interference. It remains unclear whether Pakistan's civilian government participates in private but protests in public. However, despite unresolved factual issues, there are important grounds for challenging an affirmative finding of consent.

In particular, the secrecy of any bilateral arrangement, widespread public condemnation, intra-governmental dissent, and the instability of the U.S.—Pakistan relationship challenge us to rethink the contours of consent. There are four interrelated legal issues that these facts raise. If the existence of an agreement is deliberately kept ambiguous to shield it from known opposition from the public and other branches of government, should it be accepted as lawfully and “validly” obtained consent? What kinds of domestic political arrangements that support interstate force agreements are normatively acceptable and which violate precepts of self-determination and democracy? Can a state's non-interference in other state's use of force be tantamount to consent when its recourse to actively challenge the offending state is limited because of its relative weakness? Finally, if a bilateral arrangement is so precarious so as to lead to intermittent breakdown in bilateral relations, can there be continuing consent?

VI. TOWARDS A MORE EQUITABLE DOCTRINE OF CONSENT

The issue of Pakistan's consent to drone strikes invites us to re-examine the rules that give shape to the consent doctrine. Namely, it focuses our attention on how these rules construe two key norms in international law: the right to self-determination and sovereign equality.

The secrecy of the Pakistani government's involvement in the drone program, and the result of the public and intra-governmental opposition to the strikes carry together implications for Pakistani citizens' right to self-determination. The current arrangement, in which an agency in the executive is pursuing a policy at odds with domestic public opinion, and the position of other branches of government and executive agencies, is anti-democratic, substantively as well as institutionally, because it is immune from public accountability. If any agreement exists between the U.S. and Pakistan, it relies on discord, secrecy, and unaccountable government actors. The continuing existence of the U.S.'s drone program relies on an acute crisis in representation. Thus, to find consent in such a situation solidifies domestic political arrangements in Pakistan that are unpopular and not able to be challenged through the democratic process. The norm of self-determination has traditionally been narrowly construed in analyses of bilateral agreements governing the use of force. The law has refrained from probing the substantive popularity of an agreement, the extent of intra-governmental consensus over a particular bilateral arrangement, or robustness of the democratic processes. In addition, under the traditional rule, consent need only be secured by a representative whose decisions are considered at the international level "to be the will of the State and, in addition, the person in question must be competent to manifest that will in the particular case involved."¹⁶¹ Generally, that person is head of the central government's executive branch. Popular sovereignty and the notion that final authority rests in the people and their demands have not prevailed as the authoritative standard for determining whether consent is valid.

Undeniably, the dominant legal interpretations of consent and self-determination serve the interests of finality and determinacy, because the inquiry into the legitimacy of the consenting actor is relatively limited, and because the substantive legitimacy or illegitimacy of a particular bilateral policy is largely unregulated.¹⁶² But in the case of Pakistan, the

161. Eighth Rep., *supra* note 92, ¶ 70.

162. See Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 876 (1990) (recognizing that using the metric of popular sovereignty to determine whether sovereignty has been violated is a more difficult inquiry):

rule of “effective control” is difficultly applied. The persistence of assistance for drone strikes by intelligence agencies, in the face of frequent condemnation of strikes from all branches of government, and the possibility that the state may be strategically ambiguous itself makes it difficult to discern the true intentions of the state’s international representatives. Do we rely on the actions of intelligence agencies or the words of the Prime Minister? In addition, there is the risk that state actors authorizing the use of force are domestically unaccountable, yet propped up by a foreign force, giving a foreign country greater control over domestic policies than its citizens. Furthermore, the kind of discord and inconsistencies upon which the US drone program in Pakistan is presently predicated calls into question whether consent should only be given by the executive branch. Finally, those particular circumstances invite us to examine into the benefits of broadening the consent inquiry by considering other branches of government and expressions of popular support or condemnation for a more holistic and grounded sense of consent. Whereas the executive may be deliberately ambiguous about its position, public opinion is not in Pakistan.¹⁶³

A more sensitive rule would require investigation into the popularity, the legitimacy a particular bilateral agreement enjoys, and its status in domestic law.¹⁶⁴ This would ensure that bilateral force agreements are consonant with the right to self-determination, writ large, and not merely

Because human rights considerations introduce so many more variables into the determination of lawfulness, an even heavier burden of deliberation devolves upon international lawyers in assessing the lawfulness of actions. Matters become more complex and uncertain than they were in an international legal system that was composed of a few binary rules applied to a checkerboard of monarchical states and, most particularly, that lacked an international code of human rights. One can no longer simply condemn externally motivated actions aimed at removing an unpopular government and permitting the consultation or implementation of the popular will as per se violations of sovereignty without inquiring whether and under what conditions that will was being suppressed, and how the external action will affect the expression and implementation of popular sovereignty. The identification of what is clearly ‘externally motivated action’ is itself an increasingly difficult task.

Id.

163. See Mazzetti, *supra* note 117; see also *supra* note 117.

164. See Deeks, *supra* note 69.

in a formal and procedural way. Examining more closely, the legitimacy of a particular agreement has a better chance of securing the norm of sovereign equality, as well, because such a rule pays attention to the wishes of the people, not merely the actions of isolated government actors, who, as in the case of Pakistan's ISI, are propped up and supported by a foreign government.

Furthermore, the law makes clear that consent cannot be presumed,¹⁶⁵ for example from a state's inaction, as the US may do from Pakistan's policy of non-interference. This policy of non-interference must be viewed in the context of Pakistan's precarious relationship with the U.S. Indeed, precarious agreements, particularly ones between donor states and aid dependent states, highlight the unrealistic expectation that later are able to fully represent and enforce their wishes in bilateral negotiations. To ignore inequalities in the negotiation process can reproduce them, as weaker states are bound by agreements in which its aspirations are not fully represented, and thus, compromising its existential sovereignty. Probing the power dynamics between states rather than their presuming equal capacity runs against conventional understandings of sovereignty, which permits states to consent to any agreement, even if it unfavorable or unfair, on the ground that a state is *prima facie* sovereign and master of its own destiny. A rule that is more conscious of power and histories of imperialism would consider the incentives offered and pressures placed in order to secure consent and the constraints on agency of weaker states. Such a rule may offer a corrective to the strong current in international law that has strengthened interstate hierarchy. The precarious agreement also suggests that bilateral force agreements be periodically reevaluated to ensure that consent has been validly obtained. Consent must be viewed not as a single instance in which parties agree to cooperate but part of a sequence of negotiations over a course of time. Periodic breakdown in bilateral relations weakens the case for continued consent because the agreement is not sustainable and raises questions of coercion.

If international law has operated to enhance rather than correct interstate inequality, it is partly because it has foreclosed alternative, more

165. See *DARS*, *supra* note 79, art. 20 cmt. n. 6.

expansive understandings of sovereign equality and self-determination. The suggestions made here would replace formalist interpretative practices with ones open to greater nuance and flexibility. International legal norms need not be static. Arguably, change is built into the law's interpretive processes.¹⁶⁶

166. See Saul, *supra* note 38, at 610.