Another common approach is that a government can resort to hostilities only once the internal violence crosses a threshold of intensity—namely, when there is a noninternational armed conflict (NIAC) in its territory, or, when international humanitarian law (IHL) applies. If there is a NIAC, the government can request forcible help.[10] For instance, much of the debate on U.S. drone attacks in Pakistan concerned the question of whether there is an armed conflict *in* Pakistan. But this reasoning is somewhat circular since the test for the existence of a NIAC is factual, not normative. Essentially, it's like saying force can be used because force is used, even if it is the consenting government *itself* that resorted first to internal force.

I would like to suggest another approach. My argument is that a government is only authorized to use force internally in self-defense—meaning, against a first use of force by a nonstate actor that would be comparable to an armed attack. The source of this rule can be found in international human rights law, in particular the right to life, which allows lethal force only in self-defense. This restriction, to me, applies also to the *decision* to resort to internal hostilities, meaning, to move from the law enforcement paradigm to that of hostilities. Indeed, there is no reason to assess decisions of individual police officers to use lethal force in light of human rights norms, but not to so assess the general decision by governments to resort to armed hostilities, which triggers many individual instances of use of lethal force.[11]

If this is true, consent could legalize intervention only if the requesting government is acting in "internal" self-defense itself. In such cases, consent would remain a precondition to use force (so as not to violate state sovereignty and Article 2(4) of the UN Charter), but the substantive justification to do so would be found elsewhere. If we accept this construction, we avoid the circularity of subjecting the power to consent to the factual existence of an armed conflict, without determining whether the government was justified to resort to internal force to begin with. In this sense, the external validity of consent would hinge on the internal right to use force, or *internal jus ad bellum*.

Military Intervention by Consent and Its Relationship to International Human Rights Law

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*By Jonathan Horowitz**

These remarks focus on the issue of "military intervention by consent" from the perspective of international human rights law (IHRL). More specifically, they focus on how the consenting state's human rights obligations can impact what that state can, and cannot, consent to.

The reason for this focus is that most legal discussions about military intervention focus on the state that's using force (i.e., the intervening state) and not on the state that's consenting to the use of force on its territory (i.e., the consenting state). Even human rights scholars and advocates have not given this issue enough attention, and consenting states and intervening states seem to have either largely ignored or avoided the topic. And yet, consent is a powerful legal key that unlocks the UN

[10] *Compare* Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu & Sarah Weiner, *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 164 U. Penn. L. Rev. 1 (2016).

[11] *See generally* Eliav Lieblich, *Internal Jus ad Bellum*, 67 Hastings L.J. 687 (2016).

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Charter's Art 2(4) restrictions on the use of force, all of a sudden making something that was illegal legal. It is axiomatic for international lawyers to say that if a state allows another state to use force on its territory, that use of force is legally permissible. As a matter of *jus ad bellum*, that very well may be true. But that's not my focus. My focus is on the fact that the intervening state's compliance with *jus ad bellum* doesn't wash away the need to evaluate what *type* of force the consenting state can permit on its territory.

U.S. detention practices after September 11, 2001, exposed why both of these issues need to be addressed. International law permits a state to allow, on its territory, another state to carry out a detention operation (which answers legal questions about sovereignty). But that consent can't permit certain types of force, such as torture (which of course raises serious IHRL problems). My impression is that in today's counterterrorism operations where lethal force by means of airpower—including unmanned aerial vehicles, or drones—is most often used, if the territorial state consents to such use of force on its territory then no one much bothers to ask what limits the consenting state needs to put on the type of force it just consented to.

To look at why IHRL impacts consent, let's start with the basic rule that a state has IHRL responsibilities for what transpires on its territory. This means a state cannot commit IHRL violations, nor can it facilitate or be complicit in human rights abuses by others on its territory. It's therefore undeniable that when one state allows another state to use lethal force on its territory, such consent engages the territorial state's IHRL obligations, in particular the right to life. The European Court of Human Rights has held, for example, that a state is responsible for "acts performed by foreign officials on its territory with the acquiescence or connivance of its [the territorial state's] authorities."

But not all types of killing are unlawful under IHRL, which means we need to determine if the territorial state's consent merely *engages* its IHRL obligations, or whether it *violates* those obligations. To do this, we have to determine what use-of-force rules govern the territorial state's relationship with the person whom the foreign state wishes to target.

If the person whom the intervening state wishes to target is in an armed conflict with the consenting state, then IHL may become the primary body of law that governs that relationship. To oversimplify things a bit, in this situation IHRL remains applicable but it can undergo a bit of an interpretive transformation that allows it to accommodate certain IHL rules. As a result, the territorial state might be able to use IHL's targeting rules against someone without breaching its IHRL obligations. When a state can do that, then that state can allow a foreign state to do the same, at least against that same target. This is what's happening in, for example, Iraq, where the United States and Iraq are in the same armed conflict fighting a common enemy under the rules of IHL.

But what if the territorial state isn't in an armed conflict? After all, it's quite possible that the intervening state may want to use IHL's targeting rules against someone whom the territorial state isn't in an armed conflict with. The United States presumably sought consent from Pakistan to use lethal force against the Haqqani Network, yet the network has had close ties with Pakistan; some of the United States' earliest strikes in Yemen were against people Yemen wasn't in an armed conflict with. Under these conditions, does IHRL permit a territorial state to consent to the *type* of force that IHL permits?

I don't see how it can. In these situations the territorial state's relationship with the target is regulated purely by IHRL. This means the territorial state cannot use, or consent to the use of, lethal force against that target unless the person poses an imminent threat to life or limb; and only then the force must be necessary and proportionate. This is in contrast to IHL's looser use of force rules, which don't require an imminent threat and allow for a level of civilian harm under the principle of proportionality that is largely anathema to IHRL. This being the case, I don't see how under IHRL a state can consent to that which it is not allowed to do itself. I don't see how one state can allow

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another state to use IHL rules on its territory when the consenting state's legal relationship with the target is regulated purely by IHRL.

Where does this leave us? There needs to be greater recognition that consent in the context of military intervention may wash away *jus ad bellum* issues but that, as a separate legal matter, that same consent implicates the territorial state's IHRL obligations. In theory, the territorial state could address these two issues together in the form of a single consent agreement or, I suppose, it could divide them up into two agreements. Either way, it can't simply avoid its IHRL obligations and the consenting state must, in fairly specific terms, make clear which legal framework regulates the intervening state's actions. It cannot be up to the intervening state to decide this unilaterally. This obligation is derived from a consenting state's IHRL obligation to account for the action taken by foreign forces on its territory.

As for the intervening state, the implication of this analysis is that it might face a situation where the territorial state withholds or limits its consent. This doesn't leave the intervening state without options. Let's not forget that IHRL has considerable flexibility and can pragmatically adapt its rules to situations falling short of armed conflict. Short of that, there is nothing under international law that prevents the intervening state from joining the consenting state's armed conflict if one exists, in which case the intervening state can use IHL's targeting rules. Finally, an intervening state always retains its inherent right to self-defense, although this raises a host of separate issues about what type of force the intervening state can use.

Remarks by Robert Taylor*

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The use of armed force inside the territory of a country is a matter that involves the rights and responsibilities of the territorial state. Control over the use of force is a fundamental aspect of the state's sovereignty. With respect to other states, it is the territorial state that has rights. Article 2(4) of the United Nations Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This obligation extends from one state to another state. The government of the territorial state might have obligations under the domestic law of that state to defend its territory, or to prohibit the use of force by any other state within its territory, but any such obligation is not a matter of international law and another state is not bound or limited by such domestic law provision.

If the territorial state consents to the introduction of armed force inside its territory, or indeed invites the introduction of armed force, then such introduction of force would not be a "use of force against the territorial integrity or political independence" of the territorial state. Since the territorial state consents, there is no third party or entity whose rights are affected by the introduction of force within the scope of the consent by the territorial state. ISIS in Iraq might assert that it is adversely affected by the United States presence there with the consent of the Iraqi government, and that is certainly the case, but its *rights* are not adversely affected.

The United States has had a strong preference to rely on the consent of a territorial state, but typically where it has used force within the territory of another state there has been another basis as well—typically, the inherent right of individual or collective self-defense. Relying on,

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