

Consent to the Use of Force and International Law Supremacy

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Many celebrate international law as a way to compel states to protect human rights. Often it serves this role. But sometimes it has the reverse effect: states use international agreements to circumvent individual rights in domestic law. For example, the United States reportedly relied on Italy's consent to render a terrorist suspect from the streets of Milan into secret detention. Pakistan seems to have authorized U.S. lethal strikes against Al Qaeda members without regard to rights protections in Pakistani law.

This Article uses the under-examined phenomenon of international consent to the use of force to explore the larger question of how states use international law to circumvent individual rights. International law facilitates these rights violations by embracing a principle termed "supremacy." Supremacy requires a state to prioritize its international obligations over its domestic laws. This means that a state may rely on another state's consent to an agreement without asking whether that consent violates the rights of individuals in the consenting state.

To minimize this manipulation of international law, the Article proposes that states receiving consent to use force bear a "duty to inquire" to ensure that the state consenting to the use of force is acting in a manner consistent with its domestic laws. This solution challenges international law's traditional approach to supremacy. The Article shows why a more functional approach to supremacy for international agreements that operate at the intersection of national security and individual rights will advance the goals of international and domestic law more effectively.

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INTRODUCTION

“Blind obedience to the supremacy of international law is not the same thing as the rule of law.”¹

Consider the following hypothetical: Thailand allows the United States to detain a terrorist suspect who is unlawfully present in Thailand and to transfer him out of the country. Thailand’s domestic law forbids the government from deporting an individual without first giving him a hearing. Does that prohibition extend beyond the Thai government’s own actions to prevent it from allowing other states to take actions that it could not? Or does international law permit the United States to rely on Thailand’s consent to remove the person from Thailand without a hearing? One might reasonably assume that international law would reject Thailand’s consent in this context on the grounds that Thailand should not be able to consent to something it could not do itself. Currently, however, international law would not preclude the United States from relying on Thai consent.

1. André Nollkaemper, *The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, 20 EUR. J. INT’L L. 862, 868 (2009).

The reasons for this lie deep in international law. International law allows one state to take at face value the commitments made to it by another state.² A state need not search behind another state's consent to unearth tensions between the international arrangement and the consenting state's domestic law. Nor may a state invoke its own domestic law as a reason to breach its international obligations.³ These concepts often are termed "international law supremacy."⁴ Thus, in the above example, international law allows the United States to assume that Thailand's consent is valid and to act consistently with that consent.

In many cases, the supremacy rule is not normatively troubling. When international and domestic rules clash, international law often is the more "rights-protective" of the two bodies of law. Thus, allowing it to trump domestic law is appealing to those who favor rights maximalism, or at least greater rights protections than otherwise would be available.⁵ Increasingly, however, rights-protective domestic laws come into tension with less protective international rules, including those regulating counter-terrorism.⁶ This

2. International law contains one modest exception to this rule. Article 46 of the Vienna Convention on the Law of Treaties states, "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

3. *Id.* art. 27.

4. See, e.g., André Nollkaemper, *Inside or Out: Two Types of International Legal Pluralism* 12 (ACIL Research Paper No. 2011-15, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967032.

5. For instance, a state party to the European Convention on Human Rights may not impose the death penalty, even if its domestic laws allow it. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114. See also Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 214 (1998) ("Countries that had lived under non-democratic regimes in the past were especially eager to provide their courts with the legal power not to give effect to national laws or executive decisions in conflict with the states' international human rights obligations.").

6. For examples in the sanctions and counter-terrorism context, see *Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council*, 3 C.M.L.R. 41 (2008); *Al Barakaat Int'l Found. v. Council*, 2008 E.C.R. I-6351; *R (on the application of Hani El Sayed Sabaei Youssef) v. HM Treasury*, [2010] UKSC 2 (appeal taken from [2008] EWCA Civ 1187); *Abousfian Abdelrazik v. Minister of Foreign Affairs & Att'y Gen. of Canada*, [2009] FC 580 (Can.); FRANCESCO FRANCONI, *Foreword to ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* (Francesco Francioni ed., 2001) ("[The] two values [of environment and human rights] have provided by far the most important source of challenge to the justice and legitimacy of the present international trade regime."); PHILIPPE SANDS, *LAWLESS WORLD* 136-37 (2005); Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 601 (2004) ("[Human rights advocates] contend that trade liberalization and other economic forces of globalization are weakening the international human rights regime through two mechanisms: a 'race to the bottom' and a constraint on domestic policy-making ability."). For critiques of trends in international law toward a less rights-protective approach, see Janne Nijman & André Nollkaemper, *Beyond the Divide, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 341, 356 (Janne Nijman & André Nollkaemper eds., 2007) ("Considering the faltered state international law is in since 9/11, the normative attraction of dualism has increased: when international norms seem to be violated or misinterpreted more easily and international normative standards are tainted, the state order has to uphold (national) values and norms."); Kim Lane Scheppele, *The International State of Emergency*:

raises an obvious question: is supremacy still a desirable rule of international law? Or should the traditional approach—which allows one state to turn a blind eye to its negotiating partner’s domestic laws—give way to a more procedurally rigorous approach that forces states to identify potential conflicts between international and domestic law before they occur? As a related matter, to what extent should international law continue to allow states deliberately to enter into international agreements to overcome or ignore limits in their domestic laws?

Consent to the use of force provides a particularly useful lens through which to examine supremacy. First, the role of consent to the use of force in international law is ambiguous and under-theorized, which makes it ripe for manipulation by states—as the Thailand example shows.⁷ Second, when a host state consents to another state’s use of force, that consent frequently stands in tension with laws in the host state, including laws that protect individual rights. Third, the situations in which such consent arises—anticipated military or law enforcement action—generally demand a level of secrecy, which makes it relatively easy for a state to consent privately to acts that violate its domestic laws. As a related matter, executive branches often operate with a relatively free hand when conducting military and law enforcement actions, and rarely face pressure by other branches of the government to consider the host state’s domestic laws.

The first goal of this Article is to understand how and when states employ consent to the use of force. Sometimes a state that wishes to use force outside of its territory (the “acting state”) will seek and obtain the host state’s consent to use force even when the acting state has additional legal rationales—such as self-defense—for using force in the host state. In other cases, consent serves as the sole basis on which an acting state uses force extraterritorially. Finally, after ending its use of force, an acting state may invoke the consent it received as a defense against claims that its action was unlawful. The Article explains why it is problematic in each of these cases to allow states to rely on consent that ignores or violates the host state’s domestic laws or obscures the legal basis on which the acting state relies. This Article uses the term “unreconciled consent” to describe consent that the acting state has

Challenges to Constitutionalism after September 11 (Sep. 2006) (unpublished manuscript) (on file at digitalcommons.law.umaryland.edu/schmooze_papers/49/) (arguing that Security Council’s counter-terrorism regime encouraged states to create “new, vague and politically defined crimes, [find] ways around warrant-and-notice requirements before seizing property, launch[] massive new domestic surveillance programs, [and move] toward preventive detention and aggressive interrogation . . .”).

7. See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 51–52 (2008) (“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 . . .”). The existing scholarship on consent to the use of force focuses primarily on the quality of consent—that is, whether the entity within the host state that purportedly consented to the foreign state’s presence was in a position to provide that consent on the host state’s behalf. See, e.g., David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209 (1996).

not evaluated for its consistency with the host state's domestic laws. Because it is likely in the use of force context that the consent will conflict with some of the host state's domestic laws, reliance on unreconciled consent is problematic.

This Article proposes a way to minimize the use of unreconciled consent. The proposed solution flows from an understanding—familiar in many areas of law—that entities generally may consent only to actions that they themselves could take. This solution relies heavily on the host state's domestic law to determine whether a particular instance of consent is valid internationally. This Article argues that purported consent by a host state to a different type of force than that which it lawfully may use cannot serve as a basis for the acting state to use force. The acting state should bear a “duty to inquire” to determine whether the host state's consent exceeds the scope of the host state's legal authority.

Thinking more clearly about consent to the use of force offers several advantages. First, it establishes the rules of the road for the acting and host states in a high-stakes area of international law. Express rules governing consent will compel acting states to defend their uses of force with increased legal precision and give the international community a common platform from which to evaluate these justifications for using force. Second, a greater understanding of consent's power and limits would better protect the rights of individuals in the host state and make it more costly for states to ignore their own laws. Third, the approach gives the international community more leverage to press host states to comply with their domestic laws. In sum, this approach should reduce the misuse of consent to the use of force.

Having established a proper understanding of consent to the use of force, the Article evaluates what this approach teaches us about supremacy—which, after all, allows states to use unreconciled consent. If this Article's approach to consent is appealing, we should rethink more systematically international law's current approach to supremacy. To that end, the Article explores the values that supremacy intended to advance and explains why those values are less compelling today. It then identifies several structural features that, by virtue of supremacy, enable states to use unreconciled consent in other areas of international law in ways that are likely to conflict with the host state's domestic law. These features include a lack of parliamentary, judicial, or public oversight of the international arrangement and a failure by the negotiating states expressly to balance international and domestic legal equities as they craft their agreements.

The Article argues that its proposed solution to unreconciled consent in the use of force context—a duty to inquire—could anticipate and prevent substantive tensions between international and domestic law in certain other subject areas, such as law enforcement and intelligence cooperation. Even if good reasons exist for preserving the core principles that underlie supremacy, the Article seeks to initiate a broader conversation about

whether states should pay greater heed to domestic laws when establishing international obligations. Such an approach would allow states to hold each other accountable for compliance with their own domestic laws, particularly when the citizens of those states find it difficult to do so.

Part I of this Article introduces the roles of supremacy and consent generally in international law. Part II employs a hypothetical to introduce several varieties of consent and surveys recent examples of consensual uses of force to explore whether states are using unreconciled consent today. Given the troubling uses of consent that are possible under the current regime, Part III argues that the international community should cabin the permissible scope of consent to the use of force by reference to the host state's domestic laws. This Part explains why modifying supremacy in the context of consent to the use of force advances other goals of international law. Part IV explores the broader tensions between Part III's approach and the traditional supremacy rule. After identifying the decreased relevance today of some of the values that underlie supremacy, it isolates several structural and procedural factors that make it easier for states to use unreconciled consent. Drawing from Part III, it proposes a requirement that states "reconcile" consent in situations where these structural factors are present. It concludes by highlighting the long-term benefits for international law of modifying the supremacy principle in this way.

I. SUPREMACY AND CONSENT IN INTERNATIONAL LAW

In international law, the principles of supremacy and consent play important and sometimes confounding roles. This Part first describes the supremacy principle and its origins. It then sets out the several ways that consent manifests itself in international law and describes the relationship between supremacy and consent.

A. *Supremacy in International Law*

The supremacy principle reflects the idea that states must comply with their international legal obligations, notwithstanding potentially contradictory provisions in their domestic laws.⁸ The version of the supremacy rule encapsulated in the 1969 Vienna Convention on the Law of Treaties ("VCLT") states, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."⁹ The rule emerged only after decades of debate, in which participants held three basic positions regarding the respective weight to give to international and domestic laws.

8. ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 286 (2011) (noting that the supremacy principle requires international law to prevail over domestic law, whatever the contents of international law and whatever the nature of the decision-making process through which states have entered into those international commitments).

9. VCLT, *supra* note 2, art. 27.

The “constitutionalist” position gave priority to a state’s domestic laws, treating acts that were not legally valid under domestic law as without legal effect in international law.¹⁰ Strict constitutionalists would argue that a state must inquire into the constitutional competence of the treaty-making authorities of its partner states; that an unconstitutional treaty does not express the true will of the state and thus is not binding domestically or internationally; and that modern democracy precludes a state from being bound by an agreement made by agents acting *ultra vires*.¹¹ One constitutionalist took the dramatic position that international law will encourage “dictatorship, tyranny and lawlessness” unless it admits that every violation of domestic law procedure renders an agreement void.¹² There is a more pragmatic angle to the constitutionalist position as well: a state that enters into an unconstitutional agreement is more likely to have trouble executing its obligations under that agreement. When a state’s treaty partner wants to ensure the treaty works, it should pay attention to its partner’s domestic rules.¹³

At the other end of the spectrum, the “internationalist” view is concerned exclusively with the manifestation of a state’s will on the international plane, regardless of how a state internally organizes the procedures and organs by which it concludes treaties.¹⁴ A third position, the “modified inter-

10. See MALGOSIA FITZMAURICE & OLUFEMI ELIAS, *CONTEMPORARY ISSUES IN THE LAW OF TREATIES* 375–76 (2005) (noting that the first and second Special Rapporteurs for the codification of the law of treaties, J.L. Brierly and Sir Hersch Lauterpacht, held this view); 1966 Y.B. Int’l L. Comm’n, vol. II, art. 43, Commentary ¶ 2, U.N. Doc. A/CN.4/SER.A/1966/Add.1. For an early commentator’s defense of constitutionalism, see CHARLES HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED TO THE UNITED STATES* 9–10 (1922) (“An unconstitutional treaty must be regarded as void. The nature and extent of the limitations which the document setting forth the fundamental law of the State has imposed, become, therefore, matters of concern to all foreign powers with which it may have occasion to contract.”).

11. LUZIUS WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* 150 (1971). See also Michael Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84, 99 (1983) (noting that for constitutionalist theorists “a treaty concluded by a state’s representatives is invalid if it exceeds their competence under the constitutional law of the state; the rationale of the rule is that no real consent has been given by the state concerned”).

12. WILDHABER, *supra* note 11, at 152–53. Wildhaber himself argues, “Provisions of internal law relating to the content of international agreements (to so-called intrinsic constitutionality) have no relevance under international law.” Luzius Wildhaber, *Provisions of Internal Law Regarding Competence to Conclude a Treaty*, 8 VA. J. INT’L L. 94, 148 (1967–68).

13. FITZMAURICE & ELIAS, *supra* note 10, at 375. While this shifts more of the burden of error to the “innocent” treaty partner, in the context of consent to the use of force, the “innocent” party often will be a powerful state with significant capacity to investigate the host state’s laws.

14. 1966 Y.B. Int’l L. Comm’n, *supra* note 10, at ¶ 5, A/CN.4/SER.A/1966/Add.1. The third and fourth Special Rapporteurs, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, took this view. For a description and critique of the internationalist approach, see Curtis A. Bradley, *‘Breard’, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 561 (1999) (arguing that many scholars possess an “internationalist conception” of the relationship between international law and U.S. domestic law that presumes that international law automatically is incorporated into domestic law and that international law should supersede domestic law when the two conflict); Giorgio Gaja, *Dualism – A Review*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW*, *supra* note 6, at 61 (“One of the reasons of the relative success of the monist conception among international lawyers is an ideological factor: the conviction that only monism ensures that international law prevails over municipal laws Advocates of supremacy of international law are attracted to a monist approach,

nationalist” approach, amends this stringent rule when the other state actually is aware of the other party’s failure to comply with its own domestic procedural limitations, or when the constitutional limitations at issue are “notorious.”¹⁵

In the VCLT, and in international law more generally, the modified internationalist position carried the day. The VCLT presumes the validity of a treaty but tempers the rule’s stringency when an organ’s lack of constitutional authority to conclude the treaty “is so manifest that the other State must be deemed to be aware of it.”¹⁶ The clear implication from VCLT Articles 27 and 46 is that international law is deliberately blind to all *substantive* constitutional or statutory provisions of domestic law—that is, to provisions that do not relate to the procedural competence of an organ to conclude a treaty.¹⁷ If that requires a state to amend or reinterpret its own constitution or laws to bring itself into compliance with international law, so be it.¹⁸

B. Consent in International Law

Consent, which serves as another fundamental principle of international law, performs at least three different functions. Using consent, states create and amend international law and excuse other states’ wrongdoings. Most significantly for this Article, consent enables the supremacy principle to function.

rather than to a municipal legal system that requires incorporation of norms of international law in a statute or an instrument of secondary legislation before these norms can be applied by municipal courts.”).

15. Y.B. Int’l L. Comm’n, *supra* note 10, at ¶ 4, A/CN.4/SER.A/1966/Add.1.

16. *Id.* at ¶ 5.

17. Another way to view VCLT Articles 27 and 46 is as conflicts of law rules that instruct states how to navigate between competing rules of international and domestic law. The exception in Article 46 identifies a case in which domestic law will trump international law because of the state’s manifestly greater interests. See Karen Knop, Ralf Michaels & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 AM. SOC’Y INT’L L. PROC. 269, 271 (2009).

18. The preceding discussion is particularly relevant to states that take a dualist approach to international law. As Professor Curtis Bradley puts it, “[E]ach nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.” Bradley, *supra* note 14, at 530. In a dualist system, international law applies on the municipal plane only where it is incorporated into that system by a municipal act. Monist states incorporate international law into their domestic legal order automatically, without requiring additional domestic action. Tensions between competing provisions of international and domestic law therefore are far more likely to occur in dualist systems than in monist ones. Most states’ systems are dualist, rendering supremacy a live issue for many states. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 66 (1995). Using unreconciled consent nevertheless poses a problem in strict monist systems as well. Where an instance of consent is deemed to constitute an international arrangement, that consent automatically would override inconsistent domestic law, even where the domestic law is more rights-protective.

1. *Creating or amending international law*

Many scholars and international tribunals view consent as the foundation of international law itself.¹⁹ States consent to enter into treaties with each other, and by virtue of that consent, are bound to those treaty commitments.²⁰ Even when the U.N. Security Council authorizes a group of states to use military force in another state, the latter state technically has given prior consent to the forcible intervention by acceding to the U.N. Charter.²¹

States also may consent to amend existing treaty obligations or to terminate those obligations entirely. The process usually is straightforward when two states consent to amend a bilateral treaty. It is legally more difficult for two states to conclude a subsequent bilateral agreement with the goal of amending their multilateral obligations as between themselves.²² The VCLT provides that two states may modify their multilateral obligations between themselves only where the modification does not affect the rights of other parties to the treaty, and where the modification would not defeat the

19. See, e.g., *France v. Turkey*, 1927 P.C.I.J., ser. A, No. 10, at 18 (The Lotus Case) (“The rules of law binding upon States . . . emanate from their own free will”); THOMAS BUERGENTHAL & HAROLD MAIER, *PUBLIC INTERNATIONAL LAW* 15 (1985) (“Positivism gradually emerged as the dominant theory, leading to the acceptance of the view that international law as law depended upon the sovereign consent of the states comprising the international community”); 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.”).

20. VCLT, *supra* note 2, art. 26. Some have argued that state consent plays a diminishing role in the formation of international law. See Duncan Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 *BERKELEY J. INT’L L.* 137, 172 (2005) (describing debate about whether the treaty-making power remains exclusive to states). In general, however, state consent retains pride of place in international law.

21. Article 24 of the U.N. Charter provides that Member States “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” U.N. Charter art. 24, para.1. More generally, consent has played an important role in establishing the contemporary international system that regulates states’ resort to force. All states consented to the U.N. Charter and therefore agreed to comply with its provisions governing the use of force. Article 2(4) requires states to refrain from the “threat or use of force against the territorial integrity or political independence of any state.” U.N. Charter art. 2, para. 4. Article 51 provides an exception to that rule “if an armed attack occurs against a Member of the United Nations.” *Id.* art. 51. Finally, under Chapter VII of the Charter, the Security Council may authorize states to take forcible measures against other states or entities. *Id.* arts. 39–51. The Charter is silent on the role of consent to the use of force, however.

22. Giving consent in this context may violate the host state’s international legal obligations and thus trigger liability under the international rules of state responsibility. For reasons of space, this Article does not discuss state responsibility issues in detail. See generally *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int’l Law Comm’n, 53rd Sess., April 23–June 1, July 2–Aug. 10, 2001, arts. 16–19, 33, 42, U.N. Doc. A/56/10 and Corr. 1; U.N. GAOR, 56th Sess., Supp. No. 10 (2001), as reprinted in 2 *Y.B. Int’l Law Comm’n*, pt. 2, 2001, at 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter DASR], available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

treaty's object and purpose.²³ It will not always be clear when a bilateral arrangement violates that provision.²⁴

2. *Excusing wrongdoing under international law*

As a related matter, a state may invoke consent after the fact to justify violating an international agreement.²⁵ Assume, as has been reported, that Yemen has consented to the U.S. use of force in Yemen against Al Qaeda.²⁶ The United States could invoke Yemen's consent as a defense against subsequent Yemeni allegations that the United States violated its international legal obligation—contained in the U.N. Charter—not to use force in another state.²⁷

The Draft Articles on State Responsibility, which generally reflect customary international law, recognize this role for consent. The Draft Articles assert, "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."²⁸ This permits the state receiving consent to act in a manner inconsistent with its existing legal obligation to the consenting state without committing a legal wrong.

3. *Enabling supremacy*

In addition to serving as the basis for constructing and amending international obligations and for defending against claims of wrongdoing under international law, consent has a more complicated function. By virtue of consent's power, a state must comply with its treaty obligations even where the provisions of that treaty contradict its domestic laws.²⁹ Rather than treating that state's consent to the treaty as an *ultra vires* act without legal consequence, international law allows the state's treaty partner to insist on performance.

Relatedly, international law does not require one state to look behind its partner's consent to an international agreement. Thus, the first state has no

23. VCLT, *supra* note 2, art. 41.

24. See, e.g., Gregor Noll, *Diplomatic Assurances and the Silence of Human Rights Law*, 7 MELB. J. INT'L L. 104, 114–15 (2006) (explaining how the relationship between a bilateral agreement such as an assurance not to torture and a multilateral treaty such as the Convention Against Torture is not clear).

25. Deryck Beyleveld and Roger Brownsword describe this function of consent as "a defence to wrongdoing" and the function of consent described in Section A as "the reason for entitlement." DER-YCK BEYLEVELD & ROGER BROWNSWORD, *CONSENT AND THE LAW* 336–37 (2007).

26. Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes*, WALL ST. J., June 14, 2011, at A8.

27. The U.N. Charter requires states to refrain from the "threat or use of force against the territorial integrity or political independence of any state." U.N. Charter art. 2, para. 4.

28. DASR, *supra* note 22, art. 20. The Commentary to the DASR notes, "The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation." *Id.*

29. VCLT, *supra* note 2, art. 27.

obligation to assess the consistency of that consent with the partner's domestic laws. By making domestic law irrelevant when determining the validity of an international agreement, supremacy allows states to craft agreements with the goal or effect of overriding domestic laws.³⁰ Supremacy thus offers a mechanism by which states may attempt to use international law to "brush[] aside the bounds" of domestic law.³¹

An overriding goal in developing international human rights law over the last half-century has been to respond to perceived inadequacies in the way states protect individual rights under their own laws.³² As a result, it has been salutary to rely on unreconciled consent to allow new international legal protections to trump inconsistent domestic laws.³³ Indeed, one reason that states around the world have improved their human rights laws (if not their practices) in the past forty years is that international human rights treaties deliberately set standards higher than those in the domestic laws of many states. This practice forced states to amend their domestic laws to comply with their international commitments.³⁴

II. CONSENT TO THE USE OF FORCE: STATUS AND PROBLEMS

Part I illustrated how unreconciled consent often advances the goals of international law. In some circumstances, however, including in situations involving consent to the use of force, it will prove problematic for states to use unreconciled consent. As Kim Lane Scheppelle has written:

The two realms of international law and constitutional law may therefore not continue to be mutually reinforcing and compatible In the anti-terrorism campaign, the new international public law seems primarily to provide the conditions for *undermining* do-

30. Professor William Van Alstyne has explored a loose parallel to this situation in U.S. law: whether a U.S. state may accept federal funds subject to federal conditions, where those conditions would put at risk rights protected by the state's constitution. He argues that states may not accept federal funds in these circumstances, though it is not clear whether his argument is descriptive or normative. William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J. L. & PUB. POL'Y 303, 307 (1993).

31. Cf. Paul Stephan, *The Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT'L L. 1073, 1095 (2011) (discussing how jus cogens allows states to brush aside the bounds of inconvenient international law obligations).

32. See Samantha Power & Graham Allison, REALIZING HUMAN RIGHTS, at xvii (Samantha Power & Graham Allison eds., 2000) (describing how World War II prompted a recognition that a "higher law [that is, international human rights law] was needed to check and, in extreme cases, override the will of the ruler even when his actions directly affected only his own citizens").

33. See LOUIS HENKIN, THE AGE OF RIGHTS 17 (1990) ("[N]ational protections for accepted human rights are often deficient; international human rights were designed to induce states to remedy those deficiencies.").

34. See, e.g., International Covenant on Civil and Political Rights art. 2, para. 2, Dec. 19, 1966, 999 U.N.T.S. 171 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.").

mestic constitutional law, particularly its concern for balanced and checked constitutional powers, for human rights and for due process.³⁵

Although Professor Scheppele is focused on counter-terrorism laws, her arguments resonate in the use of force context as well. In both cases, states employ consent in a way that alters the relationship between the host state and the personal rights of individuals within that state's territory, to the detriment of the latter. This is a far more controversial use of consent than a use that simply regulates a state-to-state relationship.

This Part introduces a hypothetical to illustrate the several guises in which consent to the use of force may appear, without reaching particular legal conclusions. It summarizes the literature on consent to force, which sheds little light on how to assess consent's various manifestations. The actual or perceived legal ambiguity surrounding consent is one of several factors that allow states to use consent in a manner that disregards the host state's domestic laws. This Part defines in greater detail what it means for states to employ unreconciled consent to the use of force, describes systemic incentives for states to do so, and introduces real-world examples to show that we already may be witnessing this phenomenon.

Before turning to the hypothetical, it is important to clarify two assumptions. First, this Article assumes that the quality of the consent at issue is voluntary, informed, and given in advance by an individual who is lawfully entitled to bind the host state.³⁶ It also assumes that the host and acting states agree on the basic factual scope of what the acting state will do. That is, it assumes that the two states agree on the basic goals of the acting state's use of force (as against a particular individual or group, in a particular geographic area, etc.). This type of information seems likely to emerge in the high-level political discussions that surround consent to the use of force. It is far less certain, though, that the states' leaders have discussed the often complicated technical and legal details of those military operations. For this

35. Scheppele, *supra* note 6, at 5. See also Human Rights Watch, 140 Countries Pass Counterterrorism Laws since 9/11 (June 29, 2012), <http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterrorism-laws-911> (noting that many states have enacted counter-terrorism laws that expand detention and prosecution authority and asserting that states enacted these measures in response to Security Council post-9/11 counter-terrorism resolutions).

36. The host state's domestic law may dictate which entity within the state may consent to uses of force. Thus, robust adherence to the host state's domestic law, see *infra* Part III, would require the acting state to be concerned about whether the entity providing consent lawfully may do so as a domestic matter. See Wippman, *supra* note 7, at 209. This would be relevant, for instance, where a rebel group that claims newly legitimate authority to lead a country seeks to provide consent to the use of force—as the Libyan rebels recently did. Kareem Fahim & David Kirkpatrick, *Libyan Rebels Said to Debate Seeking U.N. Airstrikes*, N.Y. TIMES, Mar. 1, 2011, at A11, available at http://www.nytimes.com/2011/03/02/world/africa/02libya.html?pagewanted=all&_r=0. It also would be relevant where one senior official in the consenting state—the head of the intelligence services, for instance—authorizes another state to use force but another senior official such as the Prime Minister appears to oppose that authorization. Nevertheless, for purposes of this Article, I assume that the host state actor purporting to provide consent appears authorized to do so under the provisions allocating institutional authority in his or her domestic law.

reason, the Article does not assume that the states necessarily have agreed on the rules governing the use of force.

A. Varieties of Consent

The following hypothetical illustrates several ways in which a state might consent to the use of force, as well as the distinct concerns that each type of consent raises. Assume the United States finds itself in an armed conflict in Afghanistan, fighting Al Qaeda. Al Qaeda members operate within Afghanistan but also use neighboring Pakistan as a safe haven to assemble supplies, train soldiers, and raise funds. Although the Pakistani government does not consider itself to be in an armed conflict with Al Qaeda, it agrees to let the United States use military force against the group in Pakistan. In exchange for its consent, Pakistan asks the United States to conduct drone strikes against Group X, which recently tried to take over a Pakistani government building and killed several Pakistani government officials.³⁷ To date, Pakistan has not asserted that it is in an armed conflict with Group X but instead has responded to Group X using law enforcement tools.³⁸ The United States agrees to employ military assets against members of Group X, even though the United States is not in an armed conflict with that group and does not face an imminent threat from it.

Consent plays several roles in this hypothetical. First, the United States could invoke consent as a defense against later Pakistani claims that the United States was present unlawfully in its territory. U.N. Charter Article 2(4) generally is understood to preclude the use of force by one state in another state's territory, even if that use of force is not directed against the territorial state. In addition, customary international law requires every state

37. There is no public evidence that such a scenario actually has arisen in Pakistan. One human rights group has asserted that "the Obama Administration in March 2009 tried to win support for the drone program inside Pakistan by giving President Zardari more control over whom to target. Increasingly, drones have targeted Taliban insurgents attacking Pakistani forces, not international troops in Afghanistan" AMNESTY INTERNATIONAL, 'AS IF HELL FELL ON ME': THE HUMAN RIGHTS CRISIS IN NORTHWEST PAKISTAN 88 (2010). See also Jay Solomon, Siobhan Gorman & Matthew Rosenberg, *U.S. Plans New Drone Attacks in Pakistan*, WALL ST. J., Mar. 26, 2009, at A1 ("U.S. and Pakistani intelligence officials are drawing up a fresh list of terrorist targets for Predator drone strikes along the Pakistan-Afghanistan border . . . Pakistani officials are seeking to broaden the scope of the program to target extremists who have carried out attacks against Pakistanis, a move they say could win domestic support."). There are not enough publicly available facts to determine which groups the United States is targeting in Pakistan and under what legal theories.

38. States often resist the conclusion that they are in an armed conflict within their own territory. The Pakistani government has refused to give the International Committee of the Red Cross access to hundreds of detainees in Khyber and the FATA, arguing that the individuals have been detained in "an ongoing 'operation' against common criminals or anti-social elements." Zulfikar Ali, *Govt, ICRC at Odds over Treatment of Terror Detainees*, DAWN (Pak.), Mar. 14, 2011, <http://dawn.com/2011/03/14/govt-icrc-at-odds-over-treatment-of-terror-detainees>; see also Richard Norton-Taylor, *ICRC Urges Pakistan to Grant Access to Detention Centres*, GUARDIAN (U.K.), Oct. 21, 2010, <http://www.guardian.co.uk/world/2010/oct/21/pakistan-icrc-urges-access-detainees> ("The Red Cross is urging Pakistan to give it access to detainees as security forces are rounding up thousands of people in what the authorities describe as law enforcement operations.").

to “respect the territorial sovereignty of others,” which generally precludes one state from entering into the territory, airspace, or waters of another state without consent.³⁹ Pakistan’s consent to the U.S. presence in Pakistan thus overcomes a claim Pakistan otherwise would have that the United States had violated Article 2(4) or customary principles of sovereignty. Some scholars might object to giving Pakistan’s consent any weight if Pakistan is attempting to consent to an action that would be illegal under Pakistani law. Part III considers the normative appeal of accepting or rejecting Pakistani consent in this context.⁴⁰

Second, Pakistan’s consent might provide a separate international legal justification for the U.S. use of force against Al Qaeda. In this case, consent would supplement the presumptive U.S. claim that it has a right of national self-defense against Al Qaeda.⁴¹ Using consent as an additional rationale for using force would prove useful to the United States if it concluded that its self-defense argument was weak or had been extinguished, through passage of time or otherwise. But may consent only serve as a basis for U.S. force if Pakistan also has a right under its domestic law to use military force against Al Qaeda? Here our attention starts to shift to what Pakistan’s law allows, to assess how to value Pakistan’s consent.

Third, Pakistan asked the United States to use military force against Group X—a level of force that Pakistan itself apparently could not lawfully use in this situation. If the United States used force against Group X, that would reflect the use of unreconciled consent by both Pakistan and the United States. Or perhaps Pakistan lawfully *could* use military force against Group X but to date has chosen not to do so. In either case, would military attacks by the United States against Group X be lawful under international law based solely on Pakistan’s consent?⁴² Even if the better reading of international law would find lawful only U.S. attacks that track Pakistan’s au-

39. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 213 (June 27). One exception to this rule is when the host state is unwilling or unable to suppress imminent threats posed by entities that already have undertaken armed attacks from within the host state.

40. See *infra* text accompanying notes 137–38.

41. The U.S. self-defense rationale would be reasonable, though controversial. Some argue that the United States lacks a right of self-defense against armed attacks by terrorist organizations such as Al Qaeda. Others assert that the level of attacks by Al Qaeda in or from Pakistan against the United States is so low that Al Qaeda’s activity there constitutes a law enforcement problem, not a series of armed attacks to which the United States may respond with military force. Even those who take a pragmatic approach to a state’s right to resort to force have questioned whether the United States unilaterally could target Al Qaeda in Pakistan under a self-defense theory, given the temporal and spatial displacement of the threat from the September 11 attacks. Sean Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 109, 129 (Michael N. Schmitt ed., 2009).

42. The United States might face domestic legal prohibitions in such a case. For example, this use of force could violate the assassination ban in Exec. Order No. 12,333, 3 C.F.R. 200 (1981 comp.), *reprinted in* 50 U.S.C. § 401 app. at 549 (2006), which is not implicated when the United States uses force in self-defense. Nevertheless, one readily can imagine a similar scenario involving different states, where the acting state has fewer restrictions in its domestic law.

thorities, international law currently does not impose a duty on the United States to ask what Pakistan's laws do and do not permit.

This hypothetical leads to a separate set of questions. Assuming the United States uses force against each group, what rules govern its operations? In each case, should U.S. actions be constrained by Pakistan's domestic and international legal obligations, by U.S. domestic and international legal obligations, or by some combination thereof? As Part III will argue, the greater the weight the United States places on Pakistan's law as the basis for using force, the greater the weight the United States should give to that law to determine *how* it may carry out its use of force.

B. *Consent's Legal Status*

Consent to the use of force raises two related legal questions: what work does this consent do substantively in international law, and what legal form does this consent take? The answers to both questions are ambiguous, for different reasons.

1. *The substantive work of consent*

The limited governmental and scholarly discussion of consent to the use of force in international law has produced disagreement and imprecision. Many scholars simply assert, without discussion, that there are three international legal bases for the use of force: self-defense, authorization by the U.N. Security Council pursuant to a Chapter VII resolution, and consent.⁴³ Scholars also assert that consent may validate an otherwise unlawful use of force in the host state.⁴⁴ These statements seem defensible in traditional cases of consent, where a host state seeks assistance from an acting state to defeat an internal uprising or to counter an intervention by a third state.⁴⁵ Yet in

43. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 305–20 (2001) (noting that international use of force without Security Council mandate may be justified in self-defense; with the genuine consent of the territorial state; or in necessary and proportionate response to an unlawful but small-scale armed action by another state); Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 *VAND. J. TRANSNAT'L L.* 643, 645 (2007) (“The Charter prohibits the use of force against any state, except with that state’s consent, in self-defense, or as authorized by the Security Council under Chapter VII.”) (footnotes omitted); TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER 246 (2010) (“The Australian [Non-Combatant Evacuation Operations] doctrine identifies three possible legal bases [for the operations], namely: (a) the consent of the foreign nation; (b) the exercise of Australia’s inherent right of self-defense to protect its nationals (Australia may agree to the rescue of nationals of other countries in certain circumstances); or (c) in accordance with a resolution of the [UN] Security Council.”).

44. See, e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1645 (1984) (“[I]n the absence of a civil war, recognized governments have a right to receive external military assistance and outside states are free to furnish such aid.”); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 *DUKE J. COMP. & INT’L L.* 209, 209 (1996) (“That consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle.”).

45. When an acting state intervenes at another’s request to combat intervention by a third state, the acting state may be able to invoke the right of collective self-defense. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 236–39 (3d ed. 2001).

certain contemporary contexts, an assertion that consent may validate an otherwise unlawful use of force is at best incomplete and at worst inaccurate.

Scholars disagree about consent's role in contemporary contexts involving force, including force against non-state terrorist groups. Some scholars suggest that consent may stand as an independent basis for a state's use of force in another state's territory.⁴⁶ Others accept that consent may play that role in some cases.⁴⁷ Yet others view consent as a way to address sovereignty concerns, in the presence of alternative legal bases for the use of force.⁴⁸ Some scholars specifically reject the use of consent as an international legal basis for the use of force in particular circumstances.⁴⁹

If consent to the use of force remains a complicated proposition for scholars, it also remains one for states, which have been imprecise or silent about their views.⁵⁰ There are several reasons why states and scholars may not have

46. See Michael Bahar, *Power Through Clarity: How Clarifying the Old State-Based Laws Can Reveal the Strategic Power of Law*, 30 U. PA. J. INT'L L. 1295, 1299 (2009) (suggesting that a state might be able to rely on consent alone to use military force abroad against non-state actors); John Cerone, *Misplaced Reliance on the "Law of War"*, 14 NEW ENG. J. INT'L & COMP. L. 57, 59–61 (2007) (suggesting that the United States could have relied on Afghan consent alone as an international legal basis for using force in Afghanistan after September 11); Marko Milanovic, *More on Drones, Self-Defense, and the Alston Report on Targeted Killings*, EJIL: TALK! (June 5, 2010), <http://www.ejiltalk.org/more-on-drones-self-defense-and-the-alston-report-on-targeted-killings/> (arguing that if Pakistan consented to the U.S. use of drones in Pakistan, "self-defense becomes perfectly irrelevant so long as the US acts within the boundaries of Pakistani consent"); Murphy, *supra* note 41, at 118 ("To the extent that the government of Pakistan has consented to U.S. cross-border military operations from Afghanistan into Pakistan, that consent obviates any question about the legality of those operations under international law.")

47. See Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L.Q. 211, 224 (2004) (supporting the validity of consent given by states to help them defeat insurrections by soldiers attempting to forcibly overthrow democratic governments); Michael N. Schmitt, SUMMARY OF THE INTERNATIONAL LAW GROUP MEETING HELD AT CHATHAM HOUSE: INTERNATIONAL LAW AND THE USE OF DRONES 6 (Oct. 21, 2010), available at <http://www.scribd.com/doc/45528058/Drones-and-International-Law> ("With regard to the use of drones, it is generally agreed that operations may be launched into the territory of another state with that state's consent, albeit with limits. Examples of such circumstances include those in which the territorial state (1) agrees to other state's self-defence action, (2) asks the other state to assist with its non-international armed conflict, as is the case in Afghanistan, (3) requests the other state's assistance in complying with its obligation to police its own territory, or (4) seeks assistance with its own law enforcement operation against terrorists.")

48. Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 164 (2010) (suggesting that a state must have a self-defense rationale in order to conduct a targeted killing and that consent serves a supplementary role of paying consideration to the other country's sovereignty).

49. See, e.g., John L. Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 113, 116–17 (Lori Damrosch & David Scheffer eds., 1991) (asserting that consent cannot validate activities that would have been unlawful by the consenting state if acting alone); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt, ed.) (unpublished manuscript), available at <http://ssrn.com/abstract=1501144> (arguing that a "consenting state may not consent to the use of military force on its territory in the absence of armed conflict hostilities"); see also Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 251 (1985).

50. See, e.g., Harold Koh, Legal Adviser, U.S. Dep't of State, Address at Annual Meeting of American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s//releases/remarks/139119.htm> ("As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11,

wrestled extensively with questions of consent to the use of force. First, in the pre-League of Nations era, the use of force by one state in another's territory largely was a bilateral issue.⁵¹ Where the host state consented to that use of force, there was no controversy to consider. Today, the U.N. Charter renders the use of force of concern to all states. Second, there are now more situations in which states ask other states for (and receive) consent to use force in their territories. There is a growing recognition that non-state groups can commit "armed attacks" that trigger a victim state's right to self-defense, even when that non-state group acts without assistance from a state.⁵² Thus, when non-state groups use a state's territory as a base from which to attack a victim state and the host state plays no role in those attacks, the victim state now may seek the consent of the host state to use force there. Third, some states may see advantages in leaving the role of consent imprecise: it preserves maximum flexibility for action and makes it harder for other states and commentators to analyze and criticize their activities. For this reason, states often cite multiple rationales for their actions.⁵³

Legal ambiguity of consent leaves unclear how states and scholars would analyze the hypothetical cases of consent in Section A and the rules that should govern each discrete operation. Some scholars likely would accept U.S. reliance on unreconciled consent as a defense against Pakistan's claims of an Article 2(4) or sovereignty violation.⁵⁴ Thus, in the hypothetical, because Pakistan consented to the U.S. use of force in Pakistan against all three groups, it would be unable later to complain about the U.S. presence pursuant to that consent, assuming U.S. actions remained within the scope of Pakistan's consent.

The attractiveness of the second type of consent—a justification that would operate as a separate U.S. legal basis for using force—would be more

2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of 'all necessary measures' by the NATO countries . . . to fulfill their mandate in Afghanistan."); John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Address at London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006) (suggesting that a state must have a self-defense rationale apart from consent).

51. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 78–80 (5th ed. 2011) (describing states' freedom in nineteenth century to go to war without violating international law and detailing bilateral nature of limitations on resort to force).

52. See, e.g., S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (recognizing the right to individual or collective self-defense in the wake of attacks by a non-state actor); JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 296 (2010) ("[I]nternational practice seems to have evolved both to allow self-defense against armed attacks by non-state forces, and to loosen the required link between such forces and a state in which armed defence measures are undertaken").

53. See, e.g., Rein Mullerson, *Intervention by Invitation*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 49, at 127, 128 (noting that the United States "has relied upon the justification of an invitation from a lawful government as the basis for intervention (along with self-defense, rescue of citizens, and decisions of a regional organization), for example when intervening in the Dominican Republic in 1965 and in Grenada in 1983"); *id.* (describing Russia's reliance on multiple rationales for its interventions in Hungary, Czechoslovakia, and Afghanistan).

54. See CASSESE, *supra* note 43, at 305–20; Murphy, *supra* note 41, at 129.

controversial. Those who believe that consent may serve as an independent basis for using force would give weight to Pakistan's consent to the U.S. use of force against Al Qaeda, regardless of whether Pakistan could use force against that group. Others would argue that the United States must have an independent basis (such as self-defense) for using force, and might not credit Pakistan's consent substantively unless Pakistan lawfully could use military force against Al Qaeda.⁵⁵

The third type of consent would be even more contentious. Scholars and states that embrace unreconciled consent might be comfortable with the U.S. use of force against Group X in at least some cases, regardless of Pakistan's underlying authorities. The (presumably larger) group of actors that believes one of the states involved needs a clear legal justification to use the type of force at issue will reject the validity of this third type of consent, which seems to expand permissible uses of force beyond the limits of the U.N. Charter and which undermines the legal relationship between the host state and individuals within its jurisdiction.

2. *The form of consent*

So far, this Article has assumed that consent to the use of force operates like an international agreement.⁵⁶ If this form of consent is an international agreement, then its relationship with other international and domestic laws is clear. If it is something else, that relationship is less certain. Is it appropriate to treat consent to the use of force as an international agreement? In general, it is, although this point is not without difficulty.⁵⁷

In some cases, consent to the use of force indisputably takes the form of a formal, written international agreement.⁵⁸ In other cases, it is unclear what form consent takes, because states often do not publicize their consensual

55. See Blum & Heymann, *supra* note 48.

56. I use the term "international agreement" to describe arrangements that states parties intend to be legally binding and to be governed by international law, whether or not they exist in written form. See generally Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW AND PRACTICE 1 (Duncan B. Hollis et al. eds., 2005).

57. See Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L.J. 337, 357–65 (2011) (discussing different types of consensual arrangements on the use of force and arguing that many different forms of consent—including oral and implied agreement and agreements deduced from practice—should be considered international agreements).

58. See, e.g., Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq arts. 4 and 22, U.S.-Iraq, Nov. 17, 2008, 71 Status of Forces Agreement 2008 (authorizing U.S. forces to continue to act in self-defense in Iraq and detain); Protocol Relating to the Establishment of the Peace and Security of the African Union art. 4(j), July 9, 2002 (recognizing the right of the African Union to intervene in a Member State when war crimes, genocide, or crimes against humanity are occurring); Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, U.S.-Pan. art. VI, Sept. 7, 1977, DEP'T. ST. BULL. Oct. 1977, at 496, 16 I.L.M. 1040 (1977) (granting the United States a perpetual right to use force to ensure that the Canal remains open and available to American traffic); WALLACE McCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 81–82 (1941), available at <http://supreme.justia.com/constitution/article-2/24-executive-agreements-by-presi>

arrangements. Yet even written arrangements that lack formal trappings may constitute international agreements. For example, the International Court of Justice has treated informal documents, such as meeting minutes, as binding.⁵⁹ Some states and courts recognize the possibility that international agreements may be formed orally, though this practice may be waning.⁶⁰ Whether an agreement creates binding legal obligations generally turns on the states' intent.⁶¹ Although there is little empirical evidence to indicate whether states perceive consent to the use of force to be legally binding, politically binding, or non-binding, the prominent role of consent in international law suggests that states likely view such consent as legally binding.⁶²

Even a unilateral act by a state may be deemed binding under international law.⁶³ For example, Israel considers itself legally bound by its declaration to abide by the principles of the Fourth Geneva Convention, even where that treaty does not formally govern its actions.⁶⁴ Thus, when a discussion between states leads to an arrangement pursuant to which the host state temporarily cedes the right to territorial integrity—and possibly also authorizes the acting state to take a particular forcible action—it is reasonable to treat consent to the use of force as having legal consequences on the international plane (either as an international agreement or a unilateral legal com-

dent.html (describing agreements between the United States and Mexico made between 1882 and 1896, according each state the right to pursue “marauding Indians” across the other’s border).

59. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar. v. Bahr.), Judgment, 1994 I.C.J. 112, ¶¶ 21–30 (July 1) (stating that the Minutes “do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.”).

60. See generally Hollis, *supra* note 56, at 12 (describing mixed practice of states); Myres McDougal & Asher Lans, *The Identical Legal Consequences of Treaties and Executive Agreements*, 54 YALE L.J. 307, 322–23 (1945) (“Even unwritten agreements constitute, in the opinion of the overwhelming majority of students of international law, enforceable obligations if it has been the intention of negotiators to make a binding commitment The 1936 agreement between Great Britain, France, and the United States—whereby the contracting States agreed to make gold available from their monetary stabilization funds for purchase by one another—was made by telephone. In the *Eastern Greenland* case, the Permanent Court of International Justice held that an oral declaration by the Norwegian Minister of Foreign Affairs, waiving an objection to the extension of Danish sovereignty over Eastern Greenland was binding upon the Norwegian Government.”) (citations omitted). Another example is Lebanese President Chamoun’s oral appeal to the U.S. Embassy in Beirut for armed support. U.S. Marines landed in Lebanon the next day. Telegram from the Embassy in Lebanon to the Dep’t. of State (July 14, 1958), Dep’t of State Central Files, 783A.00/7-1458.

61. LASSA OPPENHEIM, *OPPENHEIM’S INTERNATIONAL LAW* 1202 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

62. Compare ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2000) (noting that even non-binding arrangements can give rise to “legal consequences”), with Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 305 (1967–68) (describing situations in which the line between “binding” and “non-binding” international arrangements is unclear).

63. See Hollis, *supra* note 56, at 13–14 (describing the views of a number of states that unilateral acts have legal force under international law).

64. *Id.* at 14.

mitment). This Article thus assumes that most examples of consent to the use of force implicate supremacy concerns.⁶⁵

Even when a state's consent to the use of force constitutes an international agreement, its status as such does not establish conclusively what role the agreement plays in the consenting state's domestic law. Each state establishes its own processes by which it incorporates international obligations into its domestic system.⁶⁶ Some states require their legislatures to enact implementing legislation before an international obligation gains domestic force.⁶⁷ In other cases, international agreements take direct effect in a state's domestic law—even in agreements concluded by the executive alone.⁶⁸ There clearly will be situations in which consent to the use of force as an international agreement will not (or not yet) have altered a state's domestic law, though the consent binds a state on the international plane. This Article is concerned about cases in which a state's consent to the use of force alters that state's inconsistent domestic laws. But it also is concerned about the conceptual tension that arises when a state undertakes a commitment on the international plane that is in tension with its domestic laws, even if that commitment technically has not overridden those laws. The next Section further reveals the persistent power of consent and its relationship to states' domestic laws.

C. *Unreconciled Consent*

1. *Defining the term*

Consent to the use of force is not inherently unlawful and can be useful in regulating state-to-state relations. If international law fails to take consent seriously, it undercuts sovereign decision-making,⁶⁹ reduces valuable cooperation between states, and possibly renders it harder to end conflicts. The process of acquiring consent prompts a dialogue between the host and acting states, reducing the likelihood of inadvertent violence between them. It

65. An early version of the DASR Commentary treated consent as a bilateral agreement. Rep. of the Int'l Law Comm'n, 31st Sess., May 14–Aug. 3, 1979, art. 29, U.N. Doc. A/34/10; U.N. GAOR, 34th Sess., Supp. No. 10 (1979) (“If a State . . . consents to another State's committing an act that, without such consent, would constitute a breach of an international obligation towards the first State, that consent really amounts to an agreement between the two subjects . . .”).

66. Hollis, *supra* note 56, at 3 (“Ultimately, every state must decide for itself . . . how to incorporate such treaties into its national law.”).

67. *Id.* at 43 (describing the United Kingdom's practice and noting that, without legislation, international agreements have no effect in U.K. law).

68. *Id.* at 41–42 (citing U.S. and Dutch practice). See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 226–28 (2d ed. 1996) (noting that, in the United States, at least some sole executive agreements can be self-executing and have status as the law of the land); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575 (2007) (criticizing *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), in which the U.S. Supreme Court struck down a California statute because it contradicted a policy undergirding a sole executive agreement).

69. Abass, *supra* note 47, at 225 (noting that “consent lies at the very foundation of international law and as such, care must be taken when precluding its operation in respect of certain international obligations”).

avoids claims by the host state of a right to reciprocate with force.⁷⁰ In some circumstances, obtaining consent can enhance the perception of weaker states that they retain input into critical international decisions, despite significant power differentials.⁷¹ In fact, consent may strengthen the underlying norm in Article 2(4). That is, when states emphasize the ability of consent to overcome a violation of Article 2(4), they implicitly highlight that the underlying forcible actions in question would violate Article 2(4) absent consent.

Consent to the use of force can be normatively problematic, however, particularly when it is unreconciled. Specifically, consent is “unreconciled” when the acting state does not know (and has not investigated) whether the host state’s consent is consistent with its domestic laws and international obligations. This is a problem where it is likely that the consent will conflict with provisions of the host state’s laws or when the acting state is using consent to supplement controversial or weak alternative rationales for using force. In contrast, “reconciled” consent occurs (1) after an acting state confirms that a host state’s consent is consistent with its domestic laws; or (2) where, assuming the consent is inconsistent with host state laws, the host state undertakes to bring its domestic law into line with its international commitments.

The reasons to be cautious about letting consent to the use of force (even in the form of a treaty) supersede existing *international* obligations are apparent. Most states are party to most human rights treaties, which function to protect individuals in those states against particular state actions.⁷² States should approach consent to the use of force with a clear understanding that uses of force are likely to implicate key provisions in human rights treaties and, concomitantly, the actual protection of individuals on the ground in the host state.

There are at least four reasons to protect a state’s *domestic* laws against unreconciled consent as well. First, international human rights law has had a significant effect on states’ domestic laws.⁷³ Most states, in incorporating their human rights treaty obligations into their domestic laws, have secured

70. See BEYLEVELD & BROWNSWORD, *supra* note 25, at 60.

71. See PHILIP JESSUP, A MODERN LAW OF NATIONS 30 (1948) (describing the “inescapable fact of power differentials”); Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 27 (Rolf Sartorius ed., 1983) (“To be able to choose is a good that is independent of the wisdom of what is chosen.”). Host state consent features prominently in several recent Security Council Resolutions that authorize the use of force in weak states, including Afghanistan, Iraq, and Somalia. See S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (Afghanistan); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (Iraq); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) (Somalia).

72. See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 (requiring each state party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); International Covenant on Civil and Political Rights arts. 8, 9, 15, Dec. 10, 1966, 999 U.N.T.S. 171.

73. See Buergenthal, *supra* note 5, at 216–20 (describing incorporation by various states of human rights treaty provisions into their domestic laws).

(at least on paper) a wide range of individual protections and have internalized those protections through court cases, regulations, and practice.⁷⁴ Some domestic law contains human rights protections more extensive—and more specific—than those accorded by international law.⁷⁵ Even where a state's domestic rights laws simply mirror its treaty obligations, domestic laws generally are more readily enforced and may be better known to the public and the courts. Second, a state's domestic laws tend to emerge from a relatively transparent law-making process.⁷⁶ Therefore, there is good reason to be skeptical of arrangements that undermine a state's domestic laws through an international process that is less transparent and less inclusive.⁷⁷ Third, some domestic laws lack an equivalent in international law, but nevertheless articulate and protect important aspects of a state's sovereignty. Fourth, states undercut core "rule of law" principles when they use international law against domestic law in a way that the international community did not intend. If one views a core aspect of democratic governance as the accountability of a state's decision-makers—and if one believes that international law has an interest in promoting democracy—then it is problematic to allow those decision-makers to turn to international law as a way to avoid accountability for controversial decisions.⁷⁸

74. See Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT'L L. 267, 276–77 (2008) ("[T]he last sixty years has witnessed the development of an ever-growing integration of international and domestic legal systems, with domestic law increasingly being employed to implement and enforce the provisions of international legal regimes, ranging from such technical areas as international trade and intellectual property, to that of human rights. Even international legal regimes that relate to areas of so-called 'high politics,' such as the rules of jus in bello, arms control, and nuclear non-proliferation, have increasingly found expression in domestic legal systems."); RICHARD OPPONG, *Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, 30 FORDHAM INT'L L.J. 296, 324 (2007) ("Human rights provisions inspired by various international human rights instruments . . . are now routinely incorporated into national constitutions in Africa."); Sigrun I. Skogly, *Global Responsibility for Human Rights*, 29 OXFORD J. LEGAL STUD. 827, 831 (2009) ("[S]tates have generally accepted their own human rights obligations at the domestic level . . .").

75. See, e.g., Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147, 164 (Michael Ignatieff ed., 2005) (noting that the American constitution and jurisprudence contain more expansive conceptions of certain liberties, including freedom of speech and criminal rights of defendants, than treaties do); Jack Goldsmith & Curtis Bradley, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000) (noting that many human rights treaty terms are broad and open-ended).

76. There obviously are important exceptions to this, including in states governed by dictators and states with legislatures that act as puppets of the executive.

77. See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 908 n.4 (2004) ("In the constitutional context, arguments from democracy . . . serve to justify claims that a rule of international law does not pre-empt the application of a conflicting norm of domestic law in specific contexts."); John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1178 (2007) ("Holding constant other considerations, if international law has a comparative democracy deficit, this deficit substantially reduces its attractiveness relative to domestic law . . .").

78. See Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. J. INT'L L. 387, 401 (2003).

Among the domestic laws that a foreign state's use of force may violate are laws that restrict foreign troops from entering the state's territory⁷⁹; prohibit the use of certain weapons⁸⁰; protect a person's right to life (or prohibit arbitrary deprivation of life); limit the ability of law enforcement officials to use lethal force during arrest⁸¹; preclude security detentions⁸²; require states to bring detainees promptly before a court; and require individuals to receive some form of process before they may be removed from the state.⁸³ We should be cautious about letting states use unreconciled consent against these types of domestic laws.

2. Systemic incentives to use unreconciled consent

Although it is difficult to ascertain the extent to which host states currently authorize acting states to undertake acts that would violate a host state's domestic law, Section D suggests that examples exist. Moreover, the acting and host states both face systemic incentives to use unreconciled consent in this fashion. These incentives, described below, will grow if transnational terrorist groups continue to proliferate. Even if this misuse of consent is limited today, it is important to decide how to approach the most problematic uses of consent, in order to develop a coherent overall analytical structure in which to evaluate any scenario involving consent to the use of force.

79. For example, Mexico's constitution grants the Senate the power to oversee Presidential decisions to allow foreign troops on Mexican soil. Constitución Política de los Estados Unidos Mexicanos [C.P.], tit. III, ch. III, sec. III, art. 76(III), Diario Oficial de la Federación [DO], 31 de Enero de 1917 (Mex.). Mexican statutes prohibit foreign officials from carrying weapons or directing criminal investigations on Mexican territory. See John Ackerman, *Why Is Barack Obama Sending Drones to Mexico?*, THE DAILY BEAST, Mar. 18, 2011, <http://www.thedailybeast.com/articles/2011/03/18/why-is-barack-obama-sending-drones-to-mexico.html>. The constitution of the Philippines provides that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate . . . and recognized as a treaty by the other contracting State." CONST. (1987), art. XVIII, sec. 25 (Phil.).

80. See, e.g., Loi réglant des activités économiques et individuelles avec des armes [Weapons Law] of June 9, 2006, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 9, 2006, 3d ed., 29840 (banning cluster munitions and landmines); Anti-Personnel Mines Convention Implementation Act, S.C. 1997, c. 33 (Can.); Emergency Law on the Amendment of Ordonnantie Tidelike Byzondere Strafbepalingen (Stbl. 1948 No. 17) and Law No. 8 of 1949, No. 12/1951 (1951) (Indon.) (Indonesia's Emergency Law on Fire Arms and Explosives).

81. The U.S. Supreme Court has interpreted the Fourth Amendment to restrict the situations in which a law enforcement official may use force against a fleeing suspect. See *Tennessee v. Garner*, 471 U.S. 1 (1985). South African law contains a similar rule. See Judicial Matters Second Amendment Act 122 of 1998 § 7 (S. Afr.).

82. See, e.g., Art. 19, Sec. 12, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005; CONST. art. 27 (Afghanistan); CONST. (1987), art. III, sec. 12(2) (Phil.) (prohibiting secret detention sites and incommunicado detention).

83. See, e.g., United Kingdom Immigration Rules, 2012, §§ 378, 381–84 (requiring that a foreign national receive notice of his right to appeal a deportation order); Thailand's Immigration Act BE 2522 (1979) § 36 (allowing individuals to appeal to the Immigration Commission against a revocation of authorization for a temporary stay in Thailand).

a. Executive dominance

The executive leaders of the acting and host states play a seminal role in seeking and granting consent.⁸⁴ Because the national security activities at issue generally fall within the purview of the executive (rather than courts or parliaments), executives often have a relatively free hand in making these decisions.⁸⁵ When concluding formal treaties, states presume that the actor ostensibly committing his or her state to a treaty is entitled to do so because “international law has devised a number of treaty-making procedures . . . specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements.”⁸⁶ Because the arrangement at issue here—consent to the use of force—often passes through fewer procedural hurdles, even the limited role that parliaments play in approving treaties *post hoc* may be absent.⁸⁷ Actual or potential oversight could force executives to heed the host state’s domestic laws because they would expect their overseers to do so. Today, that oversight is limited at best.

b. Nature of military and intelligence actions

Consent to the use of force generally anticipates military, intelligence, or law enforcement activities that demand a level of secrecy.⁸⁸ Because many of these activities are carried out in a clandestine manner in locations inaccessible to journalists and non-governmental organizations, reporting on those activities tends to involve speculation and surmise. Consent that fails to comply with the host state’s domestic laws thus imposes relatively few costs, because there is little transparency about what the host state consented to and what actions transpired pursuant to that consent.⁸⁹

84. Eur. Consult. Ass., *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. No. 11302 rev. ¶ 154 (2007) [hereinafter Marty Report] (arguing that much of the “consent” to U.S. renditions in Afghanistan and Romania was done by executives without parliamentary involvement); Scheppele, *supra* note 6, at 2 (noting that since September 11 “national executives are empowered relative to local parliaments and courts . . .”).

85. See PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY xi (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994) (stating that national executives, and not parliaments, generally hold primary treaty making powers because of their traditional role in conducting political relations and managing national security).

86. 1966 Y.B. Int’l L. Comm’n, vol. II, art. 43, Draft Articles on the Law of Treaties.

87. See, e.g., Oona Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 150 (2009) (noting that the texts of U.S. sole executive agreements sometimes are made public long after they enter into force).

88. Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 299 (2012) (noting that “[d]esigning oversight mechanisms suited to practices necessarily shrouded in high degrees of secrecy was a challenge; public scrutiny would not provide a natural check”).

89. One obvious solution to this problem is to require that consent be made public before international law will deem it valid. This solution is doomed to fail, however. States will reject a rule that requires them to publicize their confidential bilateral arrangements with other governments about military or law enforcement operations.

c. *Host state incentives*

In many contemporary cases of consent, host states can afford politically to pay limited attention to their own domestic laws. Frequently an acting state seeks to use force against non-state armed groups, which often include individuals who are not nationals of the host state. It is less controversial politically for a leader to permit force against disfavored groups, such as individuals who hold foreign nationalities and purportedly have undertaken unlawful acts.⁹⁰

In addition, the host state has responsibilities under international law—including U.N. Security Council Resolution 1373⁹¹ and, as a matter of custom, U.N. General Assembly Resolution 2625 on the Declaration on Friendly Relations and Co-Operation Among States⁹²—to prevent threats from emanating from its territory. The host state may face significant pressure to address the problems posed by these non-state actors, but be unable to do so.⁹³ Therefore, it has incentives to be sloppy about adhering to its own laws if doing so allows another state to curb those problems. Supremacy currently gives the acting state few incentives to assess the host state's laws, particularly where a diligent assessment might limit the scope of action.⁹⁴ When the interests of the acting and host states align, it is easier for states to use unreconciled consent collusively.

d. *International law supremacy*

The supremacy of international law itself promulgates a cavalier approach to consent. Supremacy promotes the importance of international agreements at the expense of (or in ignorance of) domestic law, even when doing so undercuts the latter. Executives recently have found it advantageous to invoke international legal provisions that broaden their authorities.⁹⁵ It is easy

90. When the use of force results in the deaths of the host state's nationals (i.e., as collateral damage), the host state's population—the principals, using the agency analogy—will focus on the activities to which their “agent” consented. In addition, during civil wars, the actors fighting the host state have greater ability and incentives to identify domestic legal violations by the host state and have greater credibility in raising those concerns in international and other public fora.

91. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling on states to prevent terrorist financing and to cooperate on terrorist criminal proceedings).

92. G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

93. See Scheppele, *supra* note 6, at 11 (“National executives of these terror-implicated weak states become hostages to the transnational terrorism campaign because they are under pressure to get on board with the international program, particularly when they are on the front lines of terrorism.”).

94. See *id.* at 53 (“Many of the pressures to comply with international security law come from outside particular constitutional systems, and those who are doing the pressuring often do not even know the local constitutional norms that might constrain states in complying with what international organizations are asking.”).

95. See *id.* at 1 (“The primary marker of these [post-September 11] changes is the increased abilities of national executives to use the cover of international law to undermine domestic constitutions at home.”); *id.* at 4–5 (“[I]nternational security law has a different domestic constituency than the constituency for human-rights based laws characteristic of the first wave of public law globalization. This time it is national executives (sometimes with and sometimes without legislative approval) who have moved swiftly to put the new international security law into practice.”); Stephen Schnably, *Emerging International*

to see why an executive might want to rely on the legitimacy of international law to bolster his authority. Supremacy's intentional effort to keep domestic law from muddying international law also may allow officials mentally to cabin off legal arrangements that exist in those distinct realms.

e. Legal ambiguity of consent

Finally, acting states that obtain another state's consent to use force often assert that they have an independent international legal justification: self-defense. Sometimes this justification is incontestable. In other cases, the self-defense claim is weak or contested.⁹⁶ In many contemporary cases of consent to the use of force, where terrorist groups project force outward from within host states, the underlying international legal basis for using force against these groups has proven controversial.⁹⁷ While all states agree that one state may use force in self-defense against an armed attack by another state, there is less agreement about whether and when attacks by non-state actors trigger a state's right to self-defense.⁹⁸ Where states are operating at the outer reaches of accepted theories of self-defense—where consensus about legality wanes—states will be tempted to look to the “transformative power” of consent to shore up otherwise controversial self-defense arguments.⁹⁹ This elevates the importance of understanding whether and when consent may justify the resort to force.

The presence of consent also makes it easier for an acting state to avoid being precise about its specific legal authorities to use force, because the host state is unlikely to challenge those authorities. In contrast, where an acting state uses force in another state's territory without consent, the acting state is far more likely to determine carefully in advance what its public legal defense would be, knowing that the host state will protest.¹⁰⁰

International 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

Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal, 62 U. MIAMI L. REV. 417, 430 (2008) (discussing the Bush Administration's invocation in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) of law of war authorities).

96. For example, many states challenged Israel's claim that it had bombed Iraq's Osirak nuclear reactor in self-defense. THOMAS FRANCK, *RECOURSE TO FORCE* 105–06 (2002).

97. See, e.g., Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUM. L. 3, 35 (2010) (“[T]he US government's claim of a distinct armed conflict vis-à-vis al Qaeda alone . . . proved to be exceptionally controversial; perceptions that the US government claimed the existence of armed conflict not just with al Qaeda but with terrorism in general further aggravated such concerns.”).

98. For a discussion of three main schools of thought, see Ashley Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. 483, 492–93 (2012).

99. See John Kleinig, *The Nature of Consent*, in *THE ETHICS OF CONSENT* 3, 5 (Franklin Miller & Alan Wertheimer eds., 2010).

100. Cf. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 103 (1974) (“There is continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be chosen.”).

that the host state legally could not undertake. It is therefore reasonable to expect that states will continue to take advantage of the current ambiguity about consent to the use of force to evade or ignore host state domestic laws that otherwise might limit that force.

D. Problems in Practice

Opportunities for consent to the use of force abound. This Section considers how states currently may use unreconciled consent. It first examines cases of consent to the use of force that violated or ignored the host state's domestic law. It then illustrates how consent allows states to be imprecise about their legal rationales for the consented-to activity.

1. Violations or evasions of host state law

Several types of extra-territorial actions by the United States against suspected members of Al Qaeda appear to represent problematic uses of unreconciled consent. These actions including forcibly rendering these individuals from one state to another,¹⁰¹ targeting them using lethal force,¹⁰² and detaining them in secret facilities.¹⁰³ These consensual actions seem to have violated the domestic laws of the host states, where those laws would have provided certain protections to individuals subjected to forcible action by the United States. In each case, it remains unclear what the scope of the host state's consent was and what weight the affected governments put on consent as a basis for using force under international law.

Several U.S. renditions in the aftermath of the September 11 attacks, which apparently took place with the consent of the states in which the individuals were found, likely violated the host state's domestic laws. For example, although Italian officials reportedly gave the CIA consent to remove radical Muslim cleric Abu Omar from the streets of Milan, this removal violated Italy's criminal laws.¹⁰⁴ An Italian court eventually convicted twenty-three U.S. officers in absentia, as well as two Italian officers.¹⁰⁵ In

101. See *infra* text accompanying notes 104–107.

102. See *infra* text accompanying notes 111–112.

103. See *infra* text accompanying notes 113–115.

104. Francesco Messineo, *The Abu Omar Case in Italy*, 7 J. INT'L CRIM. JUST. 1023 (2009) (citing Article 605 of the Italian Penal Code, making it a crime to deprive someone of his personal freedom); Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach*, WASH. POST, Dec. 16, 2006, at A1. Prime Minister Silvio Berlusconi, who did not support the trial of Italian and U.S. officials who allegedly conducted the rendition, reportedly stated, "You can't tackle terrorism with a law book in your hand." David Altheide, *The Mass Media, Crime and Terrorism*, 4 J. INT'L CRIM. JUST. 982, 986 (2006).

105. Britta Sandberg, *Italian Court Delivers Damning Verdict on CIA Renditions*, DER SPIEGEL, Nov. 5, 2009, <http://www.spiegel.de/international/europe/abu-omar-case-italian-court-delivers-damning-verdict-on-cia-renditions-a-659418.html>. For an argument that these trials violated Italy's obligations under the NATO Status of Forces Agreement and the European Convention on Human Rights, see Eric Jensen & Christopher Jenks, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraterritorial Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 HARV. NAT'L SEC'Y J. 171 (2010).

another case, a 2003 CIA-led operation captured Hambali, a top Al Qaeda operative, in Thailand.¹⁰⁶ Thailand then allegedly allowed the United States to transfer Hambali to an undisclosed location without regular legal proceedings, even though Thai officials had arrested him for an immigration violation. This appeared to violate Thai laws.¹⁰⁷

The United States did not focus on whether these renditions violated host state domestic laws, presumably because it had the host state's consent. When asked in 2004 whether Hambali's detention comported with Thai sovereignty, then-Secretary of Homeland Security Tom Ridge stated that he was not knowledgeable concerning the relevant Thai laws.¹⁰⁸ Likewise, when Secretary of State Condoleezza Rice publicly defended U.S. decisions to forcibly transfer certain individuals from one state to another after the September 11 attacks, she strongly suggested that the United States did so with the consent of the state in which the United States found the person. She was silent about the relevance of the host state's laws, however.¹⁰⁹ She stated:

In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But . . . where, for some reason, the local government cannot detain or prosecute a suspect . . . [it] can make the sovereign choice to cooperate in a rendition The United States has fully respected the sovereignty of other countries that cooperate in these matters.¹¹⁰

Consent to lethal uses of force also reveals limited attention to host state law. The United States reportedly has used lethal force against Al Qaeda members in Afghanistan, Iraq, Yemen, Somalia, and Pakistan. Most com-

106. See Ellen Nakashima & Alan Sipress, *Al Qaeda Figure Seized in Thailand; Local Units, CIA Cooperated to Nab Top Asian Terror Suspect*, WASH. POST, Aug. 15, 2003, at A1.

107. See Shawn W. Crispin, *US and Thailand: Allies in Torture*, ASIA ONLINE (Jan. 25, 2008), http://www.atimes.com/atimes/Southeast_Asia/KB14Ae01.html.

108. *Id.*

109. See Condoleezza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005) [hereinafter Rice Remarks], available at <http://2001-2009.state.gov/secretary/rm/2005/57602.htm>. The speech adds, "[I]t is the policy of the United States . . . to comply with its laws and comply with its treaty obligations." *Id.*; see also Bronwyn Maddox, *Tough Words from Rice Leave Loopholes*, THE TIMES (LONDON), Dec. 6, 2005, at 34–35. Interestingly, a 1993 Memorandum from the Department of Justice in the wake of the Supreme Court's *Alvarez-Machain* decision did focus on the relevance of foreign states' laws, stating, "[T]he *Alvarez-Machain* decision does not constitute a 'green light' for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the laws of foreign states, or international law." Memorandum from the U.S. Dep't of Justice on *U.S. v. Alvarez-Machain* (Jan. 1993) 32 I.L.M. 277.

110. Rice Remarks, *supra* note 109. See also Abraham Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 112 (1989) (noting that the United States reserves the right to engage in non-consensual abductions, but that the host state "may be prepared to allow the individual to be removed without granting formal consent and may even offer some cooperation in carrying out the action"). Cf. *Ocalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., IV (2005) (describing Ocalan's transfer out of Kenya by Turkey and emphasizing importance of host state consent, but failing to discuss Kenya's laws).

mentators believe that it has done so with the consent of those countries.¹¹¹ For example, in a 2009 meeting between President Saleh and President Obama's top counterterrorism adviser, Saleh "insisted that Yemen's national territory is available for unilateral CT [counter-terrorism] operations by the U.S." and claimed that he had "given [the United States] an open door on terrorism."¹¹² This suggests both that Yemen's consent was broad and that the Yemeni President was unconcerned about possible Yemeni domestic legal restrictions on the use of force against individuals in Yemen.

Consent to the use of force may include authorization to conduct detentions. In 2006, the Bush Administration transferred to Guantanamo fourteen individuals who had been held overseas in secret detention facilities.¹¹³ News reports allege that the United States held these detainees in facilities in Eastern Europe and Asia.¹¹⁴ Although the United States has not confirmed that it operated such facilities with host government consent, its unwillingness to reveal the location of the facilities (and the practical difficulties in running such a facility without the host government's agreement) suggests that it obtained permission from those governments.¹¹⁵

The United States asserted that the detention program complied with its own laws,¹¹⁶ but these activities clearly stood in tension with (if not in violation of) the domestic laws of the host states. Among the type of domestic laws implicated by allowing another state to establish secret detention facilities in its territory are laws prohibiting a state from holding individuals in undisclosed detention facilities, and preventing a state from detaining indi-

111. See Koh, *supra* note 50 (Afghanistan); Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq, *supra* note 58 (Iraq); Scott Shane, *Yemen Sets Terms of a War on Al Qaeda*, N.Y. TIMES, Dec. 4, 2010, at A1, available at <http://www.nytimes.com/2010/12/04/world/middleeast/04wikileaks-yemen.html> (Yemen); U.S. Dept. of State Cable 09 NAIROBI 1057 ("Somalia TFG Prime Minister Worried About Rival") (Somalia); Murphy, *supra* note 41, at 116 (Pakistan).

112. Shane, *supra* note 111.

113. Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES (Sept. 10, 2006), http://www.nytimes.com/2006/09/07/us/07detain.html?pagewanted=all&_r=0.

114. Human Rights Watch, Statement on U.S. Secret Detention Facilities in Europe (Nov. 3, 2005) (noting Romania's and Poland's possible involvement in hosting secret detention facilities); Marty Report, *supra* note 84 ("The Legal Affairs and Human Rights Committee now considers it factually established that secret detention centres operated by the CIA have existed for some years in Poland and Romania."); Matthew Cole, *Lithuanian President Announces Investigation into CIA Secret Prison*, ABC NEWS (Oct. 21, 2009), <http://abcnews.go.com/Blotter/lithuania-investigating-secret-cia-prisons/story?id=8874887>; David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, at 1 (stating that the United States detained Abu Zubaydah at a secret safe house in Thailand).

115. George W. Bush, President, Trying Detainees: Address on the Creation of Military Commissions (Sept. 6, 2006) [hereinafter Bush Speech], available at <http://www.presidentialrhetoric.com/speeches/09.06.06.html> (stating that information about where the detainees were held cannot be divulged because "doing so would provide our enemies with information they could use to take retribution against our allies"); Marty Report, *supra* note 84, at ¶ 113 ("According to US sources, such bilateral arrangements [to host secret detention facilities] . . . exist under many different forms in Europe alone. For example, at the lower end of the range, bilaterals can institute ad hoc collaboration on a single operation to capture, detain or transfer a particular target.")

116. Bush Speech, *supra* note 115 ("This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws.")

viduals without due process.¹¹⁷ The Council of Europe's (COE's) Venice Commission stated that incommunicado detention in a COE state party's territory would violate "the applicable domestic law of that State."¹¹⁸ Human rights researcher John Sifton argued that if Lithuania hosted a secret facility, "CIA personnel involved in any secret detentions and interrogations in Lithuania were . . . breaking Lithuanian laws relating to lawless detention, assault, torture, and possibly war crimes. Lithuanian officials who worked with the CIA were breaking applicable Lithuanian laws as well."¹¹⁹

While the United States claimed additional legal rationales beyond consent to the use of force in the situations described above, these examples illustrate that consent to the use of force often implicates and sometimes violates the host state's domestic laws.

2. *Imprecise legal rationales*

Another way in which states may use unreconciled consent to their advantage is by obtaining or invoking consent to avoid specifying their legal rationales for particular actions. Especially where alternative rationales for using force—or the use of force itself—are contentious, consent's rhetorical and substantive power allows states to cloak their actions in added legitimacy. Until recently, the lack of transparency regarding the alleged U.S. use of force in Pakistan and the ambiguous role of Pakistan's consent clearly worked to the advantage of both states. As *The Economist* put it:

[T]he drone strike campaign . . . seems to result from systematic governmental attempts on all sides to evade any kind of responsibility. The Pakistani government doesn't want to take responsibility for eliminating Taliban insurgents in the unruly bits of its own territory. The American government doesn't want to take responsibility for invading those unruly bits, so it carries out pseudo-secret drone strikes without describing or explaining them. The Pakistani government doesn't want to take responsibility for allowing those American drone strikes, so it complains about them. Everyone preserves plausible deniability; everyone evades legal and democratic accountability. It's perfect.¹²⁰

117. See, e.g., Council of Europe, Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, ¶ 125, Opinion No. 363/2005, Mar. 17, 2006 ("If and in so far as *incommunicado* detention takes place, is made possible or is continued on the territory of a member State of the Council of Europe, in view of its secret character that detention is by definition in violation of the European Convention on Human Rights and the applicable domestic law of that State.").

118. *Id.*

119. Cole, *supra* note 114.

120. *We Don't Need No Stinking Authority*, ECONOMIST (Jan. 14, 2010), available at http://www.economist.com/blogs/democracyinamerica/2010/01/we_dont_need_no_stinking_authority. Pakistan may be engaged in a different kind of collusive consent with the United Arab Emirates. Pakistan's military reportedly has tried to distance itself from activities taking place on the Shamsi airbase in western Pakistan (from which U.S. drones reportedly operate) by "claiming that the airbase was the territory of the

Similar ambiguity exists in Yemen. President Saleh's statements—that he gave the United States “an open door on terrorism”¹²¹ but “would continue to pretend that American missile strikes against a local al-Qaida group had come from his military forces”¹²²—suggest that Yemen's consent allowed the United States freedom to operate without having to offer a clear explanation for its use of force.¹²³ While this fact pattern is somewhat unusual—because the host state is claiming credit for the use of force, rather than distancing itself from it, and thus would be more likely to face criticism for violating its own domestic laws—it illustrates another way in which an acting state may use unreconciled consent.¹²⁴

These examples feature prominently in the news, but the United States is hardly the only state that has received or relied on consent to use force against armed non-state actors. For example, Bahrain recently invited Saudi Arabian forces into Bahrain to help manage internal protests.¹²⁵ The Saudi Arabian military repeatedly used force in 2009 in Yemen against the Houthi rebels, allegedly with Yemen's consent.¹²⁶ France reportedly cap-

United Arab Emirates.” Declan Walsh, *Pakistan Orders US Out of Drone Base*, *GUARDIAN* (June 30, 2011), <http://www.guardian.co.uk/world/2011/jun/30/pakistan-orders-us-out-drone-base>.

121. Shane, *supra* note 111.

122. Anne Flaherty, *U.S. Says Wikileaks Has Hurt Foreign Relations*, *ASSOCIATED PRESS*, Dec. 7, 2010, available at <http://www.armytimes.com/news/2010/12/ap-us-says-wikileaks-hurt-foreign-relations-120710/>. Reports state that the United States conducted at least four air strikes against Al Qaeda forces between December 2009 and May 2010. Scott Shane, Mark Mazzetti & Robert Worth, *Secret Assault on Terrorism Widens on Two Continents*, *N.Y. TIMES*, Aug. 14, 2010, available at http://www.nytimes.com/2010/08/15/world/15shadowwar.html?pagewanted=all&_r=0. President Saleh's deputy told the United States that Saleh had lied to Yemen's Parliament in telling them that Yemeni forces used U.S.-made bombs in attacks. Pam Benson, *U.S. Role in Yemen Covered Up By Its President, Wikileaks File Reveals*, *CNN* (Nov. 28, 2010), http://articles.cnn.com/2010-11-28/us/wikileaks.yemen_1_yemeni-american-president-ali-abdullah-saleh?_s=pm.

123. The United States has provided its general legal justification for targeting members of Al Qaeda, including in State Department Legal Adviser Harold Koh's statement in March 2010 and in the U.S. Government's brief in the *Awlaki* case. See Koh, *supra* note 50; Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, *Al-Aulaqi v. Obama*, No. 10-cv-1469 (D.D.C. Sept. 25, 2010), available at 2010 WL 3863135. It has not discussed its use of force in particular countries such as Yemen, however.

124. President Saleh recently faced precisely this criticism from Yemeni opposition leaders. See Laura Kasinof, *Yemen Notes Its Own Role in U.S. Attack on Militant*, *N.Y. TIMES*, Oct. 1, 2011, at A14, available at <http://www.nytimes.com/2011/10/02/world/middleeast/yemen-notes-its-own-role-in-us-attack-on-militant.html> (quoting opposition spokesman as stating that the alleged U.S. decision to resort to killing *Awlaki* showed “the [Yemeni] regime's failure and weakness to perform its duty to arrest and try *Awlaki* in accordance with the Constitution”).

125. See Neil MacFarquhar, *Saudi Arabia Scrambles to Limit Region's Upheaval*, *N.Y. TIMES*, May 27, 2011, at A1, available at <http://www.nytimes.com/2011/05/28/world/middleeast/28saudi.html> (“In Bahrain, [Saudi Arabia] resorted to force, sending troops to crush a rebellion by Shiites because it feared the creation of a hostile government—a kind of Shiite Cuba—only about 20 miles from some of its main oil fields, one sympathetic to Iran, if not allied with it.”).

126. Katherine Zimmerman & Steve Gonzalez, *American Enterprise Institute Tracker (January 4, 2010): Saudi Arabia's Military Operations Along Yemeni Border*, available at <http://www.criticalthreats.org/yemen/tracker-saudi-arabia%E2%80%99s-military-operations-along-yemeni-border> (noting that “Yemen and Saudi Arabia have been cooperating and sharing intelligence for the two operations being conducted against the al Houthi rebels” but that, despite evidence to the contrary, both governments repeatedly denied that the Saudi government used force in Yemeni territory).

tured six pirates in Somali territory in 2008 with Somalia's consent.¹²⁷ Mali apparently authorized Algerian and Mauritanian forces to enter Mali to suppress Al Qaeda in the Islamic Maghreb.¹²⁸ In the 1980s, Turkey and Iraq concluded an agreement that allowed Turkey to carry out anti-guerrilla operations in Iraq.¹²⁹ Little is known about these activities, including the scope of the host state's consent, whether that consent reflected the host state's domestic legal constraints, and whether the acting state had other legal justifications for using force. Absent a clear understanding of the role that consent to the use of force should play, however, there is little chance of an increased focus on these questions.

In general, the current, incautious approach to consent to the use of force threatens to allow states to undercut certain protections contained in the host state's domestic laws and, in doing so, also threatens to undermine the rule of law—a principle that international law otherwise seeks to promote.¹³⁰ Part III proposes a new way to evaluate this consent.

III. CABINING CONSENT TO THE USE OF FORCE

Parts I and II showed that international law's ambiguous approach to consent to the use of force has a significant potential to undercut respect for the domestic law of host states, usually without furthering equities that international law seeks to advance. Yet international law rarely cabins state consent,¹³¹ and rarely treats a state's domestic law as relevant when determining whether an international agreement is valid. This Part challenges those traditional approaches.

127. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 404 (2009).

128. *Mauritania Strikes at Militants on Mali Border*, BBC (Sept. 18, 2010), <http://www.bbc.co.uk/news/world-africa-11354029> ("Mauritania's armed forces have an agreement with Mali to patrol the largely lawless desert areas that cross both countries to pursue suspected militants.")

129. *Turkish Jets Hammer at Kurdish Bases in Northern Iraq*, N.Y. TIMES (Sept. 6, 1996), <http://www.nytimes.com/1996/09/06/world/turkish-jets-hammer-at-kurdish-bases-in-northern-iraq.html> ("During the Persian Gulf war, Turkey had an agreement with Iraq that allowed it to cross the border in pursuit of Kurdish rebels."); *Turkey Says Its Planes Raided Kurdish Guerrilla Bases in Iraq*, N.Y. TIMES (Mar. 5, 1987), <http://www.nytimes.com/1987/03/05/world/turkey-says-its-planes-raided-kurdish-guerrilla-bases-in-iraq.html> (referring to a 1984 agreement that allowed Turkey to carry out anti-guerrilla operations in Iraq).

130. Cf. Scheppele, *supra* note 6, at 29–30 ("[T]hese very same international institutions have disavowed any responsibility to ensure that the anti-terrorism campaign is conducted in accord with international human rights law or international humanitarian law, or even in compliance with countries' own constitutions [T]he domestic executives who have pushed the changes [in their domestic law] often themselves have something quite directly to gain in terms of enhanced power and room to maneuver."); *id.* at 52 ("[T]he new international security law is one of the forces pushing countries to deviate from their own constitutional practices.")

131. The one clear exception relates to jus cogens norms. States may not grant or rely on consent to violate those norms. See DASR, *supra* note 22, art. 26 (stating that nothing precludes the wrongfulness of a state act that violates an obligation arising under a peremptory norm of international law).

This Part argues that international law should recognize consent as a legal basis for using force only where a state's consent authorizes actions the state itself could lawfully undertake. It would impose a "duty to inquire" on the acting state to assess whether the host state's consent is consistent with its domestic laws. When an acting state relies exclusively on consent as the basis for using force—such as when it assists a host state in suppressing a rebellion—the proposal would require the acting state to comply *not only* with its own laws *but also* with certain of the host state's laws. Adopting this rule would significantly reduce the opportunity for either acting states or host states to use consent inappropriately. It would also answer a longstanding question about what rules should apply in "internationalized" internal armed conflicts, and would create new incentives for the host and acting states to comply with the laws of armed conflict. Part IV argues that this analysis should prompt us to reconsider more broadly international law's traditional approach to domestic law.

A. *Consent and the Resort to Force*

As discussed above, international law does not currently preclude a state from using consent as a basis for employing force in another state's territory. Indeed, it seems to allow one state to rely on another state's consent as a standalone justification for using military force, possibly even where the host state has consented to activities that are inconsistent with its legal obligations.

International law should not allow states to rely on unreconciled consent to the use of force in the contexts discussed in Part I.B.1 and I.B.2.¹³² That is, when a host state purports to consent to an action that is inconsistent with its domestic laws, an acting state should not be allowed under international law to rely on that consent either as a positive justification for using force or as a later defense to a claim of wrongfulness.¹³³ This Section proposes to navigate the problems posed by unreconciled consent by focusing on the importance of the host state's domestic law. It argues that, at least in the use of force context, a state's consent is only valid to the extent that it authorizes actions the state itself could undertake.¹³⁴ The proposal contains both substantive and procedural aspects.

132. Even if states may not rely on unreconciled consent as a legal matter, an acting state will continue to derive obvious political and policy benefits from consulting with the host state before taking action pursuant to a separate legal rationale. This is true even if the host state legally cannot consent to the activity of the acting state in a particular situation.

133. There is an intuitively appealing argument that, even where host state consent violates the host state's laws, that consent should estop the host state from later claiming against the acting state. However, if we preclude an acting state from using unreconciled consent as a justification for acting when that consent fails to reflect the will of the host state's nationals, it is not clear why we should be content to allow the acting state to use that same consent in the "defense of wrongfulness" context.

134. This approach effectively rejects as *ultra vires* efforts to agree to activities that the consenting state itself lawfully could not undertake. *Cf.* Case T-306/01, *Yusuf and Al Barakaat Int'l Found. v. Council*, 2005 E.C.R. II-3544 (noting that, in concluding the European Community treaty, Member

1. *The scope of consent*

To minimize the use of unreconciled consent, international law should give an acting state two choices: it may proffer a well-accepted *jus ad bellum* rationale for its use of force (self-defense or U.N. Security Council authorization), or it may rely on consent and use only that “quality of force” that the host state could use.

The phrase “quality of force” refers to the set of rules that applies to a particular “use of force” paradigm. For example, use of force in an armed conflict constitutes a quality of force different from the use of force in a law enforcement context. Likewise, use of force in a conflict that a state characterizes as non-international is a different quality of force from that used in an international conflict. The phrase also includes the use of a particular weapon or weapon system. One state’s use of cluster munitions, land mines, or other weapons regulated by a widely-adhered-to treaty constitutes a different quality of force from the use of force by another state that may not lawfully use those weapons. By contrast, a greater *quantity* of force (hundreds more tanks, more powerful conventional weapons) does *not* constitute a different quality of force, even where the quantity of force that the acting state provides significantly exceeds the capacity of the host state.¹³⁵

The justification for this limitation lies in the inherent nature of consent. Consent—at least when it is used to affect legal relationships—generally contemplates a transfer only of those rights, privileges, powers, or immunities that the consenting entity itself possesses. The common law of property, for example, reflects the rule that no one may give what he does not have.¹³⁶ Similarly, the European Court of Human Rights has upheld a doctrine reflecting that a Council of Europe member state may not consent to certain actions (or risk of actions) by another state that the member state itself could not undertake.¹³⁷ This limitation both constrains the type of situation in

States could not transfer to the Community more powers than they possessed); Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3659 (same).

135. See generally Schachter, *supra* note 44, at 1644 (“[The principle of proportionality] calls for limits on the technological level of weapons used in a counter-intervention. . . . High-technology weapons of mass destruction should not be introduced into the internal conflict by any outside intervening state, whatever its right to intervene. On the whole, this rule of restraint has been followed in recent civil wars. . . . There is good reason to consider it as a legal restriction and not merely a prudential principle. It is, however, less clear that state practice conforms to a rule of proportionality in regard to the *quantum* of military aid on one side or the other.”) (emphasis added).

136. See, e.g., Sale of Goods Act, 1979, c. 54, § 21 (U.K.) (reflecting the property rule of *nemo dat quod non habet*). See also W. EDWARD SELL, *SELL ON AGENCY* 8 (1975) (“In general, a principal can authorize an agent to perform any act or enter into any transaction which he himself could do, and with the same results and legal consequences.”); Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986) (“[T]he enforceability of all agreements is limited by what rights are capable of being transferred from one person to another.”); *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 450 (W.D. Wash. 1978) (“[T]he rule-making power delegated by Congress to the Supreme Court is limited in scope to those which Congress could have rightfully exercised.”).

137. The famous *Soering* case held that a Council of Europe member state may not transfer an individual to another state if that individual likely will be treated in a way that would violate the European

which consent may serve as an independent basis for the use of force and informs the rules that should govern the acting state's use of force.¹³⁸ As a result, international law should not permit consent to serve as a standalone basis for force when the host state's consent exceeds what it could do under its own laws.

This approach is faithful to the text and purposes of the U.N. Charter. The Charter envisions two legal bases for the use of force: authorization by the Security Council under Chapter VII¹³⁹ and self-defense in response to an armed attack.¹⁴⁰ The Charter appears to leave room for a host state to invite an acting state to help it manage issues "essentially within [the host state's] domestic jurisdiction,"¹⁴¹ which would include efforts to suppress internal unrest.¹⁴² The proposed approach would leave the bases for using force under the Charter untouched, while ensuring that consent to the use of force does not expand those bases. On the procedural side, Article 2(4)'s main purpose is to preclude one state from forcibly intervening in another state, an act that either would constitute or might lead to armed attacks and armed conflict.¹⁴³ This approach would allow a host state's consent to overcome Article 2(4)'s limits bilaterally where that state believes that it is in its interests to do so, consistent with its own laws.

2. *The duty to inquire*

To evaluate whether a host state's consent falls within its legal authority, international law should impose a "duty to inquire" on the acting state. Specifically, this would require the acting state to undertake due diligence to understand two things, en route to "reconciling" the unreconciled consent.

First, it should determine how the host state classifies the situation that calls for force. That is, the acting state should determine whether the host state considers the situation in which the acting state will use force to be an international armed conflict, a non-international armed conflict, or a law enforcement situation. For example, if Saudi Arabia—which has no other

Convention on Human Rights if inflicted by the transferring state. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

138. Ian Brownlie seems to support this approach when he writes, "States may lawfully confer by treaty a right to intervene by the use of armed force within the territorial or other legally permitted limits of their jurisdiction." IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 317 (1963).

139. U.N. Charter art. 42.

140. *Id.* art. 51.

141. *Id.* art. 2, para. 7.

142. Uses of force by either state in this context are not free from other international rules, however. Applicable law may include 1977 Additional Protocol II to the Geneva Conventions, Common Article 3 of the Geneva Conventions of 1949, or the International Covenant on Civil and Political Rights.

143. Sean Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 42 (2002) (noting that "Article 2(4) is generally viewed as outlawing any trans-boundary use of military force").

lawful basis to use force in Bahrain—receives Bahrain’s consent to introduce troops into Bahrain to suppress a domestic uprising, Saudi Arabia would need to determine whether Bahrain believed the situation was one that required the use of military force (i.e., that it was a non-international armed conflict) or one that called for a law enforcement response. Bahrain’s approach, assuming it appeared objectively reasonable, would provide the outer limits of the quality of force that the Saudi military could use.¹⁴⁴

Second, the acting state should inquire about the scope of the host state’s consent relative to the host’s international and domestic legal authorities.¹⁴⁵ The acting state should test whether the host state itself could lawfully perform the activity to which it is consenting.¹⁴⁶ This would entail asking the host state to identify the laws that potentially regulate the activity at issue and to confirm that the laws do not preclude such activity.

Although international law does not appear to contain any express duties to inquire, duties of inquiry appear throughout U.S. law. Such duties emerge when a legal system wishes to ensure that certain information comes to light, and the person in possession of the information may not be best positioned to (or may have incentives not to) bring that information forward. The duty thus allocates the burden of seeking that information to another entity, to advance the system’s pursuit of the truth or to avoid systemic manipulation. For example, in U.S. law, certain administrative law judges have a duty to inquire about the facts of the case before them and to develop the administrative record.¹⁴⁷ The “duty of care” owed by boards of directors in corporate law generally entails a duty to inquire into corporate affairs.¹⁴⁸ To comply with their *Brady* obligations, prosecutors have a duty to inquire whether any individuals acting on the government’s behalf in a case possess evidence favorable to the defendant.¹⁴⁹ And in agency law,

144. Whether a situation rises to the level of an armed conflict is an objective question. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135, 148 (stating that the Conventions shall apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”).

145. The host state’s constitution or laws may allow the executive to claim a state of emergency and suspend various individual protections. In these cases, the host state may have only limited domestic laws in force. The acting state nevertheless should undertake an inquiry to assure itself that the executive appears to have invoked the state of emergency in accordance with relevant laws.

146. Although this Article focuses on the acting state’s duty to inquire about the host state’s laws, there are cases in which we may wish to impose a similar duty on the host state. Where the acting state purports to have an independent basis for using force in the host state but nevertheless seeks the host state’s consent to use force in the host state, the host state should inquire about the acting state’s asserted legal basis. In other words, the host state should consent to the acting state’s use of force only where the acting state is not using force in manifest violation of international law.

147. Jon Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1302 (1997).

148. Regina Burch, *Director Oversight and Monitoring: The Standard of Care and the Standard of Liability Post-Enron*, 6 WYO. L. REV. 481, 487–88 (2006).

149. *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

where a third party has questions about the scope of an agent's authority, the third party is expected to inquire into the scope of that authority.¹⁵⁰

Ruth Wedgwood has proposed a requirement akin to a duty to inquire when an acting state intervenes in a host state's non-international armed conflict. She notes:

Ordinarily, in international agreements, one country is not responsible for monitoring the internal constitutional processes of the other. . . . But in the case of intervention within domestic armed conflicts, we may wish to impose a stronger obligation to evaluate the internal constitutional competence of the requesting organ. Otherwise, the effect of intervention may in fact be to displace constitutional processes, rather than to vindicate them.¹⁵¹

This Article proposes that the acting state conduct a related—but more substantive—inquiry to understand not just the host state's constitutional treaty processes but also those parts of the host state's substantive law that the use of force implicates.

Two scholars have advocated a similar approach to boundary treaties. Malgosia Fitzmaurice and Olufemi Elias suggest that a state's domestic rules on cession of populated territory and the conclusion of boundary treaties are so important to the existence and nature of the state that questions should arise ipso facto about whether those treaties raise a “manifest violation” of the state's domestic law.¹⁵² They are particularly concerned about situations in which a non-democratic government purports to transfer territory: “[I]t is precisely in cases of non-democratic governments that the need to protect the interests of the State, specifically its territory and population, would require that care be taken in order to guarantee whatever constitutional safeguards that may exist against arbitrary disposition of territory by treaty.”¹⁵³ They argue not that one state must research the complex constitutional rules of another state, “but merely that they should obtain a more or less express undertaking as to the constitutionality of a treaty from the other party

150. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. d (2006); DANIEL KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCs 41 (3d ed. 2008).

151. Ruth Wedgwood, *Commentary on Intervention by Invitation*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 49, at 135, 138. See also Hollis, *supra* note 20, at 152 (citing several cases in which a state that is contemplating entering into a treaty with a sub-state actor has inquired into the latter's competence).

152. FITZMAURICE & ELIAS, *supra* note 10, at 385 (citing Judge Rezek's approach in the *Bakassi* case in the ICJ). See also LASSA OPPENHEIM, I INTERNATIONAL LAW 268 (2d ed. 1905), available at <http://archive.org/stream/international01oppe#page/268/mode/2up> (“The Constitutional Law of the different States may or may not lay down special rules for the transfer or acquisition of territory But if such Municipal rules contain constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by Heads of States or Governments as violate these restrictions are not binding.”).

153. FITZMAURICE & ELIAS, *supra* note 10, at 385–86.

where there are grounds, as in the case of boundary treaties, for considering that there may be a manifest violation of internal constitutional rules.”¹⁵⁴

Transfer of a state’s territory and consent to use force in a state’s territory share some important characteristics. The issues on which the states are engaging on the international plane directly impact core aspects of a state’s sovereignty and there is a strong likelihood that the international agreement will cause tensions with the state’s domestic law. A duty to inquire therefore seems a modest but important way to guard against blind adherence to the international agreement.

3. *Standard of deference*

Once an acting state inquires about the host state’s laws, the acting state may defer to the host state’s interpretation of its laws and its characterization of the factual situation requiring force, unless no reasonable state could reach that interpretation. Alternatively, one could allow the acting state to defer to the information and assessment provided by the host state except where a violation of the host state’s laws would be “objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.”¹⁵⁵

The duty to inquire is not a perfect fix.¹⁵⁶ As Judge Lucius Wildhaber notes, “Even if states care to inquire into the agreement-making process of other states, they will ordinarily have to accept the interpretation given to them by the very state officials whose competence they question.”¹⁵⁷ While that is true, part of the problem with allowing the use of unreconciled consent is that, to date, neither acting states nor host states appear to accept or

154. *Id.* at 386.

155. VCLT, *supra* note 2, art. 46.

156. Given this, states may wish to continue to supplement this approach by using their criminal laws to prosecute or deter the granting of or reliance on consent that exceeds the scope of the host state’s laws. To date, some states have pursued this approach, with limited success. Polish prosecutors are seeking to try two of Poland’s former leaders in a special State Tribunal for their alleged decision to authorize the CIA to host a secret detention facility in Poland. Marcin Sobczyk, *The Slow Revelation of Poland’s ‘CIA Detention Facilities’*, WALL ST. J. (Aug. 4, 2010, 8:46 AM), <http://blogs.wsj.com/emergingurope/2010/08/04/the-slow-revelation-of-polands-cia-detention-facilities/>; Vanessa Gera & Monika Scisłowska, *Guantanamo Captive Gets Victim Status in Polish Secret Prison Probe*, MIAMI HERALD (Jan. 20, 2011), <http://www.miamiherald.com/2011/01/20/2024929/guantanamo-captive-gets-victim.html>. Lithuania investigated allegations that it hosted a secret facility, but concluded those investigations without initiating any prosecutions. *3 Former State Security Directors to Address Seimas*, LITHUANIA TRIB. (Mar. 7, 2011), <http://www.lithuaniantribune.com/2011/03/07/3-former-state-security-directors-to-address-seimas/> (reporting that the Prosecutor General’s Office concluded that all airplanes linked to the CIA had landed in Lithuania in accordance with the Law on Intelligence and that there was no evidence to suggest that the United States had transported anyone unlawfully on those planes or opened a secret facility on Lithuanian territory). German prosecutors indicted thirteen U.S. officials for their alleged role in detaining and mistreating German citizen Khaled al Masri. Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST (Dec. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html>. The German government has not arrested those officials, however, so the case has not proceeded. *Id.* Finally, Italy prosecuted and convicted U.S. and Italian officials for the Abu Omar abduction. See *supra* text accompanying notes 104–105.

157. WILDHABER, *supra* note 11, at 176.

focus on the relevance of the host state's domestic laws in determining whether and how an acting state may use force in a host state. Thus, a requirement to inquire would at least force those domestic laws into view. Additionally, there is some reason to assume that the acting state—by definition, a state powerful enough to exert military force extraterritorially—is more likely than the host state to be a sophisticated consumer of law. When this is the case, the duty to inquire should prompt the acting state to ask detailed questions about the host state's domestic law and legal approach to the factual situation, leading the host state to take a more considered approach to its laws than it otherwise might.

B. *Consent and the Rules Governing Force*

Having concluded that an acting state effectively must stand in the shoes of the host state when using consent as its sole international legal justification for force, the acting state should be bound in its operations not only by its own international and domestic legal restrictions but also by certain of the host state's restrictions. In contrast, where the acting state relies on non-consensual legal authorities to use force, the acting state need not consider the host state's legal restrictions. As a matter of practice today, acting states do not seem to view the presence of consent as altering the *jus in bello* rules that apply to their uses of force; instead, they apply their own *jus in bello* rules to the situation, whether or not they rely on the host state's consent alone.¹⁵⁸ The proposed approach thus would require a change in state practice.

Which of the host state's legal restrictions should apply to the acting state's actions? As a strictly logical matter, one might argue that if the acting state really stands in the shoes of the host state, all relevant laws of the host state should apply. This seems unworkable in practice, however. Instead, the international community should require the acting state to apply those laws of the host state that are open and notorious.¹⁵⁹ That should consist of the host state's public treaty obligations, its constitution, high-profile interpretations of the constitution by the state's highest court, and possibly high-profile statutes.

What practical effects would this approach have? Most obviously, the host state might be party to certain treaties—such as those prohibiting the

158. See Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145, 147–49 (1983) (envisioning situations in which an acting state, intervening in a host state's civil war at the host state's request, would apply a different set of legal rules than the host state).

159. This standard harkens to the approach taken by the VCLT in Article 46. See also Wildhaber, *supra* note 12, at 140 (noting that where states have invoked their own law to invalidate a treaty, they have referred to a written constitutional provision rather than a customary rule). The standard also sounds in the doctrine of “judicial notice,” whereby a court may take judicial notice of a fact that is generally known within the court's jurisdiction or is capable of accurate and ready determination by resort to unquestionably accurate sources. See FED. R. EVID. 201.

use of landmines or cluster munitions—to which the acting state is not a party. This approach means that the acting state could not use weapons that the host state itself could not use. In a law enforcement context, if the host state's constitution limits the use of force by law enforcement (perhaps by prohibiting the use of force against a fleeing felon), the acting state would need to comply with those rules when attempting to detain someone in the host state.

While it will be challenging for the acting state to collect and apply the relevant host state law, states historically have concluded bilateral legal arrangements that govern extraterritorial uses of force.¹⁶⁰ These include basing agreements that authorize foreign governments to conduct certain military operations, and law enforcement agreements for joint operations.¹⁶¹ In a number of other situations, officials of one state must become familiar with the laws of another state. When considering whether to admit evidence obtained by foreign officials who did not comply with U.S. constitutional requirements, U.S. courts have considered themselves competent to determine whether foreign officials' actions complied with foreign legal requirements.¹⁶² Similarly, when U.S. courts decide whether to recognize a foreign court's judgment, they must assess whether the foreign system provides procedures compatible with due process.¹⁶³ The Vienna Conventions on Diplomatic and Consular Relations impose a duty on officials of the sending state to comply with the receiving state's laws, which requires a familiarity with those laws.¹⁶⁴ And occupation law requires the occupying power to respect the laws in force in the occupied territory, an obligation that requires one state to become intimately familiar with another state's laws.¹⁶⁵ This suggests that it will be possible to navigate the practical challenges that this Article's proposed approach may raise.

160. See *supra* note 58.

161. The Federal Bureau of Investigation reports the existence of, but not the content of, agreements covering joint operations. See FBI, Overview of the Legal Attaché Program, available at http://www.fbi.gov/about-us/international_operations/overview (last visited Oct. 27, 2012) ("The rules for joint activities and information sharing are generally spelled out in formal agreements between the U.S. and the host nation.").

162. See, e.g., *Stowe v. Devoy*, 588 F.2d 336 (2d Cir. 1978) (admitting wiretap evidence of Canadian origin where Canadian authorities followed their own prescribed procedures); *United States v. Derewal*, 703 F. Supp. 372, 375–76 (E.D. Pa. 1989) (concluding that evidence was not subject to exclusionary rule because wiretap was conducted by foreign officials in manner that complied with foreign state's law). See generally Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 66 (2009) (citing with favor the idea that one state's courts may "compare statutory arrangements, such as, for example, conditions for detaining suspected terrorists" and noting that "[e]ven more accessible than specific statutes are the constitutional texts, which often have similar provisions regarding such issues as the right to life, due process, equality, and fundamental political rights").

163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987).

164. Vienna Convention on Diplomatic Relations art. 41, Apr. 18, 1961, 23 U.S.T. 3227; Vienna Convention on Consular Relations art. 55, Apr. 24, 1963, 21 U.S.T. 77.

165. Hague Convention No. IV, Respecting the Laws and Customs of War on Land art. 53, Oct. 18, 1907, 36 Stat. 2277.

C. *Implications of a Violation*

What if an acting state fails to undertake its duty to inquire, and the actions it takes pursuant to host state consent prove inconsistent with the host state's laws? The answer depends on whether the acting state has an additional justification for using force. Assume that an acting state is using force in the host state on the basis of self-defense, Security Council authorization, and consent (as the United States is doing in Afghanistan, for instance).¹⁶⁶ In this case, the acting state's intervention will remain lawful; it simply will not be able to rely on the unreconciled consent if and when the other two rationales expire.

The situation is different when the acting state is relying exclusively on consent as its justification for using force. There, three implications follow from a failure to inquire and a resulting violation of host state law. First, as a political matter, the international community must be prepared to condemn the actions of the acting and host states, whether in the United Nations or in other relevant fora. Second, as a legal matter, the non-involved states should decline to recognize the unlawful situation and not render assistance to those states participating in the situation, assuming that the use of force is ongoing.¹⁶⁷ This would mean that non-involved states should not provide intelligence, sell weapons, or offer other related types of cooperation to either the acting or host state if that assistance would contribute to the unlawful situation.¹⁶⁸ The third implication is legal as well: because consent no longer can serve as a defense against wrongdoing, the host state subsequently could claim that the acting state's use of force in the host state was unlawful. This might transpire if, for instance, a rebel group overthrew the government of the host state that initially consented to the acting state's efforts to fight that group. Further, individual plaintiffs may be able to bring cases claiming violations of international law against both the acting and host states. Of course, standing doctrines and other justiciability limitations might bar suits in specific cases. But the creation of the "duty to inquire" has the effect of "internationalizing" what to date has been seen only as a violation by the host state of its own domestic laws.

To be clear, an acting state should not face liability if, in good faith, it incorrectly assesses the content of the host state's laws. If, pursuant to the duty to inquire, a reasonable state could have concluded that the activity to which the host state consented was consistent with host state laws, the act-

166. See *supra* note 50.

167. Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9) (concluding that states are "under an obligation not to recognize the illegal situation . . . [and] not to render aid or assistance in maintaining the situation created by such construction").

168. See Lee Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 INT'L L. & POL. 1 (2011) (arguing that third states should be obligated not to contribute to another state's violation of international law).

ing state has a good faith defense even if it later comes to light that the activity to which the host state consented violated that state's domestic laws.

D. *Benefits and Costs*

Cabining consent in this way offers several benefits, though at some cost. This Section discusses those costs and benefits, and then explores the incentives states have to accept an approach to consent that limits their flexibility.

1. *Benefits*

This Part's proposed approach to consent should appeal to those who are inclined to privilege a state's constitution and domestic laws in the face of contrary international arrangements. It also should appeal to human rights and civil liberties advocates, who presumably prioritize individual rights regardless of their legal source. Further, it preserves the status quo in the U.N. Charter while providing greater clarity in an area of international law that suffers from ambiguity.

Specifically, the goal of this approach is to improve a host state's compliance with its own domestic legal obligations, because it would require the acting state to inquire about (and therefore force the host state to focus on) those obligations. In effect, it would force the acting state to hold the host state accountable for compliance with its own laws in a situation in which the host state's population is unlikely to be able to do so. It also will force the host state to take responsibility for the interpretation it gives to its own laws. Second, a "stand in the shoes of the host state" approach gives the acting state incentives to ensure that the host state complies with its basic law of war ("LOW") commitments (to avoid being seen as aiding and abetting war crimes when the two states' forces fight alongside each other). This may result in mutually reinforcing compliance with the LOW.¹⁶⁹

Third, this approach would resolve the difficult (and long-unanswered) question about which LOW rules apply to armed conflicts in which a third state intervenes on behalf of the host state—what some term "internationalized" internal armed conflicts.¹⁷⁰ Where the acting state intervenes on the side of a host state that is fighting a non-state armed group, the acting state must comply not only with its own LOW commitments, but also with any additional LOW commitments the host state has assumed. Fourth, by ensuring that an international arrangement forms only when consistent with a

169. See Jeffrey Dunoff & Joel Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394, 403 (1999) (noting that in internal armed conflicts, a state's domestic laws may fail to ensure compliance with the laws of war and suggesting that international law and institutions may serve as a mechanism by which those states bind themselves to rules desirable to the state and its citizens).

170. See Gasser, *supra* note 158, at 147 (noting continuing uncertainty about what laws of war apply to civil wars in which an outside power intervenes using military force).

host state's domestic law, it minimizes the tensions to which supremacy gives rise. Finally, it limits the possibility of criminal prosecutions of host and acting state officials because it reduces the chance that the actions taken pursuant to consent will violate the host state's criminal laws.

2. *Costs*

Imposing a duty to inquire has costs, some of which were articulated by states while negotiating the VCLT.¹⁷¹ First, requiring the acting and host states to discuss the latter's laws will incur transaction costs. The discussions will take time, even when the situation calls for quick action. They may require lawyers to play a role, and could result in a legal conclusion that the acting state cannot rely substantively on the host state's consent.

Second, the host state may object to the inquiry as an infringement on its sovereignty and decline to respond. As the Swedish delegate to the VCLT negotiations argued, "[I]t would seem difficult for one government to point out to another that in virtue of certain provisions of its internal law it was not empowered to conclude the treaty."¹⁷²

Third, the duty to inquire may not always produce clear answers about the host state's law. Sometimes a state's law may be untested or difficult to interpret. Two provisions of its law may contradict each other, or several of the state's courts may have issued competing interpretations of the provision in question. In such cases, the acting state will have met its duty to inquire if the interpretation proffered by the host state is reasonable (though disputed).

Fourth, although this Article proposes to apply the duty to inquire to a limited set of subject areas, it might prove difficult in practice to cabin the duty to inquire to this set of cases. If states pursued a broad duty to inquire and took seriously the proposed sanction for failing to inquire—treating the international agreement as void and condemning it if it violates the host state's laws—this could destabilize a swath of international agreements.¹⁷³

Fifth, the proposed approach may have asymmetric effects on different types of host states. When a host state has a robust set of rights-protective laws, the duty to inquire is more likely to reveal a conflict between those rights and the host state's consent. This will narrow the overall range of security-related actions an acting state may take in the host state. In contrast, where the host state has a thinner set of domestic laws, the duty to inquire is less likely to produce an outcome that constrains the acting state.

171. See *infra* Part V.A.

172. U.N. Conf. on the Law of Treaties, G.A. Res. 2166 (XXI), ¶ 37, U.N. GAOR, 1st Sess., 43d mtg., U.N. Doc. A/Conf.39/11 (Apr. 29, 1968).

173. While this might destabilize international law in the short term, it could be beneficial for international law in the long term. As it became standard negotiating practice to explore the laws of one's treaty partner and (where the partner's international and domestic obligations prove inconsistent) to understand how the partner intends to change its domestic laws, it would become far less likely that a state's domestic and international commitments would diverge.

It may seem troubling that rights-protecting states face higher hurdles to receiving outside military assistance than do states with less protective laws. Yet this approach reflects—and upholds—the commitments that rights-protecting states have made with their citizens.

It is possible to mitigate some of these costs. Sovereignty concerns seem easiest to overcome: states regularly undertake these types of inquiries during treaty negotiations. Such inquiries seem unthreatening when each state believes that it has something to gain from the eventual arrangement. Reflexive efforts to protect sovereignty seem less pervasive today, after the international human rights revolution and the establishment of multiple international criminal tribunals. In addition, in the use of force context, the host state sometimes invites the acting state to take actions that clearly intrude on its sovereignty. Here it is less problematic optically for the acting state to ask questions about the former's law. To address "slippery slope" concerns about imposing a duty to inquire, one could cabin the duty by specifying in detail the subject matter areas that would trigger that duty. In sum, a duty to inquire would impose certain costs on the operation of international law. On balance, however, the benefits would outweigh the costs.

3. *Incentives to comply*

What incentives do states have to adopt a new approach to consent? Those who doubt that international law has bite in regulating the use of force will be skeptical that the proposed solution will impose real-world constraints on the affected states. These critics will be particularly dubious that these rules can affect how host states (which, in this narrative, tend to be unstable, security-focused, and unlikely to give great weight to rule of law principles) approach their legal obligations. Critics also will point to recent cases in which Western democracies turned a blind eye to rights violations by third countries because those countries provided the West with valuable intelligence.¹⁷⁴ Indeed, some states certainly see themselves as benefiting from the existing ambiguity about consent.¹⁷⁵ Further, most host states have criminal laws on their books, which theoretically already give acting states incentives to focus on host state domestic laws.

These are reasonable criticisms, particularly because a state's decisions on national security and the use of force starkly implicate core equities. Nevertheless, there are a number of reasons why states may see benefits in clarifying the law in this area and in placing greater weight on the host state's domestic law.

174. Elizabeth Sepper, *Democracy, Human Rights, and Intelligence Sharing*, 46 TEX. INT'L L.J. 151, 179 (2010) (noting that in some cases "Western services have exploited the lack of accountability and rights protection in partner nations to circumvent human rights law and violate individual rights").

175. See *supra* text accompanying note 120.

First, many states strongly support the U.N. Charter's relatively restrictive approach to the use of force.¹⁷⁶ These include weak states that believe they will likely be on the receiving end of that force; states committed as a national matter to international peace; and states that are interested in constraining certain powerful states. These states have a strong incentive to adopt this Article's treatment of consent, which would make it more costly for states using force to take advantage of current ambiguities in the law. After all, it is hard for one state to criticize another's actions when the underlying legal principles in play are indeterminate, even where those actions appear problematic.¹⁷⁷

Second, acting states that prioritize the rule of law—those that tend to adhere to their own international and domestic legal obligations—may see advantages to an international rule that cabins consent because the approach may make it harder for other, less law-abiding states to obscure troubling activities. Militarily powerful states such as the United States have an interest in clarifying and cabining their own precedents, to make it harder for other states (or even future administrations within those states) to invoke those precedents in problematic ways in the future.¹⁷⁸ As State Department Legal Adviser John Stevenson stated in 1970:

It is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale [T]he United States has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes.¹⁷⁹

More recently, the United States evidenced its understanding of the importance of precedent when it reportedly declined to conduct certain offen-

176. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 252 (3d ed. 2008) (noting the general rejection by states of broad claims of pre-emptive self-defense); *id.* at 253 (noting that a majority of states are unwilling to accept broad interpretation of proportionality).

177. See LON FULLER, *THE MORALITY OF LAW* 39 (1969) (noting that unclear rules can contribute to a failed legal system); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in the Age of Power Disequilibrium*, 100 *AM. J. INT'L L.* 88, 93 (2006) (“[D]eterminacy seems the most important [aspect of legitimacy], being that quality of a norm that generates an ascertainable understanding of what it permits and what it prohibits. When that line becomes unascertainable, states are unlikely to defer opportunities for self-gratification. The rule’s compliance pull evaporates.”).

178. For an argument that future administrations may misuse military precedents, see Letter from Senator Richard Lugar to President Barack Obama on U.S. Use of Force in Libya (May 23, 2011) (on file with author) (“[E]ngaging in significant and extended military operations without Congressional authorization risks setting a precedent that future Presidents may feel justified in following and potentially expanding upon, further eroding the prudent democratic checks our Constitution sought to place on the employment of our ever more powerful military forces.”).

179. John R. Stevenson, Legal Adviser, U.S. Dep’t of State, *Statement on Legal Aspects of U.S. Military Action in Cambodia to the NYC Bar Ass’n* (May 28, 1970) (on file with author).

sive cyber operations in Libya. Media reports stated that “administration officials and even some military officers balked, fearing that [the use of such weapons] might set a precedent for other nations, in particular Russia or China, to carry out such offensives of their own”¹⁸⁰

Third, many states dedicated to the rule of law believe that it is in their national interests for other states to comply with domestic legal obligations.¹⁸¹ The reasons for this are manifold: adherence to law creates a more favorable and predictable operating environment for companies and investors; it promotes domestic stability within that country and thus minimizes the chance of conflict and refugee flows; and it enhances the welfare of those living under the law-compliant government. When states focused on the rule of law turn a blind eye to a host state’s compliance with its domestic laws in particular cases (or even facilitate violations of that law), it adversely affects the former’s publicly stated goals.¹⁸² States and their leaders are keenly aware of hypocrisy.¹⁸³ The message will not be lost that it is acceptable to violate one’s own domestic law when it is expedient to do so.

Fourth, acting and host states have an interest in furthering the legitimacy of their actions. In today’s transparent society, even clandestine uses of force often come to light. Ensuring that their actions are seen as law-abiding will advance the substantive causes these states are pursuing. At the very least, the converse is true: actions that patently violate the host state’s domestic law are unlikely to be seen as legitimate by the international community. This may have a real-world impact if certain states conclude that they cannot (either legally or politically) provide intelligence or law enforcement cooperation to acting and host states that use force in ways that violate relevant laws.

Finally, the standard here is not unduly stringent. States that envision themselves as acting states may see the approach as cutting off some freedom of action. But in most cases in which it is critical for them to act, they will

180. Eric Schmitt & Thom Shanker, *U.S. Debated Cyberwarfare in Attack Plan on Libya*, N.Y. TIMES, Oct. 17, 2011, at A1, available at http://www.nytimes.com/2011/10/18/world/africa/cyber-warfare-against-libya-was-debated-by-us.html?_r=0.

181. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 247–54 (2005) (describing Western states’ “promotion of democracy, free markets, and the rule of law” in the “Third World”); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361, 376 (1999) (“To some extent, at least, the major Western powers have come to view nondemocratic regimes as political liabilities and serious human rights abuses as undermining stability.”).

182. See, e.g., Hakim Almasmari & Farnaz Fassihi, *Yemeni Leader’s Exit Prompts Joy and Fear*, WALL ST. J. (June 6, 2011), <http://online.wsj.com/article/SB1000142405270230365740457636550236018020.html> (noting that the United States urged Yemen to ensure any permanent transfer of power take place within the confines of the country’s constitution); Clark Lombardi, *Getting to Democracy, the Legal Way*, N.Y. TIMES (Feb. 17, 2011), <http://www.nytimes.com/roomfordebate/2011/02/07/is-caution-the-right-us-strategy-on-egypt/getting-to-democracy-the-legal-way?gwh=EBC16E9D3304D10AEFBA8C655DC30EE3> (noting that the United States favored a negotiated “legal” transition of power in Egypt).

183. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1525 (2003) (“The domestic and foreign media are quick to expose hypocrisy, and CNN and the Internet now spread global word of U.S. legal violations almost instantaneously.”).

have a credible alternative legal basis to use force: self-defense. And in many cases in which host states want acting states to act, host states will have existing authorities (especially law enforcement authorities) that allow the states to take at least modest steps together to address the situation that concerns them. This approach simply brings the actions of acting states into line with the host states' authorities where the acting state relies exclusively on the host state's consent to justify force.

A final argument against this project is that international law should simply leave the obligation on the host state to require the acting state to operate in a manner consistent with the host state's laws. Implicit in this argument is that international law should not care about violations of domestic law. As an international law matter, one might argue that if the host state declines to comply with its international treaty obligations when consenting to activities that might violate those treaties, the host state will bear state responsibility for those violations, but that possibility need not entail a new legal arrangement for consent.¹⁸⁴ As a domestic law matter, one might view the host state's criminal laws as providing sufficient incentives for the acting (and host) states to avoid violating host state laws.

This critique warrants three responses. First, as Part II showed, the existing legal approach to consent is unclear. Thus, an effort to clarify this regime is worthwhile in any case. Second, under the existing regime, the opportunities that the acting and host states have to use unreconciled consent are apparent. As Anne Peters has written, "[T]he activities of entities with executive functions beyond a State's borders (police, military, security forces . . .) are governed by the laws of the State in which the activities occur, including the constitutional guarantees. But often the constitutional guarantees of those States . . . are not properly enforced by local authorities."¹⁸⁵ That said, nothing in this Article precludes continued efforts to enforce a state's multilateral human rights obligations against it in international fora. Indeed, such efforts complement the proposals herein.

Third, relying on the host state's domestic criminal law poses several practical problems. It assumes a functioning criminal system, one that is sufficiently independent from the executive branch to withstand pressure not to pursue cases against either host state or acting state officials.¹⁸⁶ In addition, existing legal doctrines may bar the case, including immunity

184. A skeptic might argue that the host state's citizens have placed their leadership in a position to misuse its powers and therefore should bear any costs that ensue on the domestic plane. However, in the use of force context, the host state tends to be the kind of state in which its citizens often are in a weak position to influence, control, monitor, or threaten their leadership. This suggests the value of considering how to reallocate the losses that flow from the acts of unreliable leadership or, alternatively, to stem those unreliable acts in the first place.

185. Anne Peters, *The Globalization of State Constitutions*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW*, *supra* note 6, at 251, 258.

186. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, *N.Y. TIMES*, Oct. 8, 2011, at A1, available at http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&_r=0 (describing Department of Justice memo as con-

from jurisdiction pursuant to status of forces agreements or sovereign immunity. While some host states have prosecuted host state and acting state officials who undertook forcible actions pursuant to host state consent, few such prosecutions have occurred and fewer have resulted in convictions.¹⁸⁷

In short, relying on the host state alone to adhere to its domestic laws and to force the acting state to do the same has not proven successful. The proposal in Part III attempts to impose both procedural and substantive standards on the use of consent, to bring the acting state's responsibility to bear in addition to the host state's. Assuming the acting state often has a powerful military and a high-profile presence on the international stage, this approach leverages the acting state's interests to enhance the host state's compliance with its own laws.

IV. RETHINKING SUPREMACY

Part I demonstrated how supremacy was intended to work. Supremacy allows a state to disregard the domestic laws of its treaty partners, as well as to enforce an international agreement against its treaty partner when the latter seeks to hide behind its domestic laws. Parts II and III showed that states can manipulate supremacy because the acting state can act without regard to relevant domestic legal limitations in the host state, and the host state finds it relatively easy to consent to uses of force that run contrary to its laws. Part III proposed a way to limit states' ability to employ unreconciled consent to the use of force. Accepting Part III's approach, however, means reexamining international law's traditional approach to the relationship between international and domestic law, particularly if there are other areas of international law in which states use unreconciled consent to ignore or violate domestic laws.

This Part revisits the principles that underpin the supremacy doctrine and questions their relevance in contemporary situations involving consent to the use of force. Drawing lessons from Part II about when consent to the use of force proves most problematic, it derives several structural factors that make it more likely that states will use consent in other areas of international activity to ignore or violate domestic laws. This Part then proposes an approach to international agreements that would deem a state's domestic law internationally relevant when those structural factors are present. That is, it would modify supremacy in these cases.

cluding that CIA officials involved in killing "might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen's domestic laws against murder, a highly unlikely possibility").

187. See *supra* note 156.

A. *Supremacy's Values*

At the time that states drafted the VCLT, it made good sense to adopt an approach to supremacy that prioritized international law over domestic law in virtually all cases. This section discusses several of the values supremacy served, re-contextualizing those values for consent to the use of force.

1. *Predictability and stability*

The VCLT negotiators wanted to avoid

a result which would force a contracting party to inquire into every subtlety of the domestic law of its partner. It is rightly feared that to make the validity of agreements depend on their accord with each and every norm of constitutional law, written or customary, notorious or obscure, would gravely endanger the security of international transactions.¹⁸⁸

In 1969, a state understandably would have found daunting a requirement to understand all relevant laws of its treaty partner. Armed with today's technology and communications systems, identifying the relevant laws of another state seems less challenging.¹⁸⁹ In addition, in the world of consent to the use of force, we might not value predictability at all. Instead, the international community might prefer that an acting state face incentives to check and double-check its understandings of the host state's relevant legal authorities before using force in that state.¹⁹⁰ Challenging the predictability of consent on the international plane will promote other virtues, including greater deliberation by a state before using force outside its territory.

2. *Sovereignty*

Another important consideration in shaping supremacy was the sovereignty of the states entering into treaties. At the time, the VCLT drafters appeared to view any effort to look behind a state's consent as an affront to that state's sovereignty.¹⁹¹ The International Law Commission noted that "any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs."¹⁹² Allowing an exception where the violation

188. WILDHABER, *supra* note 11, at 347.

189. For example, Hein Online and the University of Richmond offer databases of many national constitutions.

190. *See supra* note 176 (describing international community's general skepticism about many international uses of force).

191. Rep. of the Int'l Law Comm'n, 1966 Y.B. Int'l L. Comm'n 169, 242, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

192. *Id.* *See also* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 458–59 (2003) (stating that nations are "highly defensive" about entitling others to interpret their constitutions, except where the matter is obvious).

was manifest avoided these concerns, because the treaty partner would not have to undertake intrusive inquiries to learn the existence of the other state's internal law.

Today, sovereignty is far more permeable. Very few types of state action now fall within an area that is not of interest to other states.¹⁹³ The responsibility to protect, which takes as a premise that states that fail to protect their own population surrender aspects of their sovereignty, has garnered significant recognition.¹⁹⁴ Further, states negotiating over international arrangements frequently seek to understand their partners' domestic laws to solidify their understanding of how those arrangements will operate in practice.¹⁹⁵ In the specific context of consent to the use of force, the host state will often already have signaled a willingness to forego certain aspects of its sovereignty.

3. *Avoiding manipulation*

The VCLT drafters crafted a rule that would make it difficult for states to use domestic law to evade their international obligations. Allowing states to hide behind domestic laws and procedures whenever their international law obligations became onerous or problematic would give states a perverse incentive to enter into treaties, and would severely undercut international law.¹⁹⁶ A state easily could join a treaty that appeared to provide a benefit; if the treaty became more costly than beneficial, the state party could simply change its domestic law to undo the effect of the treaty on both the international and domestic planes.¹⁹⁷ The VCLT's approach to supremacy embraced the idea that the consenting state is in the best position to avoid improperly undertaking international arrangements that are inconsistent with its domestic law, especially where its domestic legal processes provide checks on

193. Schnably, *supra* note 95, at 436 (noting that the widespread commitment of states to human rights treaties has "carved out significant exceptions to sovereignty").

194. U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 201, U.N. Doc. A/59/565 (Dec. 2, 2004) (describing the "growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community").

195. Extradition treaties provide a good example. For a case of one state's lawyers interpreting another state's laws, see Tim Arango, *In Shadow of Death, Iraq and U.S. Tiptoe Around a Deadline*, N.Y. TIMES, July 14, 2011, at A4, available at <http://www.nytimes.com/2011/07/15/world/middleeast/15iraq.html> (stating that U.S. government lawyers have interpreted Iraqi law to require the Iraqi Parliament to approve a new security agreement).

196. Similar supremacy notions arise in the European project as well. See Markus Puder, *Supremacy of the Law and Judicial Review in the European Union*, 36 GEO. WASH. INT'L L. REV. 567, 580 (2004) (noting that the ECJ makes "the pragmatic argument that little would remain of the Community order, predicated upon uniform and equal application, if it could be frozen out by subsequent unilateral rules. In more dramatic words, the Community would be rendered dysfunctional and the construction of a united Europe jeopardized."). See also DASR, *supra* note 22, art. 32 ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.").

197. See WILDHABER, *supra* note 11, at 347 (arguing that under a constitutionalist approach "[s]tates would feel encouraged to invoke their constitutional law to get rid of undesirable agreements").

its treaty-making process. In the context of consent to the use of force, however, Part I illustrated that the more pressing concern today is when states use international arrangements to evade domestic laws.

4. *Advancing human rights*

“The drafting of the Vienna Convention on the Law of Treaties took place over a number of years, but the time of this discussion . . . roughly coincided with the advent of a new era in human rights.”¹⁹⁸ One important role for supremacy is the pressure it places on states with weak human rights laws. Once states have crafted a multilateral human rights treaty, many states feel pressure to join that treaty and to bring their domestic laws up to the treaty’s standards. Further, state officials who are sympathetic to human rights sometimes seek rigorous obligations in human rights treaties, knowing that their own laws do not currently meet those standards. The existence of the treaty then allows them to pressure their own governments to improve their domestic laws. Without supremacy, those advances would have been far more difficult to achieve. Today, however, most states are parties to most major human rights treaties, so this leverage may be less important.¹⁹⁹ In addition, Part I illustrated why, in the context of consent to the use of force, the pressure now may be to comport with security-focused international arrangements at the expense of more rights-protective domestic laws. Thus, the presumptions effectively are reversed.

This is not to argue that each principle that undergirds the current supremacy rule has become invalid. As the above discussion illustrates, however, many of those principles face contemporary challenges, as international law has evolved and factual circumstances have changed in the post-September 11 era.

B. *Modifying Supremacy*

This Section proposes an approach to consent to international agreements that would deem a state’s domestic law internationally relevant when the structural factors described below are present. That is, where—as with consent to the use of force—there is an absence of legislative, public, and judi-

198. Schnably, *supra* note 95, at 436. See generally Nijman & Nollkaemper, *supra* note 6, at 356 (“[T]he moral standards of public international law have become a source of inspiration and aspiration of (national) legal development. The supremacy of international law has given direction to the development of national law, in particular, in human rights issues.”).

199. For example, the Convention against Torture has 153 states parties, the ICCPR has 167, and the Convention on the Rights of the Child has 193. See Status of Treaties: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. TREATY COLLECTION DATABASE, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf>; Status of Treaties: International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION DATABASE, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>; Status of Treaties: Convention on the Rights of the Child, U.N. TREATY COLLECTION DATABASE, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

cial scrutiny and where the affected states do not seem to have balanced the international obligation being developed against their domestic laws, states should decline to apply supremacy automatically. Instead, international law should require states to scrutinize the international arrangement for its consistency with domestic law. As in Part III, this heightened scrutiny would impose a duty on the acting state to inquire about possible tensions between the host state's domestic law and the international arrangement under consideration.

1. *Structural factors*

The existence of procedures and the transparency of state action can help police the line between cases in which the application of supremacy is normatively unappealing and those in which it is non-problematic.²⁰⁰ Often the presence of procedures minimizes states' abilities to ignore domestic laws in the face of competing international agreements. The absence of procedures and transparency, in contrast, makes it easier for states to conclude international agreements that conflict with their own domestic laws. Consent to the use of force embodies several structural characteristics that make it easier for states to use unreconciled consent, increasing the likelihood that the activity to which the host state is consenting on the international plane is in tension with its own domestic laws. When these factors appear in other types of international arrangements, international law should impose the same duty to inquire.

a. *Lack of transparency*

The fact that an arrangement between the acting and host states is unlikely to become public gives states incentives to use unreconciled consent and decreases the costs of doing so.²⁰¹ Even assuming that the governments are acting in good faith, the contexts in which consent to the use of force arises do not currently require those states to compare the international arrangement with the host state's law and consider the import of overriding the latter.²⁰² If the substance of the consensual arrangement were available

200. See Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic*, 47 HARV. INT'L L.J. 327, 348 (2006) (noting that "[s]tates with robust and independent institutions, strong constitutional frameworks, transparent political processes, and embedded systems of checks and balances are least likely to appropriate international law for their own purposes and engage or abuse their newfound power").

201. Mattias Kumm, who has proffered several factors that the international community should consider in evaluating whether to respect an international law or a competing domestic law, argues that the principle of procedural legitimacy should serve as one such factor. See Kumm, *supra* note 77, at 917–18, 924–27. He notes, "[T]he relevant question is whether procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents' concerns." *Id.* at 926.

202. As long as the host state is not itself in an armed conflict, virtually all of its individual rights protections, including its ICCPR-type provisions, will continue to attach to its actions on its territory. Thus, unlike many other areas that are the subject of international negotiation, consent to the use of force

publicly, however, human rights groups and other advocates would evaluate the two bodies of law to determine their consistency and would hold the states accountable for violations of host state law. The likelihood of this happening under the current regime is low, unless the arrangements leak.

Further, only consensual arrangements that take the form of a treaty subject to legislative approval are likely to receive public scrutiny. In areas affecting national security, where many states give their executive branches considerable discretion, there often will be no opportunity for legislators, let alone the public, to provide input on the international arrangement under consideration.²⁰³ In contrast, formalized treaty procedures ensure that different entities within the host state know what international proposal is on the table, and allow them to assess whether and how that proposal would affect its domestic law. Trade treaties serve as an example: they frequently have been criticized for overriding (directly or indirectly) a state party's environmental and labor protections.²⁰⁴ States concluding these treaties may be wielding international consent against domestic law. It is less troubling to do so, however, when those treaties pass through public procedures. When agreements are not subject to those procedures and are not otherwise made available publicly, it is more troubling to deem those agreements valid.²⁰⁵

Another area in which states and scholars have criticized supremacy's role is in U.N. counter-terrorism resolutions.²⁰⁶ U.N. Security Council Resolu-

inherently tends to position the host state to authorize another state to violate important commitments the host state has made to its citizens.

203. MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 594 (2008) (noting that states may increasingly employ executive agreements rather than more formalized treaties and that it often will not be "manifest" that an executive has violated domestic law in concluding such an agreement). In the United States, the Executive must transmit executive agreements to the Senate within 60 days after their entry into force pursuant to the Case Act. The Executive sometimes fails to transmit these agreements in a timely manner and, even after being transmitted, the agreements appear to receive little attention from Congress. See Hathaway, *supra* note 87, at 192–93.

204. See SANDS, *supra* note 6, at 136–37; Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organization*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE, *supra* note 6, at 199, 201 (noting that WTO dispute proceedings consistently have invalidated states' environmental measures); Aaron Cosbey, *The Road to Hell? Investor Protections in NAFTA's Chapter 11*, in INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT 150, 151 (Lyuba Zarsky ed., 2005) (arguing that NAFTA's investor protection regime "has gone from being a protective shield for defending corporations against unfair treatment, to a sword used by those corporations to attack legitimate government regulation in the public interest").

205. See Clark, *supra* note 68, at 1657 (arguing that allowing sole executive agreements to trump existing federal and state law—that is, allowing the President to use international law as a sword against domestic law—would give the President "ready means to circumvent traditional limits on the scope of his constitutional authority").

206. See, e.g., Scheppele, *supra* note 6, at 4 (arguing that the Security Council regime encouraged states to create "new, vague and politically defined crimes, [find] ways around warrant-and-notice requirements before seizing property, launch [] massive new domestic surveillance programs, move [] toward preventive detention and aggressive interrogation, and put up new barriers in the system of international migration"); Nijman & Nollkaemper, *supra* note 6, at 356 ("Considering the faltered state international law is in since 9/11, the normative attraction of dualism has increased: when international norms seem to be violated or misinterpreted more easily and international normative standards are tainted, the state order has to uphold (national) values and norms.").

tion 1373 required all states to criminalize terrorist financing; freeze the funds of those who would commit or facilitate (or have committed) terrorist acts; and take the necessary steps to prohibit terrorists from using their territory to commit terrorist acts.²⁰⁷ Yet even if one views the Resolution as using supremacy to force states to disregard their own domestic laws (including those laws that protect individuals against certain government actions without due process), its provisions have been subject to public criticism and litigation. This transparency, while not a cure-all, renders supremacy less troubling in this context.

b. Lack of substantive balancing

Under international law today, it would not be surprising if an acting state that received and relied on consent as its basis for using force believed that it had no obligation to inquire about, let alone heed, the host state's domestic laws. Thus, the acting state would have no occasion to undertake a substantive balancing—that is, a reconciliation—of the use of force it was planning to undertake with the content of the host state's laws (as well as the values that those laws protect).²⁰⁸ We might think that international law should be most interested in enforcing bargains between states that not only create joint gains for the negotiating states, but also respect the interests of third parties who do not participate in that bargain.²⁰⁹ Bargains that fail to take into account the interests of individuals who derive protection from the host state's laws warrant a more skeptical eye. While the host state is best placed to undertake that substantive balancing, its incentives to do so are diminished in these types of situations.²¹⁰

c. Lack of judicial review

The knowledge that a court might subsequently sit in judgment on an international agreement provides another set of incentives to ensure that the consent at issue does not exceed the host state's authorities.²¹¹ However, very few international arrangements that implicate national security are justicia-

207. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

208. See generally Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149, 1173 (2008) (advocating for a legal pluralist approach in the face of competing international and domestic laws, and arguing that procedural mechanisms and practices for managing this overlap should encourage decision makers to wrestle explicitly with questions of normative difference).

209. See generally Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 14 (1988) (discussing reasons to uphold bargains).

210. See *supra* Part III.C. Even states committed to the rule of law may have potent incentives to preserve intelligence relationships with other countries, leading them to seek to evade domestic limitations. See, e.g., Sepper, *supra* note 174, at 173 (stating, in context of German and Norwegian actions, "Network partners have also colluded to avoid statutory restraints on domestic activity. Statutes prohibiting eavesdropping on citizens or residents without a warrant, or creating a barrier between intelligence and law enforcement, have been circumvented.").

211. See generally Jacob Cogan, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1013, 1015 (2009) ("There is no doubt that controls are crucial to any system which recognizes limitations on authority. . . . Without

ble in domestic or international tribunals.²¹² For example, Canada's courts have declined to consider issues that implicate the use of signals intelligence, particularly where the Canadian government has made reference to Canada's international obligations.²¹³ This lack of potential judicial review strips away another possible incentive for the affected states to try to remain faithful to the host state's domestic law when negotiating an international agreement.

2. *Agreements covered by the proposal*

It is possible to identify types of arrangements that almost always would—or almost never would—trigger this heightened scrutiny. Arrangements that presumptively meet most or all of the factors just discussed are arrangements implicating intelligence, national security, military, or law enforcement concerns.²¹⁴ These include bilateral agreements governing law enforcement cooperation in one state's territory; mutual defense pacts; military transit agreements (which allow one state to transport military personnel and equipment through another state); status of forces and base access agreements; intelligence cooperation (including intelligence collection)²¹⁵; maritime boarding agreements; and arrangements to conduct renditions to justice. Each of these arrangements is likely to implicate core sovereignty and individual rights provisions in the host state's constitution and laws. In contrast, bilateral agreements such as those related to private international law; consular or diplomatic relations; or mutual legal assistance would almost never implicate any of the three factors listed above.²¹⁶

In some cases, it will be difficult to draw lines, particularly because some types of agreements—even those that clearly raise supremacy concerns—will reveal the presence of some but not all of these structural factors. In

[controls], actors entrusted by a system with discrete authority, aware that nothing stands in their way, may act *ultra vires*, regardless of the nature of the authority so entrusted.”)

212. Not only may an affected individual lack a cause of action for the harm suffered, but courts have employed various prudential doctrines to avoid adjudicating cases that fall squarely in the realm of national security. These include the political question, act of state, and state secrets doctrines.

213. Martin Rudner, *Canada's Communications Security Establishment from Cold War to Globalization*, in *SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND* 97, 123–24 (Matthew M. Aid & Cees Wiebes eds., 2001).

214. Research has shown, for instance, that law enforcement agents working overseas “are less guided by judicial control and political supervision and more likely to do whatever tasks they see fit given the circumstances. Police abroad may as such be less guided by concerns related to civil rights and democratic procedure.” Mathieu Deflem & Amanda Swygart, *Comparative Criminal Justice*, in *HANDBOOK OF CRIMINAL JUSTICE ADMINISTRATION* 59 (Toni DuPont-Morales et al. eds., 2001).

215. See Sepper, *supra* note 174, at 157–58 (describing formalized intelligence-sharing agreement among the United States, Canada, United Kingdom, Australia, and New Zealand and an ASEAN anti-terrorism agreement that commits its members to share intelligence and increase police cooperation).

216. Kumm, *supra* note 77, at 912 (describing treaties that regulate diplomatic and consular relations, mail delivery, and aviation as relatively easy to justify as legitimate: “Given the consent requirement, all that is necessary to ensure constitutional legitimacy is to establish a constitutional framework that ensures that whoever is authorized constitutionally to give that consent is subjected to adequate democratic controls domestically.”).

early trade treaties, for instance, states sought to avoid public scrutiny by operating under treaties that they never formalized.²¹⁷ Those treaties were therefore non-transparent and lacked parliamentary and public input. However, if negotiators intentionally balanced the international and domestic constitutional values at issue and the treaties contemplated judicial review, these treaties look less like a pure case of unreconciled consent. This Article focuses only on the most troubling cases, and leaves for another day arguments about whether to modify supremacy in intermediate cases.

For similar reasons, it is most realistic to apply this approach predominantly to bilateral arrangements. As a matter of principle, there is no clear reason to insist on a duty to inquire for an agreement between two states and not an agreement among four states (or one hundred states). However, the duty to inquire will become increasingly difficult to implement as the number of treaty parties increases. Further, it is hard to envision a treaty with a large number of parties that would implicate the three factors in Section B.1. Therefore, this Section's proposed approach focuses on cases to which it may be applied easily, leaving open its potential application to a larger set of cases in the future.

Additionally, this approach would not apply to U.N. Security Council Resolutions. Notwithstanding some recent Resolutions that raise serious supremacy concerns,²¹⁸ the U.N. Charter is (along with Security Council Resolutions) qualitatively distinct from other international legal obligations. The Charter stands at the top of the treaty hierarchy, taking precedence even over later-in-time treaties.²¹⁹ It specifically requires states to execute the decisions of the Security Council.²²⁰ As a practical matter, it is hard to see how the Security Council could continue to operate if the Council had a duty to inquire about the content of each U.N. Member State's constitution whenever it contemplated passing a Chapter VII Resolution.²²¹

217. SANDS, *supra* note 6, at 100 (noting that because the General Agreement on Tariffs and Trade only ever applied on a "temporary" basis, "national legislatures rarely debated it or acted on it, and it was rarely subject to public scrutiny or accountability").

218. S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008) (requiring all Member States to freeze funds and other financial assets of designated individuals and entities, without making allowance for due process protections that may be required by a Member State's domestic law); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (same).

219. U.N. Charter art. 103.

220. *Id.* art. 25.

221. Nevertheless, the ongoing debate within the Security Council about the level of process that is due to individuals who are subject to Council sanctions illustrates the tensions that may arise between Security Council Resolutions and states' domestic legal requirements. The European Court of Justice's decision in the *Kadi* case illustrates that even in the Security Council context, there are clear advantages to being aware of U.N. member states' constitutional requirements in developing the text of Resolutions. *Joined Cases C-402 & C-415/05 P, Kadi v. Council & Al Barakaat Int'l Found. v. Council*, 2008 E.C.R. 299, ¶¶ 348–49, 352, 369–71 (holding that the European regulation implementing the Security Council Resolution violated the appellants' rights under E.U. law to defense, an effective legal remedy, effective judicial protection, and property).

3. Implications

If developed as an international norm over time through consistent state practice (or if adopted as a modification to VCLT Article 46), the proposed approach would require all states to treat an international arrangement as void (and be prepared to condemn it) if the acting state has failed to inquire about the host state's laws and it later becomes clear that their international arrangement violates those laws.²²² Where the acting state undertakes its duty to inquire and learns that the international arrangement under consideration would conflict with the host state's laws, the two states may conclude the international arrangement as long as the host state clarifies how it will bring its laws into compliance with the new international rule. Although this Article is premised on the value of a state's domestic laws, this approach should not preclude the host state from determining that it wishes to change its domestic law to reflect the content of an international arrangement, as long as it does so openly and in a manner consistent with its legislative processes.²²³ International law benefits when states have incentives to discuss more explicitly their domestic laws—and how their laws would need to change under the international agreement—before adhering to treaties.²²⁴ In many cases, this examination happens now only *ex post*, when human rights treaty bodies or bodies implementing law enforcement treaties such as the U.N. Corruption Convention request information from states parties about whether and how they have brought their domestic laws into line with their international obligations.

To see how this would work in practice, consider a recent case of consent that involves military assets but does not contemplate the use of force. News

222. See *supra* Part III.C. Cf. André Nollkaemper, *Rethinking the Supremacy of International Law*, ZOR 65, 82 (2010), available at <http://www.springerlink.com/content/e70032u04587h2v3/> (contemplating a proposal to amend VCLT Article 27 to allow a state to invoke its domestic law to trump an international obligation when that domestic law is an internal rule of fundamental importance and reflects international obligations to protect fundamental rights). Although this approach would have a very limited formal enforcement mechanism, others have pointed out that informal control mechanisms can serve as real constraints as well. See Cogan, *supra* note 211, at 1016 (noting that “at both international and domestic levels, public opinion, articulated by NGOs, the media, and other states, serves as a non-electoral method of control”).

223. Legislatures have a role to play in reducing the number of situations in which executives attempt to rely on unreconciled consent. Where constitutionally permitted, legislatures (of both the acting and host states)—which generally hold the power of the purse—should insist on oversight over activities that fall on the “problematic” end of the spectrum. This could include holding public or closed hearings on the activities at issue, preferably before but after the fact if necessary, with a focus on the domestic law of the consenting state.

224. The United States and United Kingdom rarely ratify treaties without first enacting any necessary implementing legislation. See Martin Eaton, *Enacting Treaties*, 26 STATUTE L. REV. 13, 13 (2005) (“UK practice is always to make any necessary changes in domestic law in order to give effect to the terms of a treaty before ratifying or otherwise becoming a party to it.”); Anthony Aust, *United Kingdom*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT* 476, 477–79 (David Sloss ed., 2009) (noting that the United Kingdom will not ratify a treaty until Parliament enacts any legislation needed to enforce it); Goldsmith & Bradley, *supra* note 75, at 460 (describing steps the United States takes to avoid consenting to international obligations that it is unable to obey).

reports recently revealed that the United States secretly is operating un-armed drones over Mexican airspace with the consent of the government of Mexico.²²⁵ This use of drones likely violates Mexico's constitution and laws, which prohibit foreign military and law enforcement officials from operating in Mexico and require Senate approval before foreign forces may enter Mexican territory.²²⁶ In this case, the activity to which Mexico consented clashes with Mexico's domestic laws. Even though the international arrangement does not appear to contemplate the use of force by the United States, the arrangement is one that international law should seek to cabin by imposing a duty to inquire. Assuming that the United States determined, based on discussions with the government of Mexico, that the proposed cooperation would violate Mexico's laws, it either should have declined to operate the drones or should have worked with Mexico to find a way to bring the activity into line with Mexican legal requirements.

This proposal would alter the current VCLT and customary law approaches in two ways. First, it would expand the types of domestic law violations with which VCLT Article 46 is concerned to include violations of substantive domestic law where the subject matter of the agreement at issue implicates the three factors listed above. Second, it would impose on the acting state a new procedural requirement (a duty to inquire) before concluding the consensual arrangement. With this requirement in place, an acting state then would apply the VCLT's "manifest violation" standard against the information obtained from its inquiry, assessing whether the activity to which the host state consented would manifestly violate its domestic law. If it would not, then the acting state could rely on the host state's consent in concluding the international arrangement, and the host state could not later invoke its domestic law to invalidate that arrangement.

This approach is consistent with the logic behind the VCLT. The VCLT recognizes that where the organ of a state that purports to consent to a treaty has done so in violation of a notorious domestic law provision, the "consenting" state may invoke that provision to invalidate the treaty. Thus, where the acting state is aware of the underlying problem embedded in a host state's consent, international law is willing to make an exception to the supremacy assumption.²²⁷ The approach proposed here would make it far

225. Ginger Thompson & Mark Mazetti, *U.S. Drones Fight Mexican Drug Trade*, N.Y. TIMES, Mar. 15, 2011, at A1, available at <http://www.nytimes.com/2011/03/16/world/americas/16drug.html>.

226. *Id.*; Ackerman, *supra* note 79 ("Mexican law explicitly prohibits foreign agents from carrying weapons or being directly in charge of wiretaps or criminal investigations on Mexican territory. The Mexican constitution also requires the president to gain approval of its senate before allowing foreign military operations in domestic airspace. The general outcry in Mexico against these actions is therefore not a result of backward 'nationalistic elements in the political elite,' as one expert has claimed, but a healthy defense of fundamental constitutional principles.").

227. 1966 Draft Article on the Law of Treaties, Commentary to art. 43, ¶ 5 ("As the basic principle [according to this group] is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be

more likely that the acting state would be aware of those underlying problems before entering an international agreement.

CONCLUSION

This Article identified an important but ambiguous area of international law in which the international community should reconsider whether to accept supremacy unconditionally. That area involves the consent by a host state to another state's use of force in the host state's territory. In this context, prioritizing consent as an international agreement without regard to the host state's domestic law allows affected states to obfuscate both the international basis for the use of force and potential conflicts between the acts consented to and substantive limitations in the host state's laws. This produces a normatively undesirable outcome for the rule of law, one that Part III's proposal addressed. Part IV illustrated why, if the approach in Part III is appealing, we should reconsider in a broader way how international law currently approaches supremacy. Part IV offered a way for the international community to begin to differentiate between acceptable and problematic uses of supremacy.

Although the Article's focus has been on consent and supremacy, the discussion suggests a larger lesson about the role of domestic law in combating international terrorism in a manner that the international community views as legitimate. Specifically, domestic law offers an indirect way to enforce international law (which, by many accounts, came under serious challenge during the Bush Administration's "War on Terror").²²⁸ Most of the focus in the literature has been on U.S. laws, U.S. interpretations of international law (including human rights law and the laws of armed conflict), and legal black holes. There has been less focus, at least in a systematic way, on the domestic laws operating in the states where much of the controversial activity happened. Yet Guantanamo was the only truly "law-free" zone.²²⁹ The rest of the U.S. government's counter-terrorism activity has taken place in the United States or in the territory of other states. Reexamining the story with an eye toward the relevance of the host states' domestic law suggests ways that the international community can pressure acting states to refrain from undertaking certain problematic acts in the future.²³⁰

able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.").

228. See, e.g., SANDS, *supra* note 6, at 144–50, 161.

229. Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES, Sept. 25, 2008, at MM50, available at <http://www.nytimes.com/2008/09/28/magazine/28law-t.html> ("Using the law itself, the lawyers in the Bush administration set out to make Guantánamo into a legal vacuum.").

230. For an extensive criticism of those practices, see Special Rapporteur on the Promotion & Protection of Human Rights While Countering Terrorism, et al., *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, Hum. Rts. Council, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010) (by Martin Scheinin, et al.).

At the same time, the approach proposed in Parts III and IV illustrates how states may use rules of international law to hold each other accountable for compliance with domestic laws. It is possible to structure international law so that a state seeking to derive a particular benefit from an international agreement (assistance in fighting an internal armed conflict, say) may only do so by illustrating its compliance with its own domestic laws. In situations involving non-public activity, where there is very limited opportunity for public and legislative oversight, other states may serve as the most feasible stand-ins to enforce basic rule of law values.

Supremacy's formalism has reached a point where it has begun to facilitate a state's violations of its own domestic law. This Article tries to create escape hatches from that formalism.²³¹ Ultimately, the hope is that these exceptions will strengthen international law by preserving its actual and moral integrity.²³² Though revisiting supremacy may be seen as challenging the foundation of international law, an increased emphasis *ex ante* on whether and how states will implement their international commitments in their domestic law should ultimately result in increased compliance with international law. Further, an international law that concerns itself with democratic governance—and with securing major improvements in states' domestic protections of its citizens—should care about the problem of host state consent to violations of its law. It is to international law's advantage to advance states' commitments to their own domestic laws: a state that follows a rule of law tradition with regard to its domestic laws is more likely to follow that tradition with regard to its international law obligations.²³³

231. International law's formal approach to state sovereignty and the primacy of state consent arguably is softening in other areas. The growing recognition by the international community of a "responsibility to protect" populations from genocide, war crimes, and crimes against humanity is one example. See High-Level Panel on Threats, Challenges and Change, *supra* note 194, ¶ 203. Another example is the Rome Statute creating the International Criminal Court, which envisions that the Court may prosecute certain state actors without the consent of their state of nationality. Rome Statute of the International Criminal Court arts. 12-13, July 17, 1998, U.N. Doc. A/CONF.183/9.

232. David Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 AUSTL. Y.B. INT'L L. 105, 107 (1999) (noting that history contains ample instances where people have turned to international law "as a source of standards of fairness and humanity to supplement local traditions which may be tainted with bias, discrimination or faction").

233. See Richard A. Falk, *CIA Covert Action and International Law*, 12 SOC'Y 39, 43 (1975) ("Implicit in domestic arguments against secret foreign operations is the impossibility of insulating a constitutional order at home from what is done abroad. . . . It is neither possible nor desirable to separate foreign affairs from domestic society regarding the rule of law.").