

Plugging a Leak: A Preliminary Step in Establishing a Nuanced Approach to Govern Intervention in the New Age

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“Plugging a Leak”: A Preliminary Step in Establishing a Nuanced Approach to Govern Intervention in the New Age

Justin M. Ndichu†

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Introduction

On October 16, 2011, Kenya launched Operation Linda Nchi¹ and dispatched some two thousand troops into Somalia.² Kenya later told the United Nations Security Council that it was defending itself against increased incursions and terrorist activity by the militant group Al Shabaab.³ These attacks were not a recent phenomenon, however, and for several years prior to the invasion, Al Shabaab militants ran cross-border raids and piracy operations along the northeastern border region of Kenya and Somalia.⁴ In fact, Kenya has struggled with cross-border criminal activity since the collapse of the State of Somalia over two decades ago, but

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1. “Linda Nchi” is a Swahili phrase meaning “protect the country.”

2. Daniel Branch, *Why Kenya Invaded Somalia*, FOREIGN AFF. (Nov. 15, 2011), <http://www.foreignaffairs.com/articles/136670/daniel-branch/why-kenya-invaded-somalia>.

3. Daley J. Birkett, *The Legality of the 2011 Kenyan Invasion of Somalia and its Implications for the Jus Ad Bellum*, 18 J. CONFLICT & SEC. L. 427, 427 (2013).

4. Branch, *supra* note 2.

had never taken such robust international action.⁵

Despite the uncertainty over what motivated Kenya's military intervention into Somalia in the first place—be it a legitimate concern for national security or internal politics—many scholars argue that the invasion was legal under international law.⁶ The self-defense rationale has been unofficially accepted as offering legal coverage for Kenya's actions, and likely explains why the International Criminal Court (ICC) has not reprimanded Kenya for its actions.⁷

While there may be some questions about the proportionality of Kenya's response, few disagree that a victim state has a right to self-defense stemming from attacks committed by non-state actors such as Al Shabaab.⁸ What is less known about this international incident is that the Somali government consented to Kenya's military intervention for the purposes of neutralizing Al Shabaab.⁹ Assuming *arguendo* that the self-defense rationale was not justifiable in this instance—a position that this Note does not take—what impact could the Somali government's consent to the intervention have had on the legality of the Kenyan government's actions? Can a government that is barely in control of its country offer valid consent to international intervention? Additionally, how should the voice of that nation be treated in an international forum and what impact should that government's decision have? These questions are not limited to the Kenya-Somalia context. In fact, they apply to a variety of international disputes, even those stemming from internal conflicts within one nation.

On center stage today is an ongoing crisis in Syria and other middle-eastern countries. The respective control that Iraq and Syria have over their territories has become increasingly questionable with the growing dominance of the Islamic State of Iraq and Syria (ISIS).¹⁰ This reduction in control is important because it could put the legality of United States drone strikes in the region into question. Consent of the Iraqi government casts away most doubt regarding the legitimacy of U.S. interventionist actions.¹¹ Commentators on the Syrian crisis point out this difference as a primary

5. Birkett, *supra* note 3.

6. See, e.g., *id.* at 444-45. But see Mark Kersten, Opinion, *Chasing al-Shabaab: Is Kenya 'Right to Intervene' in Somalia?*, JUSTICE IN CONFLICT (Oct. 31, 2011), <http://justiceinconflict.org/2011/10/31/chasing-al-shabaab-is-kenya-right-to-intervene-in-somalia/> (contending that Kenya's invasion of Somalia may have contravened international law because it was disproportionate to Al Shabaab's criminal activity in Kenya).

7. See S.C. Res. 2036, ¶ 2, U.N. Doc. S/RES/2036 (Feb. 22, 2012) (incorporating Kenyan troops into the African Union Mission in Somalia). See generally Birkett, *supra* note 3.

8. Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 17 (2013).

9. *Can Kenya's invasion of Somalia be justified?*, MERCATORNET (Oct. 26, 2011), http://www.mercatornet.com/articles/view/can_kenyas_invasion_of_somalia_be_justified.

10. See Helene Cooper et al., *U.S. Launches New Airstrikes on ISIS to Protect Dam in Iraq*, N.Y. TIMES (Sept. 7, 2014), <http://www.nytimes.com/2014/09/08/world/middleeast/iraq.html>.

11. See Ranj Alaaldin & Bilal Khan, *Airstrikes on Isis targets in Syria and Iraq are legal under international law*, LONDON SCH. ECON. & POL. SCI. BLOG (Oct. 1, 2014), <http://>

reason to question the legality of the drone strikes targeting ISIS within Syria.¹² Without consent, the legality of the strikes would largely depend on the availability of the “responsibility to protect” doctrine developed by the United Nations in the context of genocide,¹³ which the U.N. later expanded to apply to protection against war crimes, crimes against humanity, and ethnic cleansing.¹⁴ Without delving too deep into whether this rationale would support U.S. drone strikes, it is worth noting that the responsibility to protect doctrine was envisioned to sanction intervention only as a last resort, and as part of a collective-action response to the aforementioned crises.¹⁵ It is not clear whether this particular line of U.S. action is part of a collective-action effort, and it certainly would not be supported by a self-defense rationale given that Syria did not attack the United States. Therefore, a good amount of its legitimacy arguably comes from consent. This Note does not seek to resolve the specific dilemma of the legality of the usage of drone strikes, but rather seeks to answer the broader questions raised above surrounding consent and the use of force in an abstract context.

In answering these questions, this Note will challenge the sufficiency of the current international provisions and legal rules governing use of force in the international context. Self-defense (which encompasses collective self-defense and has a textual underpinning in Article 51 of the U.N. Charter),¹⁶ consent, and the responsibility to protect are the prominent legal doctrines in this area.¹⁷ This Note argues that Article 51, as written, is insufficient to offer a legal basis for the kind of intervention that is becoming necessary to promote peace in certain parts of the world. The responsibility to protect doctrine, as written, likely does not apply to a variety of contemporary crises, and would largely be unavailable as a source of legitimacy for certain interventionist actions. Furthermore, this Note will

/blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/.

12. *Id.*

13. *Responsibility to Protect*, U.N. OFFICE OF THE SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Feb. 11, 2016).

14. The responsibility to protect doctrine has three pillars:

1. A state has a responsibility to protect its population from genocide, war crimes, crimes against humanity, and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist the state to fulfill its primary responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian, and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the U.N. Charter. Military intervention is considered the last resort.

See *Background Information on the Responsibility to Protect*, OUTREACH PROGRAMME ON THE RWANDA GENOCIDE AND THE U.N., <http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml> (last visited Feb. 11, 2016).

15. See *id.*

16. U.N. Charter art. 51.

17. Deeks, *supra* note 8, at 15.

take the position that the doctrine of consent needs a more structured approach. Its applicability has enormous breadth, yet the doctrine has no textual underpinning, and operates in a malleable manner with several undefined contours. This malleability results in inconsistent and illogical application of the doctrine, which creates international law quagmires in this new age of intervention.

Part I of this Note will provide background into this area of law, mapping out the relevant doctrines and highlighting their general modes of operation. Part II will describe contemporary case examples, including the Kenyan military intervention into Somalia, and U.S. intervention in Syria and Iraq with respect to the actions by ISIS. These case examples raise difficult use of force questions—especially with regard to consent—that are often glossed over for political or pragmatic reasons. Part III will explore how the unstructured consent doctrine operates in these case examples and variations thereof. Although consent may have played only a small role in some of the specific incidents themselves, this Note will fully explore the doctrine's contours by examining hypotheticals in which consent was the central factor. Part IV will propose a more structured consent doctrine, premised on two principals from private U.S. law that could be useful in creating a nuanced approach to this area of international law. Rather than offering a definitive solution, this Note's ultimate goal is to insist that the question surrounding the efficacy of consent be asked rather than presumed.

I. Background on the Use of Force and Intervention

Many academics in international law assert “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.”¹⁸ The first two bases for the use of force have a textual underpinning in the U.N. Charter.¹⁹ The Charter was signed on June 26, 1945, and came into force on October 24, 1945, binding the fifty countries represented therein to all of the articles contained in the Charter after World War II.²⁰ Subsequently, several more countries signed the Charter to become member states of the United Nations; today 193 countries are represented.²¹

Article 51 of the Charter provides the governing international legal provision on self-defense and U.N. Security Council-sanctioned use of

18. *Id.*

19. See U.N. Charter art. 51.

20. *Introductory Note*, UNITED NATIONS, <http://www.un.org/en/sections/un-charter/introductory-note/index.html> (last visited Feb. 11, 2016); *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Feb. 11, 2016).

21. See *Charter of the United Nations*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en (last visited Apr. 9, 2016) for a list of current U.N. Charter signatories.

force (sometimes referred to as collective self-defense).²² This provision states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defen[s]e shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.²³

The Member States have not amended Article 51 of the Charter since its promulgation in 1945, and it therefore remains—as originally written—the controlling law with regard to self-defense in the international arena. This provision was traditionally interpreted to govern situations that involved self-defense with regard to “armed attacks” by other states, rather than private actors, despite the fact that nothing in the language specifically limited “armed attacks” to “state armed attacks.”²⁴ This original interpretation was quickly questioned in the wake of the 9/11 attacks and the growth of terrorism in the new era.²⁵ It subsequently became generally accepted that the inherent right of self-defense extended to private attacks by parties operating overtly out of a particular state, even though there was no government involvement *per se*.²⁶

Recently, scholars have reinterpreted Article 51 of the Charter to determine how it should apply to the rogue acts of private factions not sanctioned by any state or government.²⁷ It is not entirely clear, however, how or whether this provision can be applied absent Security Council participation. This obscurity is distinctly robust in situations where the government of a particular state in an internal crisis seeks outside assistance in the form of intervention to create stability.

Consent also plays a huge role in the use of force spectrum—as it does generally in international law.²⁸ In fact, some scholars argue that even when the Security Council sanctions a military intervention in one of the Member States, consent is technically the controlling factor because the consent of that state has already been acquired through that state’s prior accession to the Charter.²⁹ It is clear that consent has a much broader scope than Article 51 of the Charter. “By virtue of consent’s power, a state must comply with its treaty obligations even where the provisions of that

22. U.N. Charter art. 51.

23. *Id.*

24. Tom Ruys, *Attacks by Private Actors and the Right of Self Defence*, 10 J. CONFLICT & SECURITY L. 289, 291 (2005).

25. *See id.* at 299.

26. *See id.*

27. *Id.*

28. *See, e.g.,* Deeks, *supra* note 8, at 8-11.

29. *Id.* at 9.

treaty contradict its domestic laws.”³⁰ This compliance attaches to simple bilateral agreements as well; a state cannot assert that its consent was *ultra vires* in order to escape its obligations.³¹ Therefore, if a state received consent to intervene and used force in another state, technically, the intervening state could invoke consent as a defense to any violation of international law claims.³²

Scholars currently disagree over the role of consent in contemporary use-of-force contexts, including force against non-state terrorist groups and consent to intervention in an attempt to combat intervention by another state. An example of the latter situation would be whether and how Ukraine could consent to use of force by a third party in order to assist with the ejection of Russia within its borders.³³ Some scholars suggest that consent can stand alone as an independent basis for the use of force in another state.³⁴ Other scholars suggest that consent has a role to play in the calculus, but in and of itself, cannot serve as an independent basis for the use of force in another state.³⁵ Yet other scholars think of consent as a mechanism to address sovereignty concerns and argue that there must be an existing affirmative right of intervention like self-defense, such that consent simply plays a supplementary role in paying consideration to that nation’s sovereignty.³⁶ At the other extreme, some scholars take the position that consent is not a valid basis for international use of force in particular circumstances.³⁷

With such a wide array of varying perspectives, it is easy to see how states struggle with the application of consent in the area of international use of force.³⁸ This Note will add another dimension to the calculus.

30. *Id.* at 10.

31. *Id.*

32. *Id.*

33. *Id.* at 17. See Shaun Walker, *As Russia enters war in Syria, conflict in Ukraine begins to wind down*, THE GUARDIAN (Oct. 1, 2015), <http://www.theguardian.com/world/2015/oct/01/as-russia-enters-war-in-syria-conflict-in-ukraine-begins-to-wind-down>.

34. See, e.g., 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).

35. See, e.g., Monika Hlavkova, Meeting Summary, *International Law and the Use of Drones*, Summary of the International Law Discussion Group meeting held at Chatham House, SCRIBD (Oct. 21, 2010), <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-defen[s]e 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.”).

36. See, e.g., Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SECURITY J. 145, 164 (2010).

37. 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).

38. Deeks, *supra* note 8, at 16.

Rather than assume that consent is voluntary and valid in certain international contexts, this Note posits that the thinking surrounding consent has been two-dimensional. There could be situations where international law should not recognize consent because certain governments lack the legal capacity to provide consent, or their consent cannot be deemed valid or representative of the state’s wishes. In those situations, a more principled and structured doctrine needs to be developed to fill a gap which is present in several contemporary international conflicts.

The “responsibility to protect” doctrine also rears its head in this arena. The doctrine emerged in the 1990s as the international community’s response to the atrocities in Rwanda, Bosnia, and Kosovo.³⁹ The responsibility to protect doctrine was borne out of a need for effective intervention in regions without the capability to protect their own citizens.⁴⁰ Its goal was to create the political will to intervene in such circumstances and overcome the paralyzing impact of the veto power exercised by the permanent members of the Security Council.⁴¹ At first glance, this doctrine seems to be at odds with the principle of non-intervention that lies at the heart of the principle of sovereignty.⁴² The United Nations, however, envisioned that if a state fails to protect its people from genocide, war crimes, crimes against humanity, or ethnic cleansing, the principle of non-intervention should yield to the responsibility to protect, and the international community has a responsibility to respond through collective action.⁴³ By declaring a responsibility—rather than a right to protect—the U.N. altered the landscape of intervention because the former act of balancing the benefits of intercession against infringement of sovereignty was a calculus that need not have been pursued endlessly in severe international incidents.⁴⁴

The International Commission on Intervention and State Sovereignty (ICISS) articulated three main duties with respect to the responsibility to protect doctrine:

- 1) Prevent both the root causes and direct causes of internal conflict putting populations at risk;
- 2) If these causes cannot be prevented, a responsibility to protect is triggered; and
- 3) After successful intervention because of the responsibility to protect, a responsibility to rebuild is triggered, which entails giving the necessary

39. Rwanda brought to the frontline the impact of international inaction, as the world passively witnessed the genocidal killings of the Tutsi ethnic group. The incidents in Bosnia and Kosovo showcased the effect of inadequate intervening measures and unilateral interventionist action, creating a need for a more principled and uniform approach from the international community in the face of such crises. Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 *STAN. J. INT’L L.* 319, 321-23 (2010).

40. *Id.* at 323.

41. *Id.*

42. Under traditional international law principles, the canon of non-intervention states that a state shall not intervene in the affairs of another state except when exercising its right to self-defense. See *INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1* (2001) [hereinafter *RESPONSIBILITY TO PROTECT*].

43. Mohamed, *supra* note 39, at 323.

44. *Id.* at 324.

assistance to the victim states to reconstruct, reconcile, and recover.⁴⁵

When this doctrine was conceived, any intervention pursuant to the responsibility to protect doctrine was to be carried out through the U.N.⁴⁶ The report did not specifically assert a right by any Member State of the U.N. to use the protection of human rights in another country as reason for the military intervention in that state's affairs.⁴⁷ This was a sensible limitation because it enabled the doctrine to be consistent with the Charter⁴⁸ and avoided the problem of delegating too much discretionary power to the individual Member States to interpret what circumstances were sufficient to justify intervention. It also discouraged individual Member States from manipulating the doctrine to intervene in another state's affairs for their own benefit. Under this doctrine, the Security Council would oversee any action undertaken, given that it already had the mandate to act effectively and promptly in matters of international peace and security.⁴⁹

The ICISS did not restrict the *modus operandi* of the responsibility to protect doctrine to situations where the Security Council would approve intervening action.⁵⁰ Rather, the ICISS recognized that certain procedural defects often hindered the Security Council—namely the veto power and the stringent voting requirement, which often paralyze the Security Council from being able to take action.⁵¹ Therefore, as a contingency, the ICISS acknowledged certain potentially viable “alternatives”:

- (1) Regional organizations such as the African Union or the European Union could take action, even if action from these organizations would traditionally require express Security Council authorization;
- (2) A role for the General Assembly to meet in an emergency special session when the Security Council was deadlocked in order to act through the Uniting for Peace procedures, even though the General Assembly lacked the authority to act unilaterally.⁵²

These contingencies, however, were not true alternatives. Rather, the ICISS intended them to act more like pressuring mechanisms to leverage the Security Council into taking action, and therefore, still adhere to the prevailing concept that all military intervention must be sanctioned by the

45. *Id.*

46. *Id.* at 325.

47. *Id.*

48. U.N. Charter art. 24, ¶ 1 (“In order to ensure prompt and effective action by the United Nations, its Members 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.”).

49. Mohamed, *supra* note 39, at 325.

50. *Id.*

51. Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 333–34 (2000); Mohamed, *supra* note 39, at 325. In several instances, where the interests of China, Russia, or the United States are implicated, any of those nations can exercise their veto power to foreclose a particular cause of action available to the Security Council.

52. Mohamed, *supra* note 39, at 325. See RESPONSIBILITY TO PROTECT, *supra* note 42, at 53–54.

Security Council.⁵³

In practice this doctrine has not operated within the United Nations as it was first conceived by the ICISS. In fact, when it was adopted at the World Summit in 2005, the original responsibility to protect doctrine was significantly watered down, so much so that many scholars argue that the international community did not intend to adopt it as a binding legal norm.⁵⁴ The United States strongly opposed the original document, and therefore the ratified document—rather than articulating a responsibility or duty to protect—merely articulates an inclination or a willingness by the international community to help alleviate humanitarian crises in states that could not adequately protect their citizens.⁵⁵ These humanitarian crises were limited to genocides, war crimes, ethnic cleansings, and crimes against humanity, rejecting the original document’s broader formulation of “large-scale loss of life.”⁵⁶ Furthermore, the document adopted by the World Summit did not provide contingencies for a situation in which the Security Council was deadlocked or could not act.⁵⁷ Essentially, the international community adopted a “statement of preparedness,” not a “statement of responsibility.”⁵⁸

Therefore, as it stands, and after undergoing enormous debate over whether the doctrine should be strengthened, the doctrine remains practically unaltered—a mere statement of preparedness.⁵⁹ Like Article 51 of the Charter, the centrality of the Security Council in the operation of this doctrine lends much more structure and certainty to its operation. Nevertheless, adopting that structure leads to the difficulties associated with attaining unanimous Security Council approval and the limited set of crises to which the doctrine applies. Its scope, in the grand scheme of things, is rather restricted.

As this overview has illustrated, the operation of consent in the international context is uninhibited by structure or any tangible, demanding rules that could curtail its invocation or its use as a justification for intervention. This Note posits that, in the use of force arena, areas not covered by the self-defense or the responsibility to protect doctrines are necessarily governed by the consent doctrine, which raises a whole slew of questions which are rarely addressed.

53. Mohamed, *supra* note 39, at 335.

54. See Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741, 750 (2006) (arguing that the World Summit approved R2P-lite). See also Carsten Stahn, Notes and Comments, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 110 (2007) (concluding that the Outcome Document leaves considerable doubt concerning whether and to what extent states intended to create a legal norm).

55. Mohamed, *supra* note 39, at 327.

56. *Id.*

57. *Id.* at 329.

58. *Id.*

59. *Id.* at 330. Additionally, this Note expresses no opinion as to whether a mere “statement of preparedness” is preferable to a “statement of responsibility.” The considerations required to evaluate the preferred approach for the responsibility to protect doctrine merit their own in-depth analysis.

II. Case Examples: Controversies Seen Around the World

A. Kenya's Intervention in Somalia

Operation Linda Nchi was the culmination of several years of tension that plagued relations between Somalia and Kenya.⁶⁰ Some argue that the troubled relations stem back to the time of Kenya's independence, when the departing British colonialists and the Kenyan nationalist leaders "rode roughshod over the demands of Kenya's Somali population to be allowed to join with Somalia at independence in 1963."⁶¹ This created a strained relationship between the Kenyan government and Kenyan-Somalis at the time, so much so that a low intensity war between the government and Somali secessionists ensued between 1963 and 1967.⁶² The official reports state that about two thousand insurgents were killed during that conflict; both scholars and commentators, however, suspect that the actual number of deaths was larger.⁶³

At the conclusion of the conflict, the Kenyan government promised to disburse funds for the purpose of developing northern Kenya and aiding with re-settling the population largely affected by the clash.⁶⁴ The government, however, failed to do so, and also failed to provide a legitimate presence in the region, thus leaving the region unstable and prone to skirmishes from across the border.⁶⁵

During the 1980s, Somalia spun into crisis, and cross-border attacks in northern Kenya became increasingly common.⁶⁶ The crisis in Somalia largely stemmed from the pursuits of the Barre regime.⁶⁷ In the late 1970s, the Barre regime of Somalia embarked on a military interventionist mission into Ethiopia in order to conquer the ethnic regions of that state.⁶⁸ This proved to be a fatal error because the new Marxist regime in Ethiopia received support from the Soviet Union and Cuba.⁶⁹ Meanwhile, the Barre regime lost its Soviet support, leaving the Somali National Army underfunded and poorly provided for.⁷⁰ While the government was engrossed in this foreign conflict, military officers from the Majeerteen

60. See Birkett, *supra* note 3.

61. See Daniel Branch, *Kenya and Somalia: Landscape of Tension*, OPEN DEMOCRACY (Oct. 24, 2011), <https://www.opendemocracy.net/daniel-branch/kenya-and-somalia-landscape-of-tension>.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. The "Barre regime" refers to the period in Somalia's history where Mohammed Siad Barre was the leader of the region. He came into power through a coup in October 1961, when he overthrew the democratic leadership to rule Somalia as a dictator. See George James, *Somalia's Overthrown Dictator, Mohammed Siad Barre, Is Dead*, N.Y. TIMES (Jan. 3, 1995), <http://www.nytimes.com/1995/01/03/obituaries/somalia-s-overthrown-dictator-mohammed-siad-barre-is-dead.html>.

68. *Somalia: Atrocities under the Siad Barre Regime*, CTR. FOR JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=287> (last visited Feb. 11, 2016).

69. *Id.*

70. *Id.*

clan attempted a coup d'état within Somalia in 1978.⁷¹ The rebellion spread in the following years, and a group known as the “Somali National Movement” was formed with the goal of overthrowing the Barre regime.⁷²

The violence in Somalia increased throughout the 1980s and 1990s.⁷³ Even after a peace agreement was reached with Ethiopia in 1988, several rebel factions sought to overthrow the Barre regime and gain control of the country.⁷⁴ When Barre was eventually driven out of Mogadishu and into exile, the rival militia leaders began to battle one another for control over the newly declared “Republic of Somaliland.”⁷⁵ This “conflagration spread across Somalia, sparking a dire food crisis and eventually an ill-fated international humanitarian intervention.”⁷⁶ Over twenty years later, Mogadishu still lacks an effective government and largely remains a lawless zone.⁷⁷

In 2004, the Transitional Federal Government (TFG) of Somalia was formed.⁷⁸ The TFG represented the fourteenth attempt to create a functioning government in the region since the end of Barre’s dictatorial rule in 1991.⁷⁹ After its formation—and until 2005—the TFG performed whatever governmental duties it had from Kenya.⁸⁰ The TFG convened Parliament on Somali soil for the first time in February 2006, and in 2007 the President of Somalia set foot in Mogadishu for the first time since his election in 2004.⁸¹ The TFG represented widespread hope for the international community, including neighbor Kenya, that peace would be restored in Somalia and the “failed state” status would finally be shaken off.⁸² By mid-2008, most experts lamented that the TFG was not the salvation the international community had hoped for.⁸³ Experts explained that the TFG was fraught with systemic internal disagreement, and without a clear sense of direction, the fundamentalist Islamic militias that governed different parts of Somalia could not be quelled or subdued.⁸⁴

During the period in which the TFG was largely ineffective, Kenya experienced increased criminal activity within its borders, some of which involved the kidnappings of several westerners.⁸⁵ The Kenyan community

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Stephanie Hanson & Eben Kaplan, *Somalia’s Transitional Government*, COUNCIL ON FOREIGN REL. (May 12, 2008), <http://www.cfr.org/somalia/somalias-transitional-government/p12475>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *See* Jeffrey Gettleman, *Kenya Forces Enter Somalia to Battle Militants*, N.Y. TIMES (Oct. 16, 2011), <http://www.nytimes.com/2011/10/17/world/africa/kenyan-forces-enter-somalia-to-battle-shabab.html>.

largely believed that this was the work of Somali bandits and pirates, who were potentially connected to the Al Shabaab militant group.⁸⁶ Additionally, cross-border skirmishes in northern Kenya increased in frequency, and the Kenyan government became increasingly concerned about its territorial integrity.⁸⁷ Operation Linda Nchi was subsequently launched. Temporally, it was a response to the recent events surrounding the kidnappings across the Kenyan coast, but arguably it was a culminated response to years of tension in the region.⁸⁸

A day after the launch of Linda Nchi, Kenya wrote an informative letter to the Security Council explaining Kenya's military intervention in Somalia and why it was justified.⁸⁹ In the letter, Kenya claimed that its use of force was necessary in view of the heightened security risk caused by increased illegal activities on the Kenya-Somalia border.⁹⁰ The letter elaborated that this had been an ongoing crisis spanning from the collapse of Somalia over the past two decades.⁹¹ The border conflicts had increased in intensity during the thirty-six months prior to the attack, and the diversification into kidnapping of foreign nationals in the coastal regions was the last straw.⁹² Prior to the launch of Linda Nchi, Kenya's security measures were not sufficient to deter Al Shabaab insurgents from continually attacking the border communities, thus Kenya, invoking the right of self-defense, embarked on a mission to disband the Al Shabaab network and neutralize the threats they faced.⁹³

There is really no consensus on the legality of this self-defense invocation. Some commentators argue that the action was justified under traditional self-defense principles, particularly in light of the expansive understanding surrounding self-defense that can be invoked in response to actions by non-state actors acting in a terrorist capacity.⁹⁴ On the other hand, other scholars claim that accepting a self-defense justification would be lowering the threshold of self-defense beyond acceptable limits, and that the sporadic and low-scale attacks by the Al Shabaab militants did not justify the extreme act of military intervention into Somalia.⁹⁵ At this time, neither the U.N. nor the ICC has undertaken any action to reprimand the Kenyan government.⁹⁶ In fact, the Security Council incorporated Kenyan

86. *Id.*

87. See Ken Menkhaus, *Kenya-Somali Conflict Border Analysis*, USAID, 9, 11-12 (Aug. 31, 2005), [http://www.somali-jna.org/downloads/Kenya-Somalia%20Menkhaus%20\(2\).pdf](http://www.somali-jna.org/downloads/Kenya-Somalia%20Menkhaus%20(2).pdf).

88. See Birkett, *supra* note 3.

89. *Id.*

90. *Id.*

91. *Id.*

92. See *id.*; Gettleman, *supra* note 85.

93. See Branch, *supra* note 2.

94. See Birkett, *supra* note 3, at 445; Deeks, *supra* note 8, at 17.

95. See Cristian Claudiu Teodorescu, *Terrorist Organization Al-Shabaab Prospering From the Chaos in the Failed State of Somalia*, 2012 International Conference on Economics Marketing and Management, 28 IPEDR 215, 219 (2012), <http://www.ipedr.com/vol28/41-ICEMM2012-G00014.pdf>.

96. Cf. S.C. Res. 2036, ¶ 2, U.N. Doc. S/RES/2036 (Feb. 22, 2012).

troops into the African Union's peacekeeping mission in Somalia.⁹⁷ This came amidst large-scale support from the regional organization of Kenya's interventionist action.⁹⁸ In addition, the United States also lent its support to the Kenyan mission in Somalia by deploying a drone strike in September 2014, targeting Al Shabaab insurgents.⁹⁹ The legality of this strike has also not garnered much discussion in the international community.

Considering the polarized landscape of opinion regarding the legality of the self-defense invocation, it is surprising that international forums have not thoroughly addressed this issue. One possible factor that perhaps has quelled opposing views on the legality of Kenya's action is the knowledge that Kenya received consent to intervene in Somalia from the TFG.¹⁰⁰ Consent to intervention has traditionally been recognized as enough justification for one state to intervene in the affairs of another, operating somewhat like an international bilateral agreement that binds both parties.¹⁰¹ Consent under these circumstances, however, should have raised different questions rather than foreclosed questions into the legality of Kenya's actions. The TFG's questionable status as the "actual" governing body over Somalia and its people should have raised questions about the standards required for consent to be valid under international law. Part III raises some of these questions, and Part IV seeks to provide a comprehensive and structured response to those questions.

B. Syrian Crisis and U.S. Involvement

The current crisis in Syria originated in early 2011 with peaceful protests that petitioned the government to release detained political prisoners.¹⁰² National security forces in Syria responded to these peaceful protests with brutal violence.¹⁰³ The peaceful protests continued, as did the violence, and Syrian President Bashar al-Assad refused to capitulate to the protesters' demands or halt any of the attacks being carried out by his national security forces.¹⁰⁴ This violence continued throughout much of the summer of 2011, all the while the Syrian president denied any state involvement in the violence, blaming militia groups and terrorist organizations.¹⁰⁵ Towards the end of the summer, the crisis escalated with the

97. *See id.*

98. *See Kenya troops to 'join Somalia's African Union force,'* BBC NEWS AFR. (Dec. 7, 2011), <http://www.bbc.com/news/world-africa-16077642>.

99. *U.S. troops mount attacks on al-Shabaab in Somalia,* THE GUARDIAN (Sept. 2, 2014), <http://www.theguardian.com/world/2014/sep/02/us-attacks-al-shabaab-in-somalia>.

100. *Can Kenya's invasion of Somalia be justified?*, MERCATORNET (Oct. 26, 2011), http://www.mercatornet.com/articles/view/can_kenyas_invasion_of_somalia_be_justified.

101. Deeks, *supra* note 8, at 10.

102. *The Crisis in Syria*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria#UN_responses (last visited Feb. 11, 2016).

103. *Id.*

104. *Id.*

105. *Id.*

emergence of government opposition groups, which included, *inter alia*, the Free Syrian Army and the Syrian National Council.¹⁰⁶ Despite ideological differences among the opposition factions, they were united by their opposition to President al-Assad and his regime, and began violent attempts to overthrow him—including attacks on civilians who were suspected of being supporters of President al-Assad.¹⁰⁷

Syria, like several other countries in the Middle East and North Africa, began to experience extreme unrest stemming from anti-authoritarian protest.¹⁰⁸ The wave of protests in the region was dubbed the “Arab Spring” and various commentators viewed it as the first step in bringing democracy to the region.¹⁰⁹ The response of the international community to the crisis in Syria was quite deliberate, some may even say hesitant.¹¹⁰ The U.N. Human Rights Council established a committee on August 22, 2011, to inquire into the nature of the violence in Syria and the extent of the conflict.¹¹¹ After seven separate reports, the committee concluded that the Syrian government and the Shabiha (a heavily armed state-sponsored militia fighting alongside the national security forces) were responsible for war crimes and crimes against humanity in the region.¹¹²

In February 2012, the United Nations sent former Secretary General Kofi Annan as special envoy to see if a peace resolution could be reached between the government and the opposition groups.¹¹³ The deal failed, however, and the U.N. declared that the crisis in Syria had become a *de facto* civil war.¹¹⁴ In April, the Security Council “authorized the deployment of a U.N. Supervision Mission in Syria (UNSMIS) of 300 unarmed observers to facilitate the peace plan in April 2012”¹¹⁵ In June, however, activities were suspended when “the observers’ presence failed to quell the violence and the mission’s mandate came to an end on 19 August 2012.”¹¹⁶

Polarization within the United Nations led Kofi Annan to resign from his post as special envoy and continued to handcuff operations by the Security Council as Russia and China exercised their veto power to prevent proposed resolutions to alleviate the crisis.¹¹⁷ Without a robust interna-

106. *Id.*

107. *Id.*

108. *The Arab Spring country by country*, THE NAT’L WORLD (June 17, 2011), <http://www.thenational.ae/news/world/middle-east/the-arab-spring-country-by-country>.

109. See Carol J. Williams, *Where the Arab Spring revolutions went wrong*, L.A. TIMES (Oct. 9, 2015), <http://www.latimes.com/world/middleeast/la-fg-arab-spring-recap-hml-20151009-htmlstory.html>.

110. *The Crisis in Syria*, *supra* note 102.

111. *Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. HUM. RTS., <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> (last visited Feb. 11, 2016).

112. See *id.*; *The Crisis in Syria*, *supra* note 102.

113. *The Crisis in Syria*, *supra* note 102.

114. See *Syria in civil war, says UN official Herve Ladsous*, BBC NEWS WORLD (June 12, 2012), <http://www.bbc.com/news/world-middle-east-18417952>.

115. *The Crisis in Syria*, *supra* note 102.

116. *Id.*

117. *Id.*

tional response, the conflict turned into a stalemate.¹¹⁸ On February 22, 2014, the Security Council broke its deadlock and unanimously passed Resolution 2139, which provided that Syria should have access to humanitarian aid.¹¹⁹ The Resolution urged that all parties involved lift sieges, and that bombing and terrorist acts by al-Qaeda-linked organizations cease.¹²⁰ The resolution, however, did not authorize the use of sanctions, probably because Russian and Chinese ties to the region would have led to the exercise of their veto.¹²¹

The involvement of ISIS in Syria is a relatively new development in the crisis.¹²² Prior to 2011, ISIS was primarily involved in Iraqi affairs.¹²³ ISIS later expanded its presence to eastern Syria, where there was large support from several groups opposed to the al-Assad regime, and continues today to increase its prominence in that region.¹²⁴ In fact, some of the groups that emerged in 2011 in opposition of al-Assad’s regime have passed domicile to ISIS to continue the efforts of an overthrow.¹²⁵ The United States has been continually involved in the region through the launch of drone and airstrike attacks against ISIS.¹²⁶ Prominent scholars question the legality of these drone strikes, and some even argue that there may be no legal justification for the United States to attack ISIS.¹²⁷

As noted in the Introduction, this Note seeks to pose a hypothetical on the Syrian crisis to raise questions surrounding the consent doctrine. Suppose that the current Syrian regime—which is hanging onto power in the region by a thread—were to have given consent to the United States to utilize drone strikes against ISIS. Would this be an incontrovertible justification of the legality of the airstrikes? This hypothetical differs from the intervention by Kenya into Somalia because the government in question was undoubtedly in control of Syria, and arguably is still recognizable as the ruling regime. That said, interesting questions remain about its capacity to lend cognizable consent under international law to such intervention.

118. See Max J. Rosenthal, *The Neverending Spring: How Syria’s Revolution Became A Stalemate*, THE WORLD POST (Jan. 21, 2014), http://www.huffingtonpost.com/2014/01/21/syrian-civil-war-arab-spring_n_4550626.html.

119. S.C. Res. 2139, ¶¶ 7, 16, U.N. Doc. S/RES/2139 (Feb. 22, 2014).

120. *Id.* ¶ 14.

121. *The Crisis in Syria*, *supra* note 102.

122. Hussain Abdul-Hussain & Lee Smith, *On the Origins of ISIS: why a terrorist state blossomed in Syria and Iraq?*, THE WEEKLY STANDARD (Sept. 8, 2014), <http://www.weeklystandard.com/on-the-origin-of-isis/article/804002>.

123. *Id.*

124. Liam Stack, *How ISIS expanded its threat*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/interactive/2015/11/14/world/middleeast/isis-expansion.html>.

125. See Rosenthal, *supra* note 118.

126. *U.S. hits ISIS with airstrikes in Syria*, CBS NEWS (Sept. 22, 2014), <http://www.cbsnews.com/news/u-s-launches-first-airstrikes-against-isis-in-syria/>.

127. Michael C. Dorf, *What Is the International Law Justification for Targeting IS/ISIS/ISIL in Syria?*, DORF ON LAW (Sept. 15, 2014), <http://www.dorfonlaw.org/2014/09/what-is-international-law-justification.html>.

III. Consent, Unfettered

Significantly, most scholars and international tribunals view consent as the foundation of international law itself.¹²⁸ Multilateral treaties and conventions, which essentially govern international law on a larger scale, are the product of countries consenting to certain terms that govern their behavior in relation to international action.¹²⁹ For treaty formulation and conventions, the process of creating the documents and ensuring accession to every term is quite robust.¹³⁰ Even the eligibility requirements for who can represent a specific sovereign in treaty negotiations is quite stringent in order to ensure the resulting document's legitimacy and binding effect.¹³¹

With regard to bilateral treaty agreements, the level of formality can vary depending on the nature and subject matter of the agreement. The process is usually straightforward when it comes to two nations either creating or amending a bilateral agreement between themselves.¹³² For instance, the United States has a rigorous process for entering into treaty agreements, particularly those that would have a great impact on its sovereignty or national security.¹³³ Typically, treaty ratification requires not only Presidential assent, but also congressional approval.¹³⁴ Outside the realm of treaties, and increasingly common, are executive agreements entered into by the President without Congressional approval.¹³⁵ These agreements tend to be limited to matters that do not seriously affect national sovereignty.¹³⁶ Importantly, these agreements often become applicable law domestically, even though there was no congressional approval.¹³⁷ It is quite evident from the existence of such executive agreements that consent can have a huge impact on a country's obligations.

In some situations, however, the uninhibited power of consent is curbed. For example, the process of amending a bilateral agreement between two parties of a larger multilateral treaty can be rather tricky. Two parties to a multilateral agreement can only alter their responsibilities to each other when doing so would not affect the rights of other parties to the

128. See Deeks, *supra* note 8, at 9.

129. *Id.*

130. See Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155, 164 (2007) (discussing the transactional costs of treaty formulation); *U.S. Treaties & Agreements—The Process*, INT'L LEGAL RES. TUTORIAL, https://law.duke.edu/ilrt/treaties_3.htm (last visited Apr. 9, 2016).

131. See, e.g., John Love, Note, *On the Record: Why the Senate Should Have Access To Treaty Negotiating Documents*, 113 COLUM. L. REV. 483, 486-90 (2013).

132. See Deeks, *supra* note 8, at 9.

133. See U.S. CONST. art II, § 2.

134. *Id.*

135. See *The Constitution—Executive Agreements*, ENCYCLOPEDIA OF THE NEW AM. NATION, <http://www.americanforeignrelations.com/A-D/The-Constitution-Executive-agreements.html> (last visited Feb. 11, 2016).

136. See Damian Paletta, *Treaties vs. Executive Agreements: When Does Congress Get a Vote?*, WALL ST. J.: BLOG (Mar. 10, 2015, 8:28 AM), <http://blogs.wsj.com/washwire/2015/03/10/treaties-vs-executive-agreements-when-does-congress-get-a-vote/>.

137. This point is significant because the U.S. Constitution specifically identifies the role of Congress in enacting law, particularly through the Bicameral Requirement. See U.S. CONST. art. I, § 7.

agreement.¹³⁸ If the rights of other parties are affected, when those parties were neither aware of the new agreement nor consented to it, their individual sovereignty will be contravened contrary to international law.

A. Problems Surrounding Consent with Respect to a Failed State

Generally, a failed state is one considered to have a government that cannot provide “the most fundamental services that make up the state’s obligations in its contract with society.”¹³⁹ While several scholars disagree on how to prevent state failure, many agree that state failure is often caused by severe economic depression, civil war, extreme governmental corruption, or a combination of those and other factors.¹⁴⁰ The governments, if they exist, are unable to “project power within their own borders.”¹⁴¹ Of course, the manifestation of failed states varies depending on the particular country’s circumstances. But paradigmatically, the government of a failed state is unable to provide physical security, basic healthcare, education, transportation, communication, and monetary infrastructure.¹⁴²

Customarily, state failure was only considered a humanitarian problem.¹⁴³ The populations of failed states are often at incredible personal risk due to the lack of physical security, food security, and poverty that results from their government’s shortcomings.¹⁴⁴ Contemporaneously, the problem of state failure is also viewed as one that exacerbates the age of terrorism.¹⁴⁵ The governments of failed states are powerless to prevent terrorists from operating within their borders.¹⁴⁶ Additionally, terrorist groups often thrive in failed states because they can easily access the monetary resources required to operate by engaging in criminal activity such as diamond smuggling or drug trafficking.¹⁴⁷ And if that were not enough, terrorist groups find it easy to recruit persons who are desperate to escape poverty.¹⁴⁸ Finally, failed states offer terrorist groups the cover of sovereignty: they can take refuge within the borders of a failed state—which is at least in principle a sovereign nation—and avoid capture because targeted nations will be hesitant to invade the borders of a sovereign.¹⁴⁹

Somalia is a paradigmatic example of a failed state.¹⁵⁰ The TFG of Somalia exerts little authority over much of the nation’s territory.¹⁵¹ The 3200 miles of coastline remain largely un-policed, which allows criminal

138. See Sandler, *supra* note 130, at 160–61.

139. Ben N. Dunlap, Note, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT’L & COMP. L. REV. 453, 458 (2004).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 459.

144. *Id.*

145. *Id.* at 460.

146. *Id.*

147. *Id.*

148. See *id.*

149. *Id.*

150. *Id.* at 459.

151. *Id.*

activity such as piracy and kidnapping to run rampant in neighboring countries such as Kenya.¹⁵² The TFG lost most of its authority, if it had any to begin with, to Islamic insurgents.¹⁵³ The most prominent group known to exercise vast control within Somali borders is the Al Shabaab group, which declared allegiance to al-Qaeda and announced a formal merger with the well-known terrorist group in 2010.¹⁵⁴ In fact, the numerous problems associated with this reality played a large role in driving Kenya to intervene militarily in Somalia.

While the efficacy of the self-defense rationale raises some interesting questions under international law, scholars have barely considered the questions surrounding consent by the TFG. Security Council Resolution 2036 de facto forecloses the argument that the ICC will declare Kenya's invasion into Somalia an invalid exercise of self-defense under international law.¹⁵⁵ Even if the ICC did make such a declaration, could Kenya's intervention legally and validly rely on the consent given by the TFG as justifying the extreme act of using force within the borders of Somalia?

In order to comprehend fully just how monumental reliance on consent from the TFG as a justification for military intervention would be, we must begin with the Montevideo Convention,¹⁵⁶ which is the international treaty that defines the basic rights and duties of states under international law. The Montevideo Convention identifies four qualities necessary for a state to qualify as a "person of international law":

- a) A defined territory;
- b) A permanent population;
- c) Government;
- d) The capacity to enter into relations with others.¹⁵⁷

While the state's existence is independent of its recognition by other countries, Article 2 of the Montevideo Convention proclaims that the "federal state shall constitute a sole person in the eyes of international law."¹⁵⁸ Given that the Montevideo Convention does not elaborate on what exactly gives a nation "capacity to enter into relations" with other countries, nor does it specify that a government of a particular country needs to be functional or in control of its territory, the questions surrounding consent with respect to military intervention cannot be resolved by the Convention alone.

In fact, this vagueness largely creates the problem of unfettered consent. While it is not the place of international institutions to delve into the

152. *See id.*

153. *Somalia Profile—Timeline*, BBC NEWS AFR. (Oct. 21, 2014) [hereinafter *Somalia Profile*], <http://www.bbc.com/news/world-africa-14094503>.

154. *Id.*

155. *See* S.C. Res. 2036, ¶ 2, U.N. Doc. S/RES/2036 (Feb. 22, 2012) (incorporating Kenyan troops into the African Union Mission in Somalia).

156. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter *Montevideo Convention*].

157. *Id.* at art 1.

158. *Id.* at art 2.

political processes of different nations, it is noteworthy that the Transitional Federal Parliament (TFP), and not the people of Somalia, elected the President of Somalia's TFG.¹⁵⁹ Additionally, the formation of the TFP and the election of the president took place entirely in Kenya.¹⁶⁰ Democracy, of course, is not the benchmark of whether a nation's government has the capacity to enter into legal relations with other nations. Otherwise countries like China would never hit that benchmark. Without representative democracy, however, or control over one's territory, it is difficult to envisage the source of the capacity or authority to enter these relations.

Interestingly, the TFG was internationally recognized as representing Somalia and its interests despite its lack of control over the territory and its not having been elected through a representative-democratic election.¹⁶¹ With this recognition, theoretically, the TFG was capable of granting Kenya consent to intervene militarily within the borders of Somalia for the purposes of quelling Al Shabaab and other insurgent militias in the country. This, however, is quite problematic.

Firstly, the TFG was largely disconnected from the populace within Somali borders. The government hardly operated within Somalia's borders, and severe internal conflict and corruption made it difficult to determine whether the TFG's actions were actually in accordance with the wishes of the citizenry.¹⁶² Ordinarily, a government in control of its territory that enforces the rule of law or a government that was elected representatively to exercise discretion on behalf of the people is presumed to be acting in accordance with the wishes of its citizenry. Imputing that same presumption to the TFG would be misplaced, particularly because the TFG could function without much consequence or reprimand from the people, which is typically the safeguard against overtly obscure government action.

Of course, a state must have some form of representation. Nevertheless, the government standard for a particular territory to qualify as a state for the purposes of international law ought to be vastly different from the standard of competence required for a government to consent to military intervention. This is particularly true where the government in question is weak and ineffective. Many believe that the TFG was heavily influenced by the Kenyan government because it operated out of Kenya, was elected in Kenya, and often acted in a manner in tandem with certain objectives the Kenyan government wanted to achieve.¹⁶³

159. *Somalia Profile*, *supra* note 153.

160. *Id.*

161. See Adjoa Anyimadu, *A Political Solution for Somalia*, CHATHAM HOUSE: THE ROYAL INST. INT'L AFF. (Feb. 6, 2012), <https://www.chathamhouse.org/media/comment/view/182049>.

162. See Jason Straziuso, *UN report cites massive corruption in Somali gov't*, THE WORLD POST (July 16, 2012), <http://www.huffingtonpost.com/huff-wires/20120716/af-somalia-un-report/>.

163. See Bronwyn Bruton & Paul D. Williams, *Cut-Rate Counterterrorism: Why America can no longer afford to outsource the war on al-Shabab*, FP (Oct. 8, 2013), <http://foreignpolicy.com/2013/10/08/cut-rate-counterterrorism/>.

On its face, the legitimacy of any such consent is dubious, and several questions surrounding the capacity to consent ought to be asked. Otherwise, through recognition alone, a government that is neither in control of its territory nor democratically elected by a representative part of its population can forever change the fate of its people. This revelation is too significant to presume valid consent. Moreover, it is too significant to ignore the need to formulate a structured methodology for determining if consent is valid—looking at whether consent was informed and whether the government giving that consent had the capacity to do so.

B. Civil War and Consent

The problems surrounding consent in relation to a nation embroiled in a civil war are different, although not mutually exclusive, from those considered above in relation to a failed state. The major difference is that legitimacy is only questionable because the government is losing control over the territory. The plain existence of a civil war suggests that a large portion of the population opposes the government's activities or policies. In contrast to the wholly ineffective government of a failed state, the government of a nation embroiled in a civil war was, at least at one point, the legitimate "face and mouthpiece" of the country.

Again, as mentioned above, democratic elections are not a fundamental prerequisite for a government's actions to be recognized as an exercise of legitimate authority over its people. Syria has largely been under authoritarian rule, and when the Ba'ath regime took over in 1963, there was no question that President Hafez al-Assad's actions represented the position of Syria in matters of international law.¹⁶⁴

After the death of Hafez al-Assad in 2000, Bashar al-Assad—one of Hafez al-Assad's younger sons—succeeded his father in an uncontested referendum by the People's Council of Syria.¹⁶⁵ In 2007, Bashar al-Assad was re-confirmed as the president of Syria in the same manner.¹⁶⁶ While there may have been discontent among part of the citizenry, such discontent was indistinguishable from that of Americans who consider themselves Republican and vehemently disagree with the actions of an executive that is Democrat. As a matter of legitimacy in international law, no doubts were cast over al-Assad's authority to act on behalf of Syria.

Since the uprising in Syria turned violent and the nation descended into civil war, numerous efforts to stabilize the nation have failed.¹⁶⁷ Nonetheless, in 2014, the country held its first election since the start of the civil war; President al-Assad won in a landslide victory, securing 88.7%

164. See *Syria Profile—Overview*, BBC NEWS MIDDLE E. (Oct. 7, 2014) [hereinafter *Syria Profile*], <http://www.bbc.com/news/world-middle-east-14703910>.

165. See *Syrians Vote For Assad in Uncontested Referendum*, WASH. POST (May 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/27/AR2007052701117.html>.

166. *Id.*

167. *Syria: The Story of the Conflict*, BBC NEWS MIDDLE E. (Dec. 8, 2014), <http://www.bbc.com/news/world-middle-east-26116868>.

of the vote.¹⁶⁸ Unlike al-Assad's two prior elections, this election featured two opponents in the election, but many suspect that these candidates were nothing more than window dressing to give the impression that democracy was at work.¹⁶⁹ In fact, scholars and commentators alike believe that the election was fraught with numerous irregularities and was rigged to keep Bashar al-Assad in power.¹⁷⁰ The Syrian government, however, has denied any criticism of the process.¹⁷¹

Objectively, how representative can an election held during a period of civil war be? Should international observers accept that half the nation laid down their arms for one day in order to partake in a "democratic" electoral process, when in fact, the uprising which caused the civil war was premised on bringing about democracy in Syria? Regardless of the speculated rigging of the recent Syrian election, serious doubts still exist as to its representativeness. ISIS continues to expand control over Syria and gain support from the public to establish an Islamic state, which further casts doubt on the legitimacy of the Syrian government, which claims to be secular.¹⁷²

Given all the suspicion and uncertainty as to whether the current government is actually representing the will of the Syrian people, how can consent to intervention from this government be legitimate? For instance, if one were to hypothesize a situation where the Syrian government consented to U.S. drone strikes, can that consent serve as a definitive defense to any accusation of an unlawful intervention in Syrian affairs?

Given that not many questions are asked about consent and there seems to be an operating presumption that a government recognized by other nations has the capacity and legitimacy to consent to intervention, it is apparent that consent is a dangerous tool. While these dangers are similar between failed states and states embroiled in a civil war, the structural solutions on determining if consent should be valid are quite different. This Note will explore these solutions in Part IV, drawing on principles of private law to create a nuanced doctrine on how consent needs to be controlled.

IV. A Structured Approach to Consent

To reiterate, consent in international law is vast and uninhibited.¹⁷³ When it comes to consenting to use of force in one's territory, international bodies should implement measures to curb the excess emphasis put on consent. Considering that the responsibility to protect and self-defense

168. Mohammed Tawfeeq & Jethro Mullen, *Syrian President al-Assad re-elected easily, state media reports*, CNN (June 4, 2014), <http://www.cnn.com/2014/06/04/world/meast/syria-unrest/>.

169. *Id.*

170. *See id.*

171. *Id.*

172. *See* Abdul-Hussain & Smith, *supra* note 122; *Syria Profile*, *supra* note 164.

173. Deeks, *supra* note 8, at 8.

doctrines as drafted are quite limited in their scope,¹⁷⁴ countries have the ability to invoke consent in several international crises with virtually no control. The act of consenting is not a principle that operates solely in the international law context. In fact, private law has developed very sophisticated doctrines of consent in different fields that can provide some insight as to how consent should be structured with respect to use of force and state intervention. The two private law concepts that are particularly illustrative are: (1) informed consent, as it operates in medical law; and (2) competence, as it operates in criminal procedure.

A. Informed Consent

It is a basic principle of medicine that no doctor, no matter how brilliant, can impose treatment on an individual without that person's consent, assuming that person is able to provide consent.¹⁷⁵ This doctrine is based primarily on an individual's right to self-determination and autonomy.¹⁷⁶ Informed consent, at least generally, creates an expectation in patients that their doctors, prior to recommending one course of treatment, will explain (1) what that treatment is, (2) the risks of undergoing that course of treatment, and (3) any available alternatives and their risks.¹⁷⁷ Presumably, once provided with this information, a patient will be provided with all the necessary tools to be able to make a reasoned decision about what should happen to his or her body.¹⁷⁸

Informed consent in the medical context provides a useful parallel to one aspect that should be used to curb consent as it operates in international law. Just as patients receive an objective set of terms detailing their treatment prior to those patients providing consent, so too should governments receive an objective set of terms prior to consenting to military intervention or use of force within another country's borders. These terms ought to be sufficiently detailed such that a consenting country can be fully aware of the actions that the intervening country intends to undertake within its borders, rather than just a vague accession to intervening action. Additionally, the risks and potential consequences must accompany these terms in order for the consent to be "informed."

The difficulty, however, comes with enforcing such a requirement. An agreement between two nations is simply a bilateral agreement, and those countries have no obligation to explain the terms of their agreement to the international community.¹⁷⁹ Nor can the international community interfere with the sovereignty of those countries by trying to exert themselves

174. See *Background Information on the Responsibility to Protect*, *supra* note 14; U.N. Charter art. 51.

175. See Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 267 (1999).

176. See *id.*

177. *Id.* at 267-68.

178. See *id.* Because there are questions surrounding capacity and voluntariness in the medical context, for the purposes of this Note, criminal procedure law on capacity and voluntariness provides a more apt structure.

179. See Deeks, *supra* note 8, at 9.

over those affairs.¹⁸⁰ Regardless, with respect to use of force and military intervention, the United Nations should impose special rules that require countries that have agreed to intervention to report these agreements. The basis for this requirement can be largely justified by the impact on neighboring countries and other humanitarian issues that accompany such action,¹⁸¹ which make it a concern for the international community at large.

The current operation of consent would need to be altered to adjust the role of the *ultra vires* doctrine.¹⁸² While it may result in unfair outcomes to allow a nation to go back on its obligations based on an ex-post reliance on the *ultra vires* doctrine, if reporting an agreement of intervention is required before involvement, ex-ante discoveries of actions contrary to a nation’s domestic law can be made and avoided. The supremacy of international law makes this point critical.¹⁸³ States are required to meet their international obligations regardless of any contradicting domestic provisions.¹⁸⁴

Allowing a consent system in the use of force that creates an obligation that trumps domestic law is not only irresponsible, but can have catastrophic political consequences. International law should aim to limit instances in which domestic law and international law conflict. Bilateral agreements of this kind may in fact not even be necessary given that states have the option of seeking assistance from the international community at large. Trying to limit such agreements would interfere too heavily with state sovereignty, however, so implementing some controlling requirements would help ensure that such agreements facilitating military intervention do not run rampant.

With respect to the case examples and hypotheticals proffered here, these changes to the operation of consent would require that the Somali TFG have known the detailed parameters of Kenya’s proposed use of force within their borders. This was, in actuality, likely the case—at least to a certain extent. Thus, with respect to the Somali invasion case example, the more relevant factor to consider is competence: was the TFG competent to consent to Kenya’s intervention?¹⁸⁵

180. See *id.*

181. See, e.g., Daniel Wagner & Giorgio Cafiero, *Regional Implications of a South Sudanese Civil War*, WORLD POST (Mar. 9, 2014), http://www.huffingtonpost.com/daniel-wagner/regional-implications-of_b_4556718.html.

182. A country that consents to an international agreement cannot claim that they cannot complete their terms of agreement on the grounds that the action they agreed to is inconsistent with their country’s own laws. Consent in this context trumps illegality. See Deeks, *supra* note 8, at 10.

183. See *id.* at 6–8.

184. ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 286 (2011) (observing 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).

185. This Note will address this point in Part IV.B.

The Syria hypothetical, on the other hand, presents some interesting informed consent concerns. In order for consent to be deemed valid under international law, the United States would be required to prove that it had received specific consent to launch drone strikes. The parameters of consent would need to include an explanation of the risks and possible consequences, including likely civilian casualties. Such a requirement is the only way to establish definitively that Syria (in the hypothetical) knew what it was agreeing to, and that the agreement formed was representative of the actions taken. Only then would consent be deemed to have provided an adequate legal basis for intervention under international law.

B. Competence

In criminal procedure, different standards of competence apply in different situations.¹⁸⁶ For instance, the competence level of a defendant required to stand trial is different from that required for a defendant to be executed, or for a defendant to represent himself in a criminal proceeding.¹⁸⁷ The varying standard clearly shows that different parts of the process require different levels of competence because at those different stages, different tasks and expectations are required of that defendant. Notably, however, the lowest threshold of competence in criminal procedure is that required to stand trial, which is set out in *Dusky v. United States*.¹⁸⁸ In order to be competent to carry out other acts in the criminal process such as pleading guilty or representing oneself, a defendant must first prove that he satisfies this lower level threshold.¹⁸⁹

Competence with respect to criminal procedure in the United States therefore serves as a useful analogy on which to draw competence requirements with respect to consenting to military intervention. Therefore, the first question should be whether the government of a failed state has the competence to consent to military intervention. This is an altogether different question from whether the government has the capacity to enter legal relations as required by the Montevideo Convention.¹⁹⁰ The difference lies in the difference between “capacity” and “competence.” Competence, in this context, suggests efficacy and legitimacy, whereas capacity simply connotes ability to act.

186. See generally ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE (2d ed. 2013).

187. See *Indiana v. Edwards*, 554 U.S. 164, 174-78 (2008) (pointing out that in some situations a defendant may satisfy the Dusky standard of competence to stand trial but fail in showing the court that the defendant has the competence to represent himself); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (declaring juveniles ineligible to be sentenced to death); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (setting out two conditions for whether a defendant is competent to stand trial: (1) Whether the defendant has a rational as well as factual understanding of the proceedings against him, and (2) Whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding”).

188. *Dusky*, 362 U.S. at 402.

189. See, e.g., *Edwards*, 554 U.S. at 174-78 (finding a defendant competent to stand trial but not competent to represent himself).

190. Montevideo Convention, *supra* note 156, at art. 1.

Unfortunately, the *Dusky* standard is not of much help in analogizing what considerations should be assessed in determining competence with respect to legitimacy and representativeness of government action. In this Note's view, some relevant factors include the functionality of the government of the failed state, the process in which it came to power, and the control it exercises over its territory. This list is by no means exhaustive, but offers a good starting point in determining if the government of a failed state can adequately consent to intervention. Based on these preliminary considerations, consent by the TFG seems to be legally inadequate. This means that Kenya cannot invoke the consent of the TFG to justify any sort of military intervention in Somalia. Of course, international drafters should provide a more nuanced and intricate measuring mechanism in order to make this determination. This mechanism must be based on objective factors that do not require interference with the internal affairs or political processes of different nations.

Determining Syria's competence to consent to intervention will likely be a more difficult task because analysis of the factors both support and reject a finding of competence. The situation is analogous to *Indiana v. Edwards* in that regard, in which a standard higher than *Dusky* competence was required for self-representation, but not exactly defined.¹⁹¹ Making this determination would be much simpler within a defined measuring rubric. The responsibility to make this determination should fall to an international body like the United Nations after the reporting requirement has been satisfied. With respect to the hypothetical posed, Syrian consent to drone strikes may in fact be considered valid under international law given the circumstances, and the level of intervention sought (in contrast with full-scale military intervention in the Kenya-Somalia case).

Without asking the question of competence to consent to the use of force, and instead presuming its existence, the international legal community is shrugging its responsibility in ensuring that any use of force is a last resort, and that such action accords with the Charters, Conventions, and Treaty Agreements that have been developed over decades.

Conclusion

This Note offers a foundational basis on how consent ought to be structured in order to control its vast power under international law. As it stands, questions of competence and informed consent are not sufficiently raised. Instead, consent and the agreements formed therefrom are presumed to be valid under international law.¹⁹² The consent question is so important because of its vast application, which is necessitated by the fact that the self-defense provisions and the responsibility to protect doctrine are so limited in their scope.

A nuanced and structured approach to consent offers the best route of "plugging a leak" that current international law doctrines have refused to

191. See generally *Edwards*, 554 U.S. at 174-78.

192. See generally *Deeks*, *supra* note 8.

address. Arguably, the international community attempted to plug this leak by creating a robust responsibility to protect doctrine. That original document, however, crumbled under the weight of several countries refusing to recognize their affirmative obligation to intervene in humanitarian crises. Additionally, the scope of the responsibility to protect doctrine was limited in scope to crises of the most severe proportions, therefore ruling out several international crises in the new age.¹⁹³ Making the necessary changes to the consent doctrine in the realm of use of force may provide much needed structure to an otherwise vast and uncontrolled sector of international law.

Notably, however, the structure that is adopted to govern consent must not inhibit a country's exercise of its core sovereign power, nor can two nations be limited in seeking to engage in the formation of lawful bilateral agreements. The purpose of creating such a mechanism is to control intervention on the basis of consent, particularly implied consent, which is very difficult to prove and articulate, and involve the international community directly in use of force matters. The principles of informed consent, as laid out in the medical field, and competence, as laid out in criminal procedure, offer a starting point and useful analogous doctrinal theories on which to base a structured consent doctrine in international law.

193. See Weiss, *supra* note 54.