ISSN 2309-8678 (Print) ISSN 2312-3605 (Online)

Russian Law Journal

Volume VII (2019) Issue 4

Volume VII (2019) Issue 4

Russian Law Journal

ISSN 2309-8678
e-ISSN 2312-3605

Frequency of Publication: four issues per year

Published by
LLC "Publishing House "Business Style",
119602, Moscow, Troparyovskaya St.,
Bldg. 4, Floor 2, Room 802

Subscription enquiries should be directed to the Publishing House "Business Style"

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RUSSIAN LAW JOURNAL (RLJ)

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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

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INTERVENTION BY INVITATION – WHEN CAN CONSENT FROM A HOST STATE JUSTIFY FOREIGN MILITARY INTERVENTION?

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https://doi.org/10.17589/2309-8678-2019-7-4-4-29

In spite of the general prohibition of intervention in the affairs of other states, military interventions undertaken with the consent of a host state are considered to be permissible. This is confirmed both in state practice and in international legal doctrine. However, in order for such interventions to be permitted in particular situations, certain requirements have to be fulfilled. The consent must be given by a due authority, it must not be vitiated, it must precede the intervention, and it must be given expressly and clearly. This article explores the meaning of each of these requirements and examines their application in state practice. In addition, the possibility of intervening in civil wars is examined. It is submitted, in the conclusion of the article, that some aspects of the right to intervene upon invitation are undergoing certain changes, which results in the non-intervention principle becoming more flexible.

Keywords: intervention by invitation; non-intervention; use of force; jus ad bellum; consent.

Recommended citation: Petra Perisic, *Intervention by Invitation – When Can Consent from a Host State Justify Foreign Military Intervention?*, 7(4) Russian Law Journal 4–29 (2019).

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Introduction

Much has been written on self-defense and actions authorized by the U.N. Security Council as the only exceptions to the use of force provided for by the Charter of the United Nations. As much as the particular aspects of these two exceptions, primarily self-defense, are far from unambiguous, their legality is not disputed. The same cannot be said about a whole range of military interventions which regularly take place among states. Besides humanitarian interventions, which nowadays no doubt represent one of the most controversial issues, in recent years much attention has been drawn to another type of military intervention – interventions by invitation, or, as some authors prefer to call them, consensual interventions.[1]

Intervention by invitation, as defined by the International Law Institute, is direct military assistance by the sending of armed forces by one state to another state upon

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[1] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* 1 (New York: Routledge, 2013). Hafner also criticizes the term "intervention by invitation" and proposes the term "military assistance on request." *See* Gerhard Hafner (rapporteur), *Problèmes actuels du recours à la force en droit international. Sous-groupe : Intervention sur invitation* [*Present Problems of the Use of Force in International Law. Sub-Group: Intervention by Invitation*] in *Annuaire de l'Institut de droit international : Session de Naples (Italie), Vol. 73, 2009* [*Yearbook of the Institute of International Law: Session of Napoli (Italy), Vol. 73, 2009*] 299 (Paris: Éditions A. Pedone, 2009) (Nov. 2, 2019), also available at http://www.idi-iil.org/app/uploads/2017/06/Hafner.pdf. Some authors use the terms "consent" and "invitation to intervene" interchangeably, treating them as synonyms. *See* Max Byrne, *Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for Us Drone Strikes in Pakistan, Somalia and Yemen*, 3(1) Journal on the Use of Force and International Law 97, 97 (2016). The author of the present paper will follow the same line of reasoning, using the terms "intervention by invitation," "invited intervention," "consent-based intervention" and "consensual intervention" interchangeably.

the latter's request.[2] The argument of "invitation" or "consent" has been invoked on number of occasions. In recent years it has, for instance, been invoked to justify French intervention in Mali, U.S. drone strikes in Pakistan, Afghanistan, Somalia and Yemen, Saudi Arabia's intervention in Yemen, Russia's intervention in Ukraine, interventions against Islamic State of Iraq and the Levant (ISIL) in Iraq, Libya and Syria, as well as numerous interventions among African states.[3] These examples, along with many others that took place in the second half of the 20th century, show that interventions by invitation appear relatively often and, therefore, deserve closer scrutiny.

It is a well-established rule of international law that intervention in the affairs of another state is prohibited. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty provides that "no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[4] An identical provision was stipulated in the Friendly Relations Declaration,[5] as well as in the Declaration on Inadmissibility of Intervention and Interference in the Internal Affairs of States.[6] Furthermore, the ICJ observed in the *Nicaragua* case that a prohibited intervention is one "bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[7] One such matter is "the choice of a political, economic, social and cultural system and the formulation of foreign policy."[8] The Court further noted that a wrongful intervention is one that "uses methods of coercion in regard to such choices, which must remain free ones."[9] Coercion is "particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."[10]

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[2] Gerhard Hafner (rapporteur), *Present Problems of the Use of Force in International Law. Sub-Group C – Military Assistance on Request*, Institute of International Law, Session of Rhodes (Greece), 10th Commission, Plenary, 8 September 2011 (Nov. 2, 2019), available at http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf.

[3] For instance, the Ugandan intervention in South Sudan in 2013, or the Economic Community of West African States (ECOWAS) intervention in Gambia in 2017.

[4] U.N. General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX).

[5] U.N. General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

[6] U.N. General Assembly, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981, A/RES/36/103.

[7] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (1986) I.C.J. 14, para. 205.

[8] *Id*.

[9] *Id*.

[10] *Id*.

In spite of the generally accepted prohibition of intervention, practically no one contests that interventions which are conducted upon invitation are permissible, provided that certain conditions are fulfilled. Therefore, the controversy over this type of intervention does not lie in the permissibility of the undertaking *per se*, but in the fulfillment of certain requirements necessary for its legality. These controversies mainly concern determining the due authority to request outside intervention. Is a government of a state the only entity authorized to invite a foreign intervention, or may opposition groups, under certain circumstances, also be empowered to do so? Is *any* government entitled to request outside military assistance? Must it have democratic legitimacy? Must it have a certain degree of control over a territory, and if so, what degree? What if both sides to the conflict control significant parts of a territory? Are invited interventions allowed in cases in which the hostilities within a country have evolved into a civil war? These and other questions will be addressed in the following chapters.

1. Consent as a Legal Basis for Intervention

Since neither the U.N. Charter, nor any other international document, specifically regulates interventions by invitation, the starting point of our analysis will be Article 20 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS), which speaks of consent. Article 20 reads:

> 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.[11]

Consent is, therefore, specified as one of the circumstances precluding the wrongfulness of an act, which act would, in the absence of such consent, be illegal. Such preclusion is conditional upon two things: first, that the consent is "valid," and second, that the act in question remains within the limits of that consent. We will consider both conditions later on. But before we move on to elaborating the prerequisites for valid consent, another issue must be addressed. It concerns the possibility of invoking consent in relation to military interventions, given the fact that consent cannot justify a breach of a peremptory norm of international law.

1.1. Consent and the Use of Force

Consent, as well as other circumstances precluding wrongfulness as outlined in DARS, may be invoked only if actions undertaken under these circumstances are

[11] United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) (Nov. 2, 2019), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

in conformity with the peremptory norms of international law.[12] This is required by Article 26 of DARS.[13] Since the prohibition of the use of force has commonly been accepted as a peremptory norm of international law (*jus cogens*),[14] the question of the permissibility of invoking consent in relation to the use of force, or more specifically to invited military interventions, has become an issue.

If a military intervention is a form of the use of force and the prohibition of force is a peremptory norm, consent could not then be a valid ground for precluding wrongfulness in a military intervention. Following this line of reasoning, consent could not serve as a legal basis for a military intervention.

However, this argument corresponds neither to scholarly writing,[15] nor to state practice,[16] which both show that interventions by invitation have generally been accepted as permissible. Even the ICJ has confirmed the right of states to seek outside military assistance.[17] On what grounds then could such interventions be justified?

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[12] A peremptory norm is defined in the Vienna Convention on the Law of Treaties (VCLT) as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties (with Annex), concluded at Vienna on 23 May 1969 (Nov. 2, 2019), available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf. A definition of a peremptory norm from the VCLT has been used for the purposes of state responsibility in DARS.

[13] Article 26 of DARS provides that "nothing ... precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law." For the text of DARS *see supra* note 11.

[14] The International Law Commission pointed out that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." *See* Draft Articles on the Law of Treaties with Commentaries (1966), at 247 (Nov. 2, 2019), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf. *See also Nicaragua* case, *supra* note 7, para. 190. Although there is a fairly unanimous understanding that prohibition of force represents a *jus cogens* norm, it remains much less clear whether the peremptory character refers to each and every form of the use of force or whether it is reserved for the most serious instances of the use of force, such as aggression. Scholarly opinion is not clear on this point. Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent* in *The Current Legal Regulation of the Use of Force* 147, 159 (A. Cassese (ed.), Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1986).

[15] Christine Gray, *International Law and the Use of Force* 85 (Oxford; New York: Oxford University Press, 2008); Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); Gregory H. Fox, *Intervention by Invitation* in *The Oxford Handbook of the Use of Force in International Law* 816 (M. Weller (ed.), Oxford; New York: Oxford University Press, 2015).

[16] *See*, for instance, Australian Prime Minister's statement on the request by the Iraqi Government for help in fighting ISIL, PM Transcripts, 12 July 2015 (Nov. 2, 2019), available at http://pmtranscripts.pmc.gov.au/prime-minister/abbott-tony?page=65; Statement by the Canadian Minister of Foreign Affairs, Keeping tabs on Canada's Parliament, 6 October 2014 (Nov. 2, 2019), available at https://openparliament.ca/debates/2014/10/6/john-baird-5/; Stephen W. Preston, *Speech on the Legal Framework for the United States' Use of Military Force Since 9/11*, U.S. Department of Defense, 10 April 2015 (Nov. 2, 2019), available at https://dod.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-/.

[17] *See infra* note 64.

It can reasonably be presumed that anything that a state consents to cannot be considered as being against that state. Where there is consent, there is no coercion.[18] This reasoning encapsulates the well-known general principle of law, *volenti non fit injuria*.[19] It seems correct to understand consent as an inherent right of each state, an aspect of its sovereignty. This right seems to be unaffected by the prohibition of force contained in Article 2(4) of the U.N. Charter. Neither does Article 2(4) prohibit force undertaken with the host state's consent, nor can consensual intervention be regarded as an exception to the use of force. As James Crawford, while ILC Special Rapporteur, observed, consent acts as a constituent part of the primary rule and not as a secondary rule of state responsibility.[20] Crawford opined that "some peremptory norms contain an 'intrinsic' consent element."[21] Naturally, this applies solely when a state consents to the use of force on its own territory.[22] Conversely, a state cannot consent to the use of force against another state. This line of reasoning was present in the Report of the International Law Association's Committee on the Use of Force. The Report differentiated self-defense and the Security Council authorizations as the so-called "excused violations" of state sovereignty, from the use of force in a foreign state upon its consent, which involves no violation of state sovereignty *ab initio*.[23] Provided that consent is understood this way, the compatibility of consent-based interventions and Article 26 of DARS is not questionable.

1.2. An Ad Hoc Consent and a Treaty-Based Consent

When speaking of consent as a basis for intervention, an *ad hoc* consent, given in particular circumstances, is what first comes to mind. Indeed, it is this kind of consent that most usually represents a ground for intervention. There is, however, a situation in which consent can be treaty-based, meaning that it is given in advance, when no

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[18] Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* 19 (Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1993).

[19] *See* Théodore Christakis & Karine Bannelier, *Volenti non fit injuria ? Les effets du consentement à l'intervention militaire* [*Volenti Non Fit Iniuria? The Effects of Consent to Military Intervention*], 50(1) Annuaire Français de Droit International 102 (2004).

[20] *See* Corten 2010, at 252.

[21] *Id*.

[22] Consent precludes wrongfulness *vis-à-vis* a consenting state, but the question is whether the wrongfulness is at the same time precluded *vis-à-vis* third states. According to one conceptual basis, consent cannot preclude wrongfulness *vis-à-vis* the international community, while according to another, the absence of coercion against the consenting state takes the intervention outside the scope of the prohibition of the use of force. In the latter case, not only would the interests and rights of the consenting state be safeguarded, but likewise the interests and rights of the third states, that is, the international community as a whole. Tanca 1993, at 22.

[23] Committee on the Use of Force, International Law Association, Report on Aggression and the Use of Force, Washington Conference (2014), B.4 (Nov. 2, 2019), available at https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1057&StorageFileGuid=1af35245-6705-48c1-be3d-4b099ea7ce60.

situation requiring intervention yet exists. These treaties mostly include consent to the stationing of foreign troops in a state's territory, or various arrangements of military cooperation among states.[24] The scope of such consent depends on the conditions of a particular agreement.

Let us imagine a situation in which two states, A and B, conclude an agreement in which state A allows state B to station troops in state A's territory. This scenario is quite possible and not particularly problematic. What would, however, happen if state B used state A's territory in ways not provided for by the agreement? For example, where the presence of B's troops is prolonged contrary to the terms of the agreement, or where they use force in A's territory in a manner not envisaged by the agreement, or even where they use force against state A? Naturally, in such a situation the use of force against the host state would not be permitted. The General Assembly Definition of Aggression has described such a scenario as an instance of aggression. It confirmed that actions which are contrary to what is stipulated in the agreements amount to aggression.[25] Thus, treaty-based consent cannot be considered as a blank authorization for any future military intervention. On the contrary, its validity must be strictly observed in light of the conditions stipulated in the agreement.[26]

Some authors have reflected on a specific type of treaty-based consent, that given by the U.N. Charter to the Security Council by all U.N. member states.[27] Member states agreed to confer the primary responsibility for the maintenance of international peace and security to the Security Council[28] and to accept and carry out the decisions of the Council.[29] This, *inter alia*, requires the obligation to accept Council decisions even if they include a coercive action towards a state. Similar authorization is provided for in the Constitutive Act of the African Union.[30] Conferring such rights to organs of particular organizations can indeed be considered as giving

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[24] *See* David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62(2) University of Chicago Law Review 607 (1995).

[25] Article 3(e) provides that aggression is "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." U.N. General Assembly, Definition of Aggression, 14 December 1974, A/RES/29/3314.

[26] For a different opinion *see* Tom J. Farer, *A Paradigm of Legitimate Intervention* in *Enforcing Restraint: Collective Intervention in Internal Conflicts* 332 (L.F. Damrosch (ed.), New York: Council on Foreign Relations, 1993).

[27] Christian Henderson, *The Use of Force and International Law* 350 (Cambridge: Cambridge University Press, 2018).

[28] Art. 24(1) of the U.N. Charter.

[29] *Id.* Art. 25.

[30] Constitutive Act of the African Union, Art. 4(h) (Nov. 2, 2019), available at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

a blank authorization for the use of force in certain circumstances. Any state, except the permanent members of the U.N., due to their right of veto, may be a subject of the U.N.'s coercive action. Thus, this particular situation is an exceptional case, which confers a kind of a prior blank authorization for the use of force. Not a right conferred on a state, however, but on an international organization.

1.3. Validity of Consent

Article 20 of DARS speaks of "valid" consent. The Commentary to DARS refers to the validity requirement in terms that the consent must be "freely given and clearly established."[31] The Commentary further explains that it must be "actually expressed by the state rather than merely presumed on the basis that the state would have consented if it had been asked."[32] Validity also requires the giving of consent by an agent or person who is authorized to do so on behalf of the State.[33] Finally, consent may be given either in advance or at the time the conduct is occurring, while cases of consent given after the conduct has occurred are a form of waiver or acquiescence.[34,35]

1.3.1. Consent Must Precede the Intervention

Consent to an intervention may be given by a state in advance or even at the time an event is occurring, while *ex post facto* consent is a form of waiver or acquiescence, leading to the loss of the right to invoke responsibility.[36] Attempts by some states to assert that retroactive consent might be appropriate in circumstances where an emergency situation required action in order to protect persons in another state from imminent and serious danger, have been inconclusive.

A discussion on the time frame for giving valid consent to intervention reflects a similar discussion on whether the Security Council can authorize military actions by U.N. member states *ex post facto*. Legal scholars, as in the case of consent, generally agree that such authorizations must be given beforehand.[37]

Examples of this were the Soviet interventions in Hungary and Afghanistan, the Vietnamese invasion of Kampuchea, and the Ugandan intervention in the Congo. The Soviet intervention in Hungary that took place in 1956 was justified by the request of J. Kadar, who came to power after the beginning of the intervention. The intervention

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[31] DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 6.

[32] *Id.*

[33] *Id.* para. 4.

[34] *Id.*

[35] For a comparison of these conditions with the ones for a valid "request" in the IDI Resolution on Military Assistance on Request *see supra* note 2.

[36] DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 3.

[37] *See* Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* 89 (Manchester: Manchester University Press, 2006); Corten 2010, at 348.

was perceived as illegal and was not approved by the United Nations.[38] When the Soviet Union invaded Afghanistan in 1979, it did so without the prior consent of Prime Minister Amin. Intervention resulted in the killing of Amin and the installing of the pro-Soviet Kamin. Kamin then issued the consent to intervention. However, such consent could not cancel the consequences of the unlawful act, even if it had been issued by a proper government of Afghanistan and not a puppet government.[39] Vietnam invaded Kampuchea in 1978 to remove Pol Pot and the Khmer Rouge. Intervention was justified by Vietnam on humanitarian grounds, however Vietnam invoked consent to justify its continued presence in Kampuchean territory. The argument was considered groundless, since the consent was given by a government that came into power by means of Vietnam's intervention, which was not regarded by the majority of states as a legally constituted government.[40] Uganda justified its military intervention in the Congo by referring to the *Lusaka Agreement* from 1999. Since its intervention had begun almost one year before the conclusion of the said Agreement, treaty-based consent could not be invoked as a valid justification for intervention.[41]

1.3.2. Express and Clear Consent

Validity of consent has also been considered by examining the requirement that consent must be clear and express. Although it has been accepted that this presupposes the exclusion of presumed consent, it is not clear exactly in what way consent must be expressed. When Special Rapporteur, Roberto Ago opined in his report to the ILC that consent, like all manifestations of the will of a state, can be *expressed* or *tacit*, as well as *explicit* or *implicit*, provided that it is clearly established.[42] He thus provided no conditions as far as the form of consent is concerned. Any form would be acceptable, then, if it derives from the circumstances of a particular case that consent indeed was given. Ago warns, on the other hand, that tacit consent should not be confused with presumed consent. The former is acceptable, the latter not. Presumed consent means that there is actually no consent at all, but it is presumed that the state in question would have consented had it been in a position to do so. Ago rejected the idea that such consent would be valid. He understandably found that, were such consent to be valid, cases of abuse would be all too common.[43]

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38 Tanca 1993, at 43.

39 Ronzitti 1986, at 161.

40 *Id.* at 162.

41 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) I.C.J. 168, para. 96.

42 Roberto Ago, *Eighth Report on State Responsibility* in *Yearbook of the International Law Commission 1979. Vol. II (Part One)* 3, 35 (New York: United Nations, 1981) (Nov. 2, 2019), also available at http://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v2_p1.pdf.

43 *Id.* at 36.

Although in theory the permissibility of tacit consent and the impermissibility of presumed consent are not disputed, in practice it is not always easy to differentiate between the two. Silence on the part of the host state has sometimes been interpreted as passive consent, as tolerance to a foreign military intervention, while in other situations it has been perceived as a lack of consent. The question then arises as to whether in such situations the principle of *qui tacet consentire videtur* can be applied. In certain areas of international law, this principle can no doubt be applied. It is, for instance, well-known that for customary law rule to be created, tacit consent or acquiescence will suffice, and no express consent to a particular conduct is required. In cases of the use of force, however, the situation is different. Doubts about interpreting silence as consent seem justified. Such interpretations might literally, as some authors suggest, "lead to chaos."[44]

The form of consent was discussed by the ICJ in the *Armed Activities* case. The Court examined the consent given by the Congolese Government to the presence of Ugandan troops in its territory. The Court found that Uganda had been allowed by Congolese President Kabila to engage in military action in the DRC against anti-Ugandan rebels operating in the eastern part of the Congo. Before August 1998, the DRC did not object to this. In April 1998, the two states signed a Protocol in which they agreed that their armies would "co-operate in order to ensure security and peace along the common border."[45] The DCR claimed before the Court that the said statement did not signify consent, that is, an invitation by either party to send its army into the other's territory.[46] The Court found that the Protocol could not form a legal basis for consent. The consent, on the contrary, predated the Protocol, and that prior consent could at any time be withdrawn by the Congolese Government, without any further formalities being necessary.[47] In July 1998, Congolese President Kabila issued a statement in which he announced the end of the mandate of the Rwandan troops in Congolese territory.[48] Although he spoke of the Rwandan army, not the Ugandan army, in the last sentence he announced "the end of the presence of all foreign military forces in the Congo."[49] The two states interpreted this announcement in different ways, Uganda claiming that any withdrawal of consent for the presence of Ugandan troops would have required a formal denunciation by the DRC of the Protocol of April 1998.[50] The Court found Kabila's statement ambiguous. However, regardless of the interpretation of the statement, the

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[44] Karine Bannelier-Christakis, *Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29(3) Leiden Journal of International Law 743, 768 (2016).

[45] *Armed Activities* case, *supra* note 41, para. 46.

[46] *Id*.

[47] *Id*. para. 47.

[48] *Id*. para. 49.

[49] *Id*.

[50] *Id*. para. 50.

Court found that consent by the DRC to the presence of Ugandan troops in its territory had been withdrawn at the latest in August 1998, when at the Victoria Falls Summit the DRC accused Uganda and Rwanda of invading its territory.[51]

There have been divergent opinions among legal scholars on whether consent needs to be public. For example, O'Connell and Murphy have both examined the legality of U.S. drone strikes in Pakistan, and came to different conclusions regarding the existence and validity of consent by the Pakistani government. It is undisputed that there was no explicit and public consent. Murphy, however, alleges that the absence of public consent does not mean that there was no consent at all. He cites the Washington Post, which noted that although Pakistan "formally protests such actions as a violation of its sovereignty, the Pakistani government has generally looked the other way when the CIA conducted Predator missions or US troops respond to cross-border attacks by the Taliban."[52] Murphy maintains that there may have been internal documents or communications from the Pakistani government that clarified such consent, and that the Pakistani government's knowledge of Predator drones being based in Pakistan and its knowledge that such aircraft were being used for missile strikes, presented a strong picture of tacit consent, so long as such knowledge could be established.[53] O'Connell, on the other hand, notes that "without express, public consent of the kind the US received from Afghanistan and Iraq, Pakistan is in a position to claim the US is acting unlawfully, even bringing a future legal claim for compensation."[54] O'Connell claims that this would be true even if there were some sort of secret consent that the U.S. would have difficulty proving in a court or other public forum.[55] The Pakistani government's protests would, according to O'Connell, be a strong argument that it had withdrawn any implicit consent that might have been given.[56]

O'Connell has been criticized by some authors for advocating the "publicity" requirement, since "such a requirement is not present in any international legal documents, nor does it appear to be a requirement of customary international law."[57]

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[51] *Armed Activities* case, *supra* note 41, para. 53.

[52] Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan* in *The War in Afghanistan: A Legal Analysis* 109, 118 (M.N. Schmitt (ed.), Newport: Naval War College, 2009).

[53] *Id*. *See also* Olivia Flasch, *The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors*, 37(3) Journal on the Use of Force and International Law 37, 42 (2016).

[54] Mary E. O'Connell, *Unlawful Killing with Combat Drones*, Notre Dame Law School Legal Studies Research Paper No. 09-43, at 18 (July 2010) (Nov. 2, 2019), available at https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/OConnellDrones.pdf.

[55] The case of the U.S. and Pakistan has been compared to that of the Congo and Uganda, in which Congo gave express consent, while the Court found that even indirect signals are sufficient for the withdrawl of consent. *Id*.

[56] *Id*.

[57] Byrne 2016, at 105.

Russian Law Journal

Volume VII (2019) Issue 4

Оформление и компьютерная верстка:
ИП Резниченко А.С.

Подписано в печать 13.12.2019. Формат 70x100 $^{1}/_{16}$. Объем 11,125 п. л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательство «Деловой стиль»
119602, г. Москва, ул. Тропарёвская, владение 4, этаж 2, комн. 802.
www.ds-publishing.ru

ISSN 2309-8678