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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE FEDERAL LAW
ON THE AMENDMENTS TO THE FEDERAL LAW ON DEFENCE
OF THE RUSSIAN FEDERATION**

**Adopted by the Venice Commission
at its 85th Plenary Session
(Venice, 17-18 December 2010)**

**On the basis of comments by
Mr Iain CAMERON (Member, Sweden)
Mr Vojin DIMITRIJEVIC (Member, Serbia)
Mr Hubert HAENEL (Substitute Member, France)
Ms Angelika NUSSBERGER (Substitute Member, Germany)**

I. Introduction

1. On 23 October 2009 the State Duma of the Russian Federation adopted, and on 30 October 2009 the Federation Council approved the law on amendments to the 1996 Federal Law on Defence No-61-FZ (CDL(2010)056rev; herein after “the 2009 amendments”).
2. On 17 March 2010 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe decided to ask the opinion of the Venice Commission on this law¹.
3. A working group was set up, consisting of Messrs Cameron, Dimitrijevic, Haenel and Ms Nussberger.
4. On 16-17 November 2010, a delegation of the Venice Commission, consisting of Mr Buquicchio, President of the Commission, Ms Nussberger and Ms Granata-Menghini, deputy Secretary of the Commission, travelled to Moscow, where it met with representatives of the Government, the Presidential Administration, the State Duma and the Federation Council of the Russian Federation. The Venice Commission is grateful to the Russian authorities for the fruitful discussions and co-operation.
5. The present opinion was prepared on the basis of the comments of the rapporteurs and of the discussions held in Moscow and was adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

II. Analysis of the Amendments to the Law on defence

A. Background

6. During its visit to Moscow, it was explained to the Venice Commission delegation that the Russian/Georgian war of summer 2008 revealed two legal gaps in the Russian legal order, related to the grounds for sending the Russian armed forces abroad and to the immediate reaction to an unexpected armed attack.
7. Until November 2009 there were only two grounds in the Russian legislation for dispatching troops (or other personnel) outside the territory of the Russian Federation: the fight against international terrorism (regulated by the Law on countering international terrorism and by Federation Council’s Order No. 219-SF of 7 July 2006²) and participation in peace-keeping operations (Law on the provision of civil and military forces to take part in peace-keeping operations). There was no specific provision about a reaction to an armed attack that occurred outside the territory of the Russian Federation³.

¹ In its resolution 1683 (2009) on “the war between Georgia and Russia: one year after”, the Parliamentary Assembly had invited the Russian authorities to submit the 2009 amendments to the Venice Commission for opinion (para. 12.5 of the resolution).

² Postanovlenie (order) of the Federation Council adopted on 7 July 2006 (N219-SF) “On the use of the Russian military formations and special military subdivisions outside the territory of the Russian Federation with the aim of fighting international terrorist activity”. Through this decision, the Federal Council empowered *the President of the Russian Federation in accordance with the legislative acts of the Russian Federation to use the formations of the Armed Forces of the Russian Federation and the units for special purposes outside the territory of the Russian Federation, with the aim to curb international terrorist activities against the Russian Federation, nationals of the Russian Federation and stateless persons permanently residing in the territory of the Russian Federation*” (art. 1) (unofficial translation)

³ Article 10 § 2 of the Law on Defence provides that “the armed forces of the Russian Federation aim to meet an aggression against the Russian Federation, to defend using military force the integrity and inviolability of the borders of the Russian Federation as well as to fulfil tasks in accordance with the international treaties of the Russian Federation” (unofficial translation).

8. The Russian Constitution provides that (Article 87) the President of the Russian Federation, as the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation, "in case of aggression against the Russian Federation or of direct threat of aggression (...) shall proclaim martial law throughout the country or in particular localities immediately reporting about that to the Council of the Federation and the State Duma" and that (Article 88) "in circumstances and according to the procedure provided for by the federal constitutional law shall proclaim the state of emergency and immediately report about that to the Council of the Federation and the State Duma". Pursuant to Article 102 § 1.d) of the Constitution, the decisions on using Armed Forces of the Russian Federation outside the territory of the Russian Federation are within the jurisdiction of the Council of the Federation.

9. In order to respond to an armed attack occurring outside the territory of the Russian Federation, before the amendments of 2009 the President of the Russian Federation had to submit a request – a draft postanovlenie – to the Federation Council. While the Federation Council sits permanently, seeking its authorisation during the night, weekends or summer holidays (as happened in 2009) risked jeopardising a prompt response of the Russian army in emergency situations. The power of the President of the Russian Federation under Article 80 of the Constitution, as guarantor of the Constitution of the Russian Federation and the rights and freedoms of the individual and the citizen, to "take measures to protect the sovereignty of the Russian Federation, its independence and state integrity, and assure the coordinated functioning and interaction of all bodies of state power" cannot be invoked in case of armed attacks outside the borders.

10. In order to fill these lacunae, the law of October 2009 inserted in Article 10 of the Law on defence two sets of provisions, the first providing for four cases in which the Russian Armed forces may be dispatched abroad and the second providing for the power of the President of the Russian Federation to decide on the "operational use" of the troops so dispatched.

11. Further, on 16 December 2009 the Federation Council adopted a Postanovlenie whereby it empowered the President of the Russian Federation "*to take decisions on the operational deployment of the Russian Federation Armed Forces beyond the territorial boundaries of the Russian Federation in accordance with the universally recognised principles and norms of international law, the international treaties of the Russian Federation and the Federal Law "On Defence" in order to fulfil the following tasks:*

- 1) *to repel an armed attack on Russian Federation Armed Forces formations, other troops or organs deployed beyond the territorial boundaries of the Russian Federation;*
- 2) *to repel or prevent an armed attack on another State which makes a corresponding request to the Russian Federation;*
- 3) *to protect Russian Federation citizens beyond the territorial boundaries of the Russian Federation from armed attack;*
- 4) *to combat piracy and ensure the security of shipping".* (article 1, unofficial translation)

12. The Venice Commission has examined the 2009 amendments to the Russian Defence Law. It finds that they can raise two types of issues. The first relates to the compliance with international law of the material provisions on the use of force by the Russian Federation outside its territory. The second relates to the procedural provisions on the discretionary powers of the head of the executive branch to decide on the use of armed forces outside the state's territory and the compliance of this with the principles of democratic control over the armed forces. These questions will be examined separately.

B. The grounds in Russian law for sending troops abroad

13. The 2009 amendments have introduced in the Russian law the four legal grounds on which Russian Armed Troops may be dispatched abroad “with a view to protecting the interests of the Russian Federation and its citizens and to maintain international peace and security”.

14. The four cases listed in new paragraph 2.1 of Article 10 of the Defence Law are the following:

- 1) *to repel an armed attack on Russian Federation Armed Forces formations, other troops or organs deployed beyond the territorial boundaries of the Russian Federation;*
- 2) *to repel or prevent an armed attack on another State which makes a corresponding request to the Russian Federation;*
- 3) *to protect Russian Federation citizens beyond the territorial boundaries of the Russian Federation from armed attack;*
- 4) *to combat piracy and ensure the security of shipping.*

15. The Venice Commission underlines at the outset that, whatever the national law, including constitutional law, provides, the legality of a particular deployment of armed forces in other states is also subject to international law. No authorization in national law, including constitutional law, can justify an act which turns out to be in breach of international law.⁴ In international law a state is a single whole, responsible for the acts of all of its sub-units regardless of its internal distribution of power.⁵ Were the Russian Federation (or any other state, for that matter) to use force in violation of the UN Charter, it would bear international responsibility for such an action, and would do so regardless of what its national law says.

16. The Venice Commission further notes that the Russian Law on Defence explicitly provides that the use of armed forces abroad will be in conformity with “commonly accepted principles and norms of international law [and] international treaties of the Russian Federation”. This *chapeau* phrase can be seen as conditioning the permissible goals for which military force can be used, as a controlling provision that shall govern all concrete undertakings.

17. This introductory sentence has to be read in the light of Article 15 of the Constitution of the Russian Federation which establishes a clear hierarchy between international treaties and national law:

“The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.”

18. This means that the Defence Law has, at any rate, to be interpreted in the light of the UN Charter and its regulations on the use of force. The wording of the Russian law therefore has to be interpreted narrowly. Justifications of the use of force that go beyond what is accepted by the UN-Charter would not only be illegal on the basis of international law, but also on the basis of national Russian law.

⁴ Treatment of Polish nationals, PCIJ Rep. 1932, Ser A/B, No. 44, p. 4.

⁵ See ILC Articles on State Responsibility, UN Doc A/56/10, chp. IV.E.2, at 71, para. 6 (“The State is treated as a unity, consistent with its recognition as a single legal person in international law.”)

19. Indeed, all the interlocutors who met with the Venice Commission delegation confirmed that all dispatching of troops abroad needs to be decided and carried out in full compliance with international law.

20. The Deputy Minister of Justice has pointed out that the Russian Federation intends to provide for an explicit, clear domestic legal basis for all cases of presence of Russian troops abroad. The Venice Commission understands therefore that the four cases in paragraph 2.1 of Article 10 of the Law on Defence, the Law on countering international terrorism and the Federal law on the procedure of allocation of military and civilian personnel for participation in the peacekeeping and peacemaking operations represent the only cases in which, as of today, Russian troops may be dispatched abroad. Any possible further case would be introduced through a legislative measure.

21. The Venice Commission welcomes the intention to provide for a clear domestic legal basis for all cases of dispatch of armed forces outside the territory of the Russian Federation. This allows for more transparency and provides for an explicit delimitation of the possibility to do so.

22. The Venice Commission wants to underscore that it is very valuable for a State to introduce references to principles of international law in its legislation. Indeed, such references represent a formal expression of the interpretation of international law by the State which becomes accessible to the international community, notably the neighbouring States. The Venice Commission nevertheless underlines that, irrespective of such references, conformity with international law will always need to be assessed in each concrete case.

23. The Venice Commission has examined the four cases separately.

- a) Military intervention to counter armed attacks against the Russian armed forces, other troops or bodies abroad.

24. The Venice Commission recalls at the outset that the freedom of states to use force has been greatly reduced in modern international law. Article 2. 4 of the United Nations Charter provides that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

25. In addition to enforcement action authorized by the Security Council, the only undisputed exception to this prohibition is the right to self-defence, contained in Art. 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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 defence 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.

26. According to article 3 (d) of the UNGA Resolution 3314 (1970) on the definition of aggression, the following act could be considered armed attack/aggression:⁶

“an attack by the armed forces of a State on the land, sea or armed forces or marine and air fleets of another State”.

27. The Resolution does not state that the troops have to be within the territory of the relevant country. Therefore it can be applied to an attack on troops stationed outside the country (the term “organs” must be interpreted in the sense of military organisations and institutions).

28. A troop dispatching based on this provision is legal from the international law point of view if the conditions for legitimate self-defence, as prescribed by international law, are met.⁷

29. The difficulties in establishing the facts in situations involving self-defence were outlined in various cases decided by the International Court of Justice, such as *Cameroon v. Nigeria* (2002)⁸ and *Iranian Oil Platforms* (2003).⁹ Indeed, the Court held that the State invoking self-defence has the burden of proof that an armed attack occurred and that the State against which the military action was conducted was responsible for it (for example, in *Iranian Oil Platforms*, the Court held that the USA had failed to do so).

30. With respect to the issue whether in a given case “an armed attack occurred against a Member of the United Nations”, as article 51 is formulated, reference must be made to the analysis of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. First, referring to the *Definition of Aggression* by the UN General Assembly, the Court held that not only acts of the regular army of a State may represent an armed attack, but also acts of irregular troops which, by their scale and effects, amount to an armed attack.¹⁰ Second, one of the conditions of the exercise of the right to self-defence, which follows from the wording of article 51, is that the armed attack should be made “against a State”.¹¹

31. Necessity and proportionality represent customary conditions for exercising the right to self-defence. According to the *Caroline*¹² precedent, the self-defence reaction must be necessary, instant, not leaving freedom of choosing the means or leaving time to deliberate and must not be unreasonable or excessive.¹³ The doctrine and case-law do not question

⁶ The French official version of the Charter provides the term “*agression armée*” in article 51.

⁷ See, for a general presentation, *Jon Galea*, Application of International Law on the Use of Force in the Georgia-Russia Conflict of 2008, *Romanian Journal of International Law* no. 8 (January-June 2009), p. 81-93. See also *Bogdan Aurescu*, Le conflit libanais de 2006 – une analyse juridique à la lumière de tendances contemporaines en matière du recours à la force, *Annuaire Français de Droit International*, LII, 2006, p. 137-159.

⁸ ICJ Reports, 2002, para. 308-324.

⁹ ICJ Reports 2003, para. 71; *Christine Gray*, *International Law and the Use of Force*, 3rd Ed., Oxford University Press, 2008, 146, 147

¹⁰ ICJ Reports, 1986, para. 187-201.

¹¹ There has been some discussion of the issue whether a state is entitled to exercise self-defence against a *non-state group* which has launched an attack of significant magnitude to qualify as an “armed attack” following Security Council Resolution 1368 (adopted in the wake of the September 11 2001 attacks). The ICJ in its Advisory Opinion Legal consequences of the construction of a wall in the occupied Palestinian territory, 24 July 2004, at para. 139 did not consider this to be the case in the circumstances. See, however, the separate opinions of Judges Simma and Koojijmans in Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) 19 December 2005.

¹² *D.G. Harris*, *Cases and Materials on International Law*, Sweet and Maxwell, London, 6th ed(2004), 921.

¹³ Quoted by *Ian Brownlie*, *International Law and the use of force by States* (1963), p. 43.

the two conditions. Thus, it is considered that self-defence may not be applied in a punitive way, but its purpose must be to stop and reject the armed attack.¹⁴ Nevertheless, self-defence does not entail “perfect proportionality”, meaning that the attacked State should use the same amount of force or that it should limit the actions to its territory.¹⁵

32. The International Court of Justice confirmed the customary nature of necessity and proportionality in *inter alia* the Advisory Opinion on the *Legality of Use of Nuclear Weapons*.¹⁶ It also addressed the issue in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, determining that the United States actions did not meet the necessity criterion, as a significant period had passed since the alleged armed attack had been countered.¹⁷ The necessity and proportionality were also found not to be met in *Iranian Oil Platforms*, as the Court showed that the US military response formed part of a larger operation.¹⁸ In the *Cameroon v. Nigeria* case, the Court held that in order to determine the legality of action involving use of force, each act (in that case, each frontier incident) should be taken into consideration.¹⁹ State practice also invoked necessity and proportionality in order to reject the legality of prolonged occupation of territory in the name of self-defence by Israel in South Lebanon in 1978-2000 and by South Africa in Angola in 1981-1988.²⁰

33. In addition, the presence of the armed forces, “other troops and organs” in another State’s territory must be in accordance with international law, that is, it must be based on the correct application of the principle of the Host Nation’s consent (to such presence).²¹

b) Military intervention to counter or prevent an armed attack against a third State upon the latter’s request

34. A similar reasoning to the one outlined in respect of the first case is applicable for the second aim of intervention abroad: “to counter or prevent an armed attack against another State which addressed the Russian Federation with such a request”.

35. Such an action of collective self-defence may be also justified on the basis of article 51 of the UN Charter and ICJ’s jurisprudence. The request of the other State must be valid: it should not be the result of coercion or of another situation illegal from the viewpoint of international law.

36. As concerns the term “prevent” in paragraph 2.1. 2 of Article 10, the Venice Commission interprets this as meaning that the dispatching of troops by a state at the request of another state is a measure of prevention of an attack against the latter by a third state, and not as authorising so-called pre-emptive strikes.

¹⁴ See also *Christine Gray*, op. cit., p. 121; the controversial question of an anticipatory attack is left open by the ICJ (cf. ICJ Reports 1986, S. 14, Ziff. 194).

¹⁵ *Ibidem*.

¹⁶ ICJ Reports (1996), para. 41.

¹⁷ ICJ Reports, (1986), para. 237.

¹⁸ ICJ Reports (2003), para. 76.

¹⁹ ICJ Reports (2002), para. 323.

²⁰ *Christine Gray*, op. cit., p. 154-155; UN Security Council Resolution no. 425 (on Israel), UN Security Council Resolution no. 545 (on South Africa).

²¹ See e.g. the *Armed Activities* case, op. cit. paras 42-53.

c) Military intervention to protect Russian citizens abroad from an armed attack against them

37. This case of military intervention abroad is problematic. The protection of a State's citizens on the territory of a third State is mainly a responsibility of the latter State. Diplomatic or consular protection may also be used where relevant. If a State is unable to prevent genocide, war crimes, ethnic cleansing and crimes against humanity, protection of the local population and foreign citizens becomes the responsibility of the international community on the basis of a relevant UN Security Council resolution²². The UNGA definition of "aggression" does not include attacks on citizens of another State.

38. A doctrinal debate persists regarding the question whether the term "inherent right to self-defence" in Article 51 UN-Charter signifies that the Charter only confirmed a previously existing homonymous sovereign right, belonging to all states and not only to members of the United Nations, or whether Article 51 established and fully defined this right. In the first case, the right to self-defence would be governed by customary law, which may grant states a scope of action wider than that explicitly allowed by the Charter.²³ In the second case, the reference to customary international law enlarging the scope of self-defence would be excluded.

39. The theory of intervention to protect a State's own nationals does not have a clear legal basis. So far, no international court or tribunal has used it as justification for the use of military force. The French doctrine refers to "*intervention d'humanité*", arguing mainly that the principle that is able to bring an exception from the prohibition to use force is the respect for fundamental human rights. Therefore, the distinction between humanitarian intervention ("*intervention humanitaire*") and the "*intervention d'humanité*" is the closer link between the State that intervenes and the persons subject to alleged violations of human rights, a link that is based on State sovereignty.²⁴

40. In some doctrine, the intervention to protect own nationals is based on the theory of *self-help*, in connection with the nationality link between the State and the protected persons. According to this theory, the State defends its own right, the right to protect its nationals abroad.²⁵ In all cases when the United States invoked the protection of nationals, it used the terms of "self defence" as legal argument. However, in the light of the interpretation of the notion of "armed attack" given by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,²⁶ an attack against a number of persons could hardly be regarded as an "armed attack" within the meaning of article 51 of the UN Charter. If this concept has any validity in international law, it is only to the extent that it can be subsumed under the concept of "necessity" as a circumstance precluding the wrongfulness of an act of intervention.²⁷ A distinction should also be made between *self-*

²² See UNGA Res. A/RES/60/1. The articles on state responsibility, op. cit., provide that non-forcible counter-measures are permissible in such situations (see in particular Articles 40 and 41). The "Responsibility to Protect" concept, <http://www.iciss.ca/report-en.asp>, which envisages forcible measures in certain circumstances has been endorsed by the UN Secretary General, <http://www.un.org/largerfreedom/> and finds considerable support in doctrine. However, it has not (yet) been accepted by the Security Council.

²³ See e.g. D. W. Bowett, *Self-Defence in International Law*, Manchester University Press, 1958, p. 185 ff; A. Constantinou, *The Right to Self-Defence under Customary International Law and Article 51 of the UN Charter*, Brussels: Bruylant, 2000, p.112 ff.; B. Simma et al. (eds.), *The Charter of the United Nations*, 2nd ed., Oxford University Press, 2002, Vol. I, p. 792 ff.

²⁴ E. Spiry, *Interventions humanitaires et interventions d'humanité: la pratique française face au droit international*, R.G.D.I.P., 1998, p. 407-434.

²⁵ Nguyen Quoc Dinh, *Droit international public*, L.G.D.J., 2003, p. 950; Christine Gray, op. cit., p. 75-78.

²⁶ ICJ Reports, 1986, p. 151.

²⁷ See Article 25 of the articles on state responsibility, and the Wall Advisory Opinion, op. cit. para. 140.

help, for which there is very little support nowadays in public international law, and *self-defence*, which requires the existence of an armed attack and represents a customary exception from the prohibition to use force. The International Court of Justice formally declared that it could not accept the United Kingdom's defence (in the *Corfu Channel* case) based on *self-protection* and *self-help*.²⁸

41. State practice includes actions conducted by States either alone or sometimes together with other States. The reaction of the international community proves that a general acceptance of this rule has not been reached.²⁹

42. One of the first cases of intervention to protect nationals is Belgium's action, supported by the United States and the United Kingdom in Congo in 1964, during a rebellion against Tshombe. The three States invoked both the intervention to protect nationals and an invitation by the President of Katanga. Although twenty-two States requested the Security Council to condemn the intervention, Resolution 199 (1964) was adopted in general terms, requiring the parties to refrain from further acts of violence – mainly due to the position of US and UK in the Council.³⁰

43. Other interventions based on the aim of protecting nationals were conducted by the United States in the Dominican Republic, Grenada and Panama. Thus, in the Dominican Republic in 1965, the US invoked both the government's invitation and the protection of nationals. Nevertheless, the result of the intervention was the installation of a new government. Within the debates in the Security Council, the only delegation that supported the legality of the intervention was the United Kingdom.³¹ Anyway, the UN did not adopt an official position. In Grenada (1983), the justification was the same: invitation by the legitimate government and protection of nationals, and the intervention resulted, again, in the installation of a new government. The intervention was condemned by General Assembly Resolution no 38/7 (1983), which qualified the situation as a "violation of international law".³² At the same time, the intervention in Panama in 1989 was motivated on self-defence to protect US citizens and the rights deriving from a 1977 Treaty. Although the Security Council did not adopt any resolutions, the General Assembly condemned the action by Resolution 44/240 (1989).³³

44. In several cases in which military force was only used to rescue citizens in situations of immediate threat and to evacuate them, the actions have, as a rule, not been explicitly condemned. One famous example is the Entebbe incident of 1976 where an Israeli special military unit conducted a rescue action at Entebbe airport in Uganda in order to liberate Israeli citizens who had been taken hostages by Palestinian terrorists.³⁴ Another example is

²⁸ *The Corfu Channel Case*, ICJ Reports, 1949, p. 35.

²⁹ *Christine Gray*, op. cit., p. 78.

³⁰ A. Virally, *Les Nations Unies et l'Affaire du Congo*, AFDI, no. 577 (1964), p. 230; *Christine Gray*, op. cit., p. 75.

³¹ *Meeker*, *The Dominican Situation in the Perspective of International Law*, 53, Department of State Bulletin (1965) 60, *Christine Gray*, op. cit., p. 77.

³² *Christine Gray*, op. cit., p. 77.

³³ See also *Anthony D'Amato*, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AJIL (1990), p. 516.

³⁴ In a special sitting of the Security Council two different resolutions were proposed (UN-Doc. S/12139 and UN-Doc.S/12138), but none of them was adopted. This confirms that a State will escape from condemnation and sanctions by the Security Council in a case where its intervention proves inevitable, proportionate and limited to the necessities of extricating the nationals from danger"; cf. Beyerlin, *Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 37 (1977), p. 243.

the evacuation of 120 persons, among them 20 Germans, from the Albanian capital Tirana in 1997 by German military helicopters.³⁵

45. In conclusion, it is doubtful that there is a reliable State practice in this context.³⁶ It can be assumed that as soon as a rescue operation exceeds a minimum intensity and falls within the scope of Article 2(4), the protection of own nationals³⁷ does not constitute an autonomous justification for the use of force.³⁸

46. In this regard, and irrespective of the term concretely used in Russian (protection “zashchita” as opposed to rescue “spasanie”), it should be understood that this kind of intervention should not be used as a pretext for military intervention and should not have as a consequence the stationing of troops in order to ensure the continued protection of the citizens in question.

d) Military intervention to combat piracy and ensure the security of shipping

47. In order for this kind of armed intervention to be legal under international law, the relevant rules of the law of the sea, as well as of the applicable international treaties, must be respected. Deployment of naval forces in coastal areas subject to a state’s jurisdiction is subject to the consent of the state in question.

48. Otherwise, it may be carried out in two cases in particular:

- a) When the deploying of armed forces is done to parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (high seas) within the meaning of the United Nations Convention on the law of the sea (Montego Bay Convention);
- b) When naval vessels or aircraft are deployed into the territorial sea of a State within the framework of a collective action under a mandate authorising the entry into the territorial seas of that State (see for example UN Security Council Resolution 1816(2008)).

C. The powers of the executive to send troops abroad

49. As has been explained above (paras. 8 and ff), the new Article 101 of the Law on Defence empowers the President of the Russian Federation to take the decision “*on the operative use of the formations of the Armed Forces of the Russian Federation outside the territory of the Russian Federation*”. The President further determines “*the general number of the Armed Forces of the Russian Federation, their area of action, tasks to be achieved and duration of the use of these formations*” and takes the decision “*on the early recall of the formations of the Armed Forces*”.

³⁵ See Claus Kreß, Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völker- und verfassungsrechtlicher Sicht, Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht 57 (1997), p. 329 et seq.

³⁶ See *Christine Gray*, International Law and the Use of Force, 3rd edition, Oxford University Press 2008, p. 88-92; *Robert Kolb*, *Ius contra bellum: Le droit international relative au maintien de la paix*, 2nd edition Helbing, Lichtenhahn/Bruyland 2009, p. 291.

³⁷ In the *Nottebohm Case* (second phase, Judgment of April 6th, 1955, ICJ Reports, 1955, p. 20), the International Court of Justice held that it must be determined whether a unilateral act granting nationality is one which can be relied upon against another State with regard to the exercise of protection.

³⁸ See the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, September 2009, page 286 (<http://www.ceiig.ch/Report.html>); see for a non-justified use of force for the protection of the own nationals *idem*, p. 283 et seq.

50. The President's decisions on the *operative use* of the armed forces abroad must be taken "on the basis of the corresponding resolution of the Federation Council of the Federal Assembly of the Russian Federation", which pursuant to Article 102 § 1.d) of the Russian Constitution has the power to decide about the deployment of armed forces abroad.

51. Pursuant to the new Article 101 as implemented by the Postanovlenie of 16 December 2009, the Federation Council has *de facto* delegated its decision-making power to the President. This delegation of power concerns not only exceptional situations when the Federation Council cannot be promptly convened, but all situations. The President may apply to the Federation Council for a resolution, as was the procedure before the 2009 amendments, but he is not obliged to do that. The Federation Council does not have the power to intervene in the process once the President has taken the decision.

52. The deployment of the armed forces falls within the broader issue of the distribution of power between the parliament and the executive. States have different approaches to this matter, depending in large part on whether they have presidential, semi-presidential or parliamentary systems of government³⁹.

53. While purely executive control over the deployment of armed forces abroad cannot be deemed to be contrary to European standards, the Venice Commission has previously expressed the view that democratic control over armed forces represents a guarantee that human rights and fundamental freedoms be respected both within the armed forces and by the armed forces during their operation, and it also constitutes an international confidence-building measure likely to avoid international conflicts and to consolidate international peace and security.⁴⁰

54. The Venice Commission notes that the Russian constitution provides a system of prior authorisation of armed interventions abroad by one chamber of the parliament; the level of parliamentary involvement is therefore high on paper.

55. The Venice Commission notes, however, that by virtue of the 2009 amendments as implemented by the Postanovlenie of 16 December 2009, the parliament's power of prior approval has *de facto* been relinquished even when there is no emergency situation. The actual level of parliamentary involvement may therefore be considered as low.

56. This thus represents a step backwards in terms of democratic control of the armed forces, although the Russian system cannot be said to conflict with international standards. The Venice Commission recalls that good models exist which combine flexibility of response with adequate systems of pre-authorisation, and/or post-hoc control⁴¹ and would strongly advise the Russian Federation to look again at this issue.

III. Conclusions

57. The 2009 amendments to the law on Defence of the Russian Federation, whereby four legal grounds on which Russian armed forces may be dispatched abroad have been introduced and the President of the Russian Federation has been empowered to take

³⁹ For an overview of European domestic legislation in this area see : Overview of national legislation on the authority to decide participation in missions abroad, Annex A to the Report on the Democratic Control of the Armed Forces, CDL-AD(2008)004.

⁴⁰ CDL-AD(2008)004, notably paras. 379 and 380.

⁴¹ See in particular DCAF, Strengthening Parliamentary "War Powers" in Europe: Lessons from 25 National Parliaments, 2008 <http://www.dcaf.ch/Publications/Publication-Detail?Ing=en&id=55090>.

decisions on the operational use of the armed troops deployed abroad, raise two types of issues: the first relates to the conformity with international law of the four cases of use of force by the Russian Federation outside its territory, and the second relates to the level of compliance of the decisional powers of the executive with the need for democratic control of the armed forces.

58. In relation to the first issue, it must be stressed that, whatever the national law, including constitutional law, provides, the legality of a particular deployment of armed forces in other states is always subject to international law. The amendments contain an introductory clause of conformity with international law, which is welcome as it acknowledges the overriding need to comply with international obligations; it is nevertheless important that the cases listed in the law conform to international law as they represent a formal expression of the interpretation of international law by the Russian Federation and, as such, they inevitably attract the attention of the international community, notably the neighbouring States.

59. The Venice Commission finds that, subject to their correct interpretation, the cases of deployment of armed forces abroad as set forth in lit. 1), 2) and 4) of paragraph 2¹ of Article 10 of the Law on defence are, as such, in conformity with international law.

60. As regards lit. 3) of paragraph 2¹ of Article 10 of the Law on defence, the Commission finds it problematic. The protection of a State's citizens on the territory of a third State is mainly a responsibility of the latter State. Diplomatic or consular protection may also be used where relevant. If a State is unable to prevent genocide, war crimes, ethnic cleansing and crimes against humanity, protection of the local population and foreign citizens becomes the responsibility of the international community on the basis of a relevant resolution of the UN Security Council. The UNGA definition of "aggression" does not include attacks on citizens of another State. There does not appear to be a reliable State practice in this context. It can be assumed that as soon as a rescue operation exceeds a minimum intensity and falls within the scope of Article 2(4), the protection of own nationals does not constitute an autonomous justification for the use of force. It cannot be used as a pretext for military intervention and cannot have as a consequence the stationing of troops in order to ensure the continued protection of the citizens in question.

61. In relation to the issue of compliance of the Executive power of sending troops abroad with the need for democratic oversight of the armed forces, the Venice Commission notes that the system foreseen in the Russian constitution provides a high level of parliamentary involvement. However, by virtue of the 2009 amendments as implemented by the Postanovlenie of 16 December 2009, the parliament's power of prior approval has *de facto* been relinquished even when there is no emergency situation. In the Venice Commission's view, although this does not, as such, conflict with international standards, it represents a step backwards in terms of democratic control of the armed forces and the Venice Commission would strongly advise the Russian Federation to look again at this issue.