



Strasbourg, 14 March 2014

CDL(2014)020*

Opinion no. 763/2014

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON “WHETHER DRAFT FEDERAL CONSTITUTIONAL LAW
No. 462741-6**

**ON AMENDING THE FEDERAL CONSTITUTIONAL LAW
OF THE RUSSIAN FEDERATION**

**ON THE PROCEDURE OF ADMISSION
TO THE RUSSIAN FEDERATION
AND CREATION OF A NEW SUBJECT
WITHIN THE RUSSIAN FEDERATION**

IS COMPATIBLE WITH INTERNATIONAL LAW”

On the basis of comments by

Mr Sergio BARTOLE (Substitute member, Italy)
Ms Veronika BILKOVA (Member, Czech Republic)
Ms Anne PETERS (Substitute member, Germany)
Mr Ben VERMEULEN (Member, the Netherlands)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. By a letter dated 7 March 2014, the Secretary General of the Council of Europe requested by way of urgency the opinion of the Venice Commission on the compatibility with international law of draft Federal Constitutional Law No. 462741-6 of the Russian Federation on “Amending the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and creation of a new subject of the Russian Federation in its Composition” (hereinafter “the draft law” or “draft law No. 462741-6”).
2. A working group immediately was set up, composed of Mr Sergio Bartole, Ms Veronika Bilkova, Ms Anne Peters and Mr Ben Vermeulen. *The present opinion, prepared on the basis of their comments, was discussed at a joint meeting of the sub-commissions on international law and on federal and regional states held on ... and was subsequently adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2014).*
3. This opinion is based on the English translation of the draft law and its Explanatory Note (CDL-REF(2014)011), but access was had to the original Russian version as well.

II. Factual background

4. On 28 February 2014, a group of deputies of the State Duma of the Russian Federation introduced Draft Federal Constitutional Law No. 462741-6 On Amending the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation.
5. The Draft Law amends Federal Constitutional Law No. 6-FKZ on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation, adopted on 17 December 2001 and amended by Federal Constitutional Law No. 7-FKZ of 31 October 2005. Law No. 6-FKZ implements Article 65 par. 2 of the Constitution of the Russian Federation, which stipulates that “accession to the Russian Federation and formation of a new subject of the Russian Federation within it shall be carried out as envisaged by the federal constitutional law”.
6. Law No. 6-FKZ sets conditions for, and regulates the procedure of, the admission of a new subject to the Russian Federation and of the creation of a new subject within the Russian Federation. Since Draft Law No. 462741-6 focuses solely on the admission of new subjects, this opinion limits its attention to this aspect.
7. Under Article 4 of the Law No. 6-FKZ, a foreign state or its part may be admitted to the Russian Federation as its new subject. The admission shall be based on a mutual accord (по взаимному согласию) between the Russian Federation and the relevant state and shall take place pursuant to an international treaty between the two countries (Article 4 par. 2).
8. The admission shall be initiated by a request from the relevant foreign state. This request shall be addressed to the President of the Russian Federation, who has the obligation to inform about it the two chambers of the Parliament and the Government. Once an international treaty on the admission of a new subject into the Russian Federation is concluded, the President has to submit it to the Constitutional Court of the Russian Federation for the verification of its compatibility with the Constitution of the Russian Federation. If the result of this verification is positive, the treaty shall be introduced into the State Duma for ratification. Simultaneously, a draft federal constitutional law on the admission of a new member is submitted to the Parliament and shall be adopted by its two chambers. Once this procedure is concluded, the foreign state or a part of it is admitted to the Russian Federation and is given an appropriate status (republic, krai, oblast, autonomous oblast or autonomous district).

9. Draft Law No. 462741-6 amends the Law No. 6-FKZ in several aspects. Most importantly, it removes the requirement of the mutual accord between the Russian Federation and the foreign state and the conclusion of an international treaty between the two states. Draft Article 4 par. 2.1 stipulates that *“when it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state, whose duty is to protect its citizens, observe their rights and freedoms, enabling actual permanent and peaceful exercise of state functions, the admission to the Russian Federation of a part of the foreign state in the capacity of a new subject may take place on the basis of a referendum conducted in accordance with the legislation of the foreign state in the territory of the relevant part of the foreign state, if the accession to the Russian Federation was approved, or on the basis of request of state authorities of the said part of the foreign state”*.

10. The Draft Law further provides that in the situation foreseen in Draft Article 4 par. 2.1, the request for the admission of a new subject to the Russian Federation shall be submitted by “state authorities of the part of the foreign state” (Draft Article 6 par. 1.1). The admission shall then be carried out solely on the basis of the constitutional law of the Russian Federation, with no need to conclude an international treaty with the foreign state.

11. The Explanatory Note attached to Draft Law No. 462741-6 explicitly refers to the situation in Ukraine and to the obligation of the Russian Federation to “take measures of support of the people of Ukraine that would push Ukraine’s authorities towards establishing proper order without violence and discrimination of national minorities”. Although it is therefore evident that it is designed to address the current situation in Ukraine, Draft Law No. 462741-6 is drafted in general terms. The purpose of this opinion is to assess the text of the Draft law and not to take a position on a concrete situation.

III. Relevant Legal Framework under International and Constitutional Law

A. Acquisition of a new territory and the principle of territorial integrity

12. The principle of territorial integrity, state unity and/or indivisibility of the state ranks among the most fundamental principles recognized both under *international law* and in domestic legal orders of the vast majority of the members of the Council of Europe. The *Friendly Relations Declaration*, annexed to the UN General Assembly Resolution 2625 of 24 October 1970,¹ and which is generally considered as an authoritative interpretation of the UN Charter, recalls in its preamble that *“any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter”* (par. 14).

13. The Declaration further confirms that the inviolability of the territorial integrity and political independence is one of the manifestations of the principle of the sovereign equality of states as enshrined in Article 2 par. 1 of the UN Charter. Moreover, while recognizing the principle of self-determination of peoples, the Declaration stresses that *“nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”*.

¹ UN Doc. A/RES/2625 (XXV), *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.

14. In the OSCE context, the *Declaration on Principles Guiding Relations between Participating States*, annexed to the 1975 Helsinki Final Act, enumerates the principle of territorial integrity of States among the fundamental principles of current international legal order. This principle encompasses the obligation of states to “refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force” as well as the obligation to “refrain from making each other’s territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal”.

15. At the *domestic level*, the principle of territorial integrity is sanctioned in numerous constitutions, together with the principles of indivisibility of the state and of the state or national unity.² For instance, the Constitution of the Russian Federation declares that “the sovereignty of the Russian Federation shall cover the whole of its territory” (Article 4 par. 1) and that “the Russian Federation shall ensure the integrity and inviolability of its territory” (Article 4 par. 3). In its decision No. 10 of 31 July 1995, the Constitutional Court of the Russian Federation stressed that state unity was not only one of the fundamentals of the constitutional order of the Russian Federation but also “a serious condition of the equal legal status of all citizens /.../, one of the guarantees of their constitutional rights and freedoms”.³ The need to protect the territorial integrity of the State is often recognized as a legitimate reason for imposing limitations upon fundamental human rights, for instance the freedom of association, the freedom of expression or the right to property.⁴

16. The principle of territorial integrity is not favourable to territorial changes and the acquisition by a state of a new territory. It does not, however, totally exclude them. States may decide to unify with others into a single state entity. Such an option is indeed explicitly foreseen by certain constitutions, for instance that of Slovakia (Article 7⁵). States may also under current international law acquire new territory by means of the natural accretion, the

² See Constitutions of Austria (Article 9a.1), Croatia (Article 101.1), Cyprus (Article 185.1), Estonia (Article 2), Finland (Article 3) France (Article 1), Italy (Article 5), Moldova (Article 10.1), Romania (Article 1.1), and Spain (Article 2). For a more detailed analysis, see CDL-INF (2000) 2, *Self-Determination and Succession in Constitutional Law*, 12 January 2000. A partial exemption to this rule is the Dutch Charter for the Kingdom of the Netherlands, which gives rules for the secession of Aruba from the Dutch Kingdom (Articles 58 through 60 Statuut van het Koninkrijk der Nederlanden). This particular example stems from the colonial past of the Dutch Kingdom

³ *Постановление Конституционного суда Российской Федерации по делу о проверке конституционности Указа Президента Российской Федерации от 30 ноября 1994 года № 2137 "О мероприятиях по восстановлению конституционной законности и правопорядка на территории Чеченской Республики", Указа Президента Российской Федерации от 9 декабря 1994 года № 2166 "О мерах по пресечению деятельности незаконных вооруженных формирований на территории Чеченской Республики и в зоне осетино-ингушского конфликта", постановления Правительства Российской Федерации от 9 декабря 1994 года № 1360 "Об обеспечении государственной безопасности и территориальной целостности Российской Федерации, законности, прав и свобод граждан, разоружения незаконных вооруженных формирований на территории Чеченской Республики и прилегающих к ней регионов Северного Кавказа", Указа Президента Российской Федерации от 2 ноября 1993 года № 1833 "Об Основных положениях военной доктрины Российской Федерации, 31 июля 1995 года.*

⁴ See, for instance, the Constitutions of Moldova (Article 41.4), Romania (Articles 8.2 and 37.2). See also Article 10 par. 2 of the European Convention on Human Rights and Fundamental Freedoms.

⁵ Article 7 par. 1 of the Constitution of Slovakia: “On the basis of its free decision, the Slovak Republic can enter into a state alliance with other states. The right to secession from this alliance must not be restricted. The decision on entering into a state alliance with other states or on secession from this alliance will be made by a constitutional law and a subsequent referendum.”

prescription and, most importantly for this opinion, the cession of the territory from the previous sovereign.⁶

17. The *cession* of a territory means “*the renunciation made by one State in favour of another of the rights and title which the former may have to the territory in question*”.⁷ The cession of a territory may solely be carried out on the basis of a mutual, freely reached accord between the original and the new sovereign and it may only be consented to by the state to which the territory belongs (principle of *nemo plus iuris in alium transferre potest quam ipse habet*).⁸

18. The valid cession thus always requires “*the full consent of the Governments concerned*”.⁹ This principle is well established under international customary law and has been repeatedly confirmed in arbitration and judicial cases.¹⁰ There are numerous examples of the voluntary cession of territory, for instance the cession of Louisiana to the USA by France in 1803 or the cession of Alaska to the USA by Russia in 1867. History also abounds in examples of involuntary cession of territory, usually carried out under the threat of force or by means of force (cession of Alsace-Lorraine to France by Germany in 1871 etc.). While originally not seen as unlawful, involuntary cession has become outlawed by the adoption of the UN Charter enshrining the prohibition on the threat and use of force (Article 2 par. 4).¹¹

19. Under modern international law, moreover, the cession of the territory is subject to other rules and principles, especially those stemming from human rights law. Thus, for instance, the state could not validly cede a territory to a state with a record of blatant and systematic violation of human rights. Additional limits may be imposed upon the cession (or, from the other perspective, the acquisition) of a territory by domestic law. Thus, for instance, the Constitution of Spain declares that it is “*based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards*” (Article 2); the Constitution of Italy speaks about “*the Republic, which is one and indivisible*” (Article 5); the French Constitution also mentions “*indivisibility*” (Art. 1) and integrity of the territory (Art. 5(2); the Constitution of the Russian Federation invokes “*the integrity and inviolability of its territory*” (Article 4 par. 3) and the Constitution of Ukraine declares that “*the territory of Ukraine within its present borders shall be indivisible and inviolable*” (Article 2). The same principle appears in some of the constitutions of autonomous regions/federal units; for example, Article 1 of the Crimean Constitution defers to the Ukrainian Constitution, stating that “*the Autonomous Republic of Crimea shall be an integral part of Ukraine and it shall solve, within the powers conferred upon it by the Constitution of Ukraine, any and all matters coming within its terms of reference.*”

⁶ See James Crawford, *Creation of States in International Law*, Second Edition, Oxford University Press, 2006; Robert Yewdall Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963; and Surya Prakash Sharma, *Territorial Acquisition, Disputes, and International Law*, Kluwer Law International, 1997.

⁷ *Reparation Commission v. German Government*, 1924, Annual Digest of International Law Cases, 1923-24, Case No. 199.

⁸ PCA, *Island of Palmas Case*, United States of America v. Netherlands, The Hague, 4 April 1928, section 3.

⁹ Georg Schwarzenberger, *International Law*, Third Edition, London, 1957, p. 303.

¹⁰ See, for instance, the Swiss Federal Council, *Colombia v. Venezuela*, 24 March 1922; or *Reparation Commission v. German Government*, *op cit.*; Arbitration, *Several British Subjects (Great Britain) v. United States (Iloilo Claims)*, 19 November 1925; etc.

¹¹ See also Sharon Korman, *The right of conquest: The acquisition of territory by force in international law and practice*, Clarendon Press, 1996.

20. International law does not contain any special rules applicable to the cession of a territory belonging to *states lacking effective government* (so called failed, collapsed or disintegrating states¹²). Such states do not become *terra nullius* and their territory therefore has to be respected in the same way as that of any other states. It is certainly true that failed states are often unable to ensure human rights and fundamental freedoms of their citizens in an adequate manner. It is equally true that ensuring the respect of such rights and freedoms is of concern not only for the territorial (failed) state but also for the international community as a whole, as human rights law gives rise to obligations *erga omnes* (or, in case of human rights treaties, obligations *erga omnes partes*).¹³

21. Current international law entitles states to deploy political, diplomatic or economic initiatives aimed at upholding human rights and fundamental freedoms of citizens of failed states. It also gives them the option of using the mechanisms of the collective security under Chapter VII of the UN Charter. It does not, on the contrary, allow them to appropriate, even *bona fide* and with purely humanitarian intentions, a part of the territory of a failed state, incorporating it within their own territory. Any decision on the cession of a territory has to wait for the restoration of effective government in the failed state.¹⁴ The general principle applying there, in all circumstances is that “*a cession can only be valid if both the State to which the territory belonged so far and the State to which it is intended to belong in the future have declared their proper consent, e.g. by concluding a treaty on the matter*”.¹⁵

22. International law likewise does not contain any special rules applicable to the cession of a territory belonging to states in which there is uncertainty as to who is the *legitimate government*. In such a situation, again, states are free to deploy political, diplomatic or economic initiatives aimed at upholding human rights and fundamental freedoms of citizens of such countries and to offer their help and assistance with the aim of overcoming the political crisis in the state.¹⁶ Any decision on the cession of a territory of a state with a contested government shall however again be postponed till this aim is reached and political stability in the country restored, as the same general principle requiring the valid consent of the two states as the only acceptable legal basis of the cession of the territory applies here as well.¹⁷ A transfer of territory from one state to the other without the valid consent of the government of the state whose territory is concerned is no lawful cession of territory but rather amounts to an annexation of territory which is prohibited under international law. A transfer of territory under a military threat (manifest, for example, in troops concentrations along a state boundary, or in a stationing of troops in the relevant territory) is additionally tainted by the violation of the international prohibition of the threat (or the use) of force.

¹² See, for instance, Mario Silva, *State Legitimacy and Failure in International Law*, Brill/Nijhoff, 2014; Riikka Koskenmäki, Legal Implications Resulting from State Failure in Light of the. Case of Somalia., *Nordic Journal of International Law*, Vol. 73, 2007, pp. 1-36; Daniel Thürer, Failed States and International Law, *International Review of the Red Cross*, No. 836, 1999, online.

¹³ See, for instance, Neil A. Englehard, State Capacity, State Failure, and Human Rights, *Journal of Peace Research*, Vol. 46, No. 2, 2009, pp. 163-180.

¹⁴ See also UK High Court, QBD, *Republic of Somalia v. Woodhouse Drake and Carey (Suisse) SA et al.*, Judgment, 13 March 1992.

¹⁵ Oliver Dörr, Cession, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Volume II, Oxford University Press, 2012, p. 66.

¹⁶ See Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, Presses universitaires de France, Paris, 1997.

¹⁷ “/.../ the principle of territorial integrity strengthens the view that, for territories under State sovereignty, only consent /.../ can transfer the territorial title.” Marcelo G. Kohen, *Mamadou Hébié, Territory, Acquisition*, in R. Wolfrum, op. cit, Volume IX, P. 896.

B. Acquisition of a Territory and the Principle of Self-Determination of Peoples

23. The principle of self-determination of peoples is, equally as the principles of the territorial integrity of states and of the sovereign equality of states, one of the fundamental principles of current international legal order.¹⁸ The promotion of self-determination is one of the purposes of the United Nations: “*The purposes of the United Nations are: ... To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*” (Article 1 (2) UN-Charter). It is also endorsed in Article 1 of both universal Human Rights Covenants of 1966. The 1970 *Friendly Relationship Declaration* specifies that “*by virtue of the principle of equal rights and self-determination of peoples /.../ all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter*”. A similar provision appears in the *Declaration on Principles Guiding Relations between Participating States*, annexed to the 1975 Helsinki Final Act.

24. The principle of self-determination of peoples encompasses two main aspects: an internal and an external one. The internal aspect pertains to the right of peoples freely to determine their political status within the state’s frontiers and to pursue their cultural, social and economic development. The external aspect pertains to the right of peoples freely to determine their place in the international community of states.

25. The right to self-determination is understood as “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups”¹⁹ and is therefore reserved exclusively to “peoples”. Although current international law lacks a treaty definition of “peoples”, it is usually accepted that this concept refers to a separate, specific group of individuals sharing the same history, language, culture and the will to live together. The right to self-determination does not appertain to minorities or other groups within a state.²⁰ It may, however, in concrete cases be difficult in practice to categorize a given group of persons as a “people” or (“only”) as a “minority” in the sense of international law.

26. But even if a group qualifies as a “people”, in the sense of international law, the principle of self-determination of peoples does not automatically entail their right to *secession*. As the Supreme Court of Canada held in *Re Secession of Québec*, a right to secession only arises “*where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state*”.²¹ The Badinter Commission, charged with the task of helping the EU in formulating its policies towards the dissolution of Yugoslavia, when dealing with the question of whether the Serbian population of Bosnia-Herzegovina and Croatia would have a right to self-determination, noted that self-determination does not include a right to secede, and amounts to little more than a favourable treatment of minorities. The Badinter Commission reconceived self-determination to serve so as to safeguard human rights. By virtue of that right [self-determination] every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In a similar way, the

¹⁸ See Antonio Cassese, *Self-Determination of Peoples A Legal Reappraisal*, Cambridge University Press, 1999; and David Rajič, *Statehood and the Law of Self-Determination*, Kluwer Law International, 2002.

¹⁹ Brownlie, *Principles of International Law* (7th ed. Oxford OUP 2008), at 580.

²⁰ ICJ, *Western Sahara, Advisory Opinion*, 16 October 1975, par. 59.

²¹ Supreme Court of Canada, *Re Secession of Québec*, [1998] 2 S.C.R. 217, p. 222.

International Fact-Finding Mission on the Conflict in Georgia arrived at the conclusion that '*Abkhazia was not allowed to secede from Georgia under International Law, because the right to self-determination does not entail a right to secession*'.²² The extent of the right to secession and especially the extent, and the very existence of the so called remedial secession,²³ remain controversial under current international law.²⁴ In any case, even a remedial secession would only be an option of last resort in a situation where a people's right to internal self-determination has been persistently and massively violated and all other means have failed. Such secession would thus have to be based on material conditions, and also be pursued in an orderly procedure.

27. If a people would seek to secede from a state under the given narrow conditions, exercising its right to self-determination, it would be free to decide whether it will establish a new state or become a part of an already existing one. A state that would unify with such an entity or would incorporate it into its territory, would not act in violation of international law.

C. Acquisition of a territory and the principles of Non-intervention in internal affairs of another state and Prohibition on the use of force.

28. If, on the other hand, a people, or a group other than a people, would seek to secede from a state in other circumstances, it would have no sound legal basis to do so under current international law²⁵. The International Court of Justice held in the 2010 Kosovo Advisory Opinion that "*general international law contains no applicable prohibition of declarations of independence*".²⁶ Such declarations are in fact typically issued by non-state actors, and it is controversial which types of non-state actors, under which conditions, and by which rules of international law these are bound. A state that would unify with such an entity or would incorporate it into its territory, would however act in violation of several fundamental principles of international law, most notably the principle of non-intervention in internal affairs.

²² *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, 30 September 2009, Vol. II, at 147, available at www.ceiig.ch.

²³ The idea of remedial secession is most often traced back to para. 7 of the General Assembly's Friendly Relations Declaration e contrario (UN GA Res. 2625 (XXV) of 24 October 1970. See also the similar wording of the Vienna Declaration and Programme of Action of 12 July 1993, A/CONF.157/23, part I.2., of the World Conference on Human Rights).

²⁴ See Jan Klabbbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, *Human Rights Quarterly*, Vol. 28, No. 1, 2006, pp. 186-206; Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, *St. Anthony International Review*, Vol. 6, No. 1, 2010, pp. 37-56; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995) 121 and 123. But see ICJ, *Accordance with International Law*, sep. op. Judge Yusuf para. 11. Although the Canadian Supreme Court's opinion on Québec left the question open, it leaned towards accepting remedial secession in principle. Accordingly, a decision of the African Commission on Human and Peoples' Rights confirmed the concept, while finding the pre-conditions not fulfilled for the Katangese people in Zaire (*African Commission on Human and Peoples' Rights, Katangese Peoples' Congress v. Zaire*, case 75/92 (1995)).

²⁵ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, Advisory Opinion, para. 82: "Outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State." This is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question.

²⁶ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, Advisory Opinion, 22 July 2010, par. 84.

29. Under this principle,²⁷ “no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law”. As the Canadian Supreme Court decided, and the ICJ indicated, secession may in certain extreme situations be allowed, and then perhaps, as a last resort, there could also be an authority of other states to intervene for humanitarian reasons. At the same time, “no State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”.²⁸ A state incorporating within its territory a part of the territory of another state without the valid consent of the latter would quite obviously act in violation of this principle. If moreover, such a state sought to achieve the incorporation of the territory of another state by means of the threat or use of force, it would in addition act in violation of the prohibition on the use of force (Article 2 par. 4 of the UN Charter).

D. Minority protection and the principles of territorial integrity, national sovereignty and *pacta sunt servanda*.

30. Securing to everybody within their jurisdiction the enjoyment of fundamental human rights, including minority rights, is primarily the task of the States where the minorities reside (so-called home-States); the obligations stemming from the international treaties relating to minority protection are without prejudice to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States (see in particular Article 21 and the Preamble of the Framework Convention for the protection of national minorities²⁹).

31. The pertinent international agreements assign to the international community as a whole a role of supervision of the home-States’ obligations.³⁰

32. Article 18.1 of the Framework Convention for the Protection of National Minorities encourages bilateral and multilateral agreements on minority protection³¹. In this connection, the Venice Commission has previously stressed that the principle of *pacta sunt servanda* entails that “when a State is party to bilateral treaties concerning, or containing provisions, on minority protection, it must duly fulfil all the obligations contained therein including that of pursuing bilateral talks with a view to assessing the state of implementation of the treaty and

²⁷ See also Maziar Jamnejad, Michael Wood, The Principle of Non-intervention, *Leiden Journal of International Law*, Vol. 22, No. 2, 2009, pp. 345-381.

²⁸ UN Doc. A/RES/2625 (XXV), *op. cit.* See also the 1975 Declaration on Principles Guiding Relations between Participating States, annexed to the Helsinki Final Act and UN Doc. A/RES/2131 (XX), *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, 21 December 1965.

²⁹ The French text of Article 21 indicates even more clearly that the principle of territorial integrity applies also to individuals: ‘Aucune des dispositions de la présente Convention-cadre ne sera interprétée comme impliquant pour un individu un droit quelconque de se livrer à une activité ou d’accomplir un acte contraires aux principes fondamentaux du droit international et notamment à l’égalité souveraine, à l’intégrité territoriale et à l’indépendance politique des Etats’

³⁰ Article 1 of the Framework Convention for the protection of national minorities reads: The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

³¹ “The Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.”

to addressing the possible enlargement or modification of the rights granted to the respective minorities³². In case of difficulties in holding such bilateral talks, all the existing procedures for settling disputes (including requests for the intervention of the OSCE High Commissioner on National Minorities and of the International Conciliation and Arbitration Court) should be used in good faith and only in case they had proved ineffective could a State envisage taking alternative, unilateral measures.³³

33. The role of so-called “kin-States” is only a subordinate one, which only comes into play after the primary role of the home-State and the role of the international community. A kin-State may not substitute itself for the home-State in the protection of a community living on the territory of the home state. The role of kin-states is also limited to maintaining genuine linguistic and cultural links with the kin-community: legitimate concerns of kin-States do not stretch to fostering the autonomy of a community residing in another State. Respect for the existing framework of minority protection must be held as a priority. Multilateral and bilateral treaties must be interpreted and implemented in good faith in the light of the principle of good neighbourly relations between States.

IV. Assessment of the draft law

34. Draft Law No. 462741-6 removes the requirement of the consent by the territorial state with the cession of a territory under its sovereignty to the Russian Federation. In case “when it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state” (Draft Article 4 par. 2.1), a part of the territory of another state may be admitted to the Russian Federation on the basis of a referendum conducted in accordance with the legislation of the foreign state, or on the basis of request of state authorities of the said part of the foreign state. The two instances (referendum *or* request) are alternative rather than cumulative: each of them is therefore of itself sufficient to trigger the procedure of the admission of a territory to the Russian Federation. In both cases, the original territorial sovereign has no saying in the whole process.

35. Unlike the original text of the Law No. 6-FKZ, which presupposed the consent of the original territorial sovereign and the conclusion of an international treaty between this state and the Russian Federation, Draft Law No. 462741-6 removes these requirements in case the other state should not be in the position to negotiate an international treaty in the light of the absence of an efficient sovereign state government, i.e. in a situation of political and constitutional crisis for the foreign state.

36. The draft law attributes the assessment of the inefficiency of the sovereign government to *the Russian Federation itself*. Similarly, the assessment of the legality, including possibly the constitutionality (the draft law refers to the *legislation* but not explicitly to the *constitution* of the foreign state) of the referendum is attributed to the Russian Federation. In respect of the request “of the state authorities of the said part of the foreign state”, there is no reference to their legitimacy and powers. In sum, the draft law disregards the essential need for the foreseen procedures to comply with all the constitutional rules of the foreign state, including the mechanisms of control by the central authorities over the local ones. The yardstick of the legitimacy and legality of the initiatives within the foreign state aimed at the admission into the Russian Federation shifts from the legal order of the foreign state (to which the territory in question clearly still belongs) to external sources, notably the recipient State (which has neither jurisdiction, nor authority over that territory).

³² Report on the preferential treatment of national minorities by their kin-State, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(2001\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)019-e)

³³ Ibidem.

37. It follows that the draft law, under the pretext to protect the citizens of the foreign state (or at least some them), de facto promotes attempts to change the borders of the foreign state, giving the opportunity to certain political parties or movements within the foreign state to have recourse to the draft law (once adopted) in order to attempt a secession disregarding the state's constitutional order and powers and is likely to aggravate the situation of political and constitutional crisis of the foreign state.

38. According to the Explanatory Note, the Russian Federation intends to act in order to ensure that the Russian speaking-community/national minority living in Ukraine (notably Crimea) be protected from violence based on their national, racial, ethnic or religious characters and from discrimination. Minority protection is without prejudice to the fundamental principles of international law and in particular the sovereign equality, territorial integrity and political independence of states.³⁴ Under international law, and specifically under the European Convention on Human Rights and the Framework Convention for the Protection of National Minorities, however, Ukraine is obliged to guarantee the enjoyment of human and minority rights not only to the Russian-speaking community, but also to the Tatar community and to the other minority groups. Supervision of Ukraine's obligations belongs to the international community, including, specifically, the Council of Europe (the European Court of Human Rights, the Advisory Committee on the Framework Convention for the Protection of National Minorities) and the OSCE. States should address their concerns for persons or situations within other States through international co-operation and the conduct of friendly relations. This includes the full support by States of international human rights standards and their agreed international monitoring mechanisms".³⁵ The Russian Federation is a party to the monitoring mechanisms of the Council of Europe, and as such it should address possible concerns relating to the protection of the Russian-speaking community within these monitoring systems.

39. In light of the above, the draft law is clearly not in compliance with several fundamental international law principles, especially the principle of territorial integrity of states, the principle of sovereign equality, the principle of non-intervention in the internal affairs of a state, and, potentially, the prohibition of the threat of force. These principles are part of customary international law and are enshrined in the UN Charter and in various international instruments (see above).

40. The principles of territorial integrity and national sovereignty are also contained in several bilateral treaties to which the Russian Federation is a party. If adopted, the Draft Law would therefore, in addition, collide with the treaty obligations of the Russian Federation. Thus, for instance, the Treaty of Good-Neighbourliness and Friendly Co-operation Between the People's Republic of China and the Russian Federation, concluded on 24 July 2001, contains several provisions, in which the two countries express their respect for the principle of territorial integrity. Under Article 6 of the Treaty, these countries promise to "adhere to the principles of non-encroachment upon territories and national boundaries as stipulated in international laws and strictly observe the national boundary between the two countries".

41. In particular, the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, concluded on 31 May 1997, stipulates that "in accord with the provisions of the UN Charter and the obligations of the Final Act of the Conference on Security and Cooperation in Europe, the High Contracting Parties shall respect each other's territorial integrity and reaffirm the inviolability of the borders existing between them" (Article 2) and that "The High Contracting Parties shall build their mutual relations on the basis of the principles of mutual respect for their sovereign equality, territorial integrity, inviolability of borders, peaceful

³⁴ See Article 21 and the Preamble of the Framework Convention for the Protection of National Minorities.

³⁵ OSCE, Recommendations on National Minorities in Inter-State relations "Bolzano principles", General principles

resolution of disputes, non-use of force or the threat of force, including economic and other means of pressure, the right of peoples to freely determine their fate, non-interference in internal affairs, observance of human rights and fundamental freedoms, cooperation among states, the conscientious performance of international obligations undertaken, and other generally recognized norms of international law” (Article 3).

42. Analogous provisions are included in the Budapest memorandum of 1994, a multilateral treaty providing security assurances to Ukraine for its accession to the non-proliferation treaty as a non-nuclear state. In this treaty, Russia agreed among other states to respect the independence, sovereignty and existing borders of Ukraine and also to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine: “The United States of America, the Russian Federation and the United Kingdom of Great Britain and Northern Ireland reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE [Commission on Security and Cooperation in Europe] Final Act, to respect the Independence and Sovereignty and the existing borders of Ukraine” (paragraphs 1 and 2).

43. Article 37 of the 1997 Russian/Ukrainian Treaty also provides that: “Disputes related to the interpretation and application of the provisions of this Treaty are subject to settlement by means of consultations and negotiations between the High Contracting Parties.” Even assuming that Ukraine were failing to fulfil its obligations under Article 11 of the treaty to protect its citizens from threats or acts of violence motivated by national, ethnic, racial or religious intolerance (see the Explanatory Note to the draft law), the Russian Federation may not *sic et simpliciter* have recourse to unilateral actions.

44. The application of the Draft Law, once enacted, with respect to any of the states with such contractual relationship with the Russian Federation would most likely constitute a violation of an international inter-governmental (bilateral) treaty. By virtue of Article 15 par. 4 of the Constitution of the Russian Federation, such treaties are binding both upon and within the Russian Federation. The draft law would therefore violate also the principle of *pacta sunt servanda*.

45. Under Article 15 par. 4 of the Constitution of the Russian Federation, “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”. Moreover, the Law No. 6-FKZ stresses that “admission of a new subject to the Russian Federation takes places in compliance with the Constitution of the Russian Federation, international (inter-governmental) treaties /.../” (Article 2 par. 1). This entails that the Draft Law No. 462741-6 and acts carried out in its implementation would be unlawful both under international law and under the Constitution of the Russian Federation and could be challenged not only at the international level but also in the Constitutional Court of the Russian Federation.

V. Conclusions

46. The Venice Commission concludes that Draft Federal Constitutional Law No. 462741-6 On Amending the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation is not compatible with international law. It violates in particular the principles of territorial integrity, national sovereignty, non-intervention in the internal affairs of another state and *pacta sunt servanda*. The time and context of its preparation, as highlighted in the Explanatory Note, make the Draft law particularly worrying.

47. The Venice Commission therefore calls on the Russian authorities to refrain from enacting it.