

# Territorial Integrity in International Law – Its Concept and Implications for Crimea

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## Abstract

The conflict between Russia and Ukraine is, at least on the surface, one about control over territories. This paper sets out the international law on territorial protection and raises the question whether and how Ukraine's territorial integrity has been violated by Crimean separatists and Russia. After a general introduction (I.), it lays out the dimensions of territorial protection under international law (II.) and then applies these notions to the Crimean case (III.). In a further step it discusses the limits of territorial protection (IV.) and, also, how states in general and Ukraine in particular may react to violations of their territory in accordance with international law (V.).

## I. What is the Concept of Territorial Integrity About?

The concept of territorial integrity emerged as a general principle of international law during the course of the 19<sup>th</sup> century. In the middle of the 19<sup>th</sup> century the language on territorial protection that we still use today

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was already established within the discourse on international law.<sup>1</sup> In his 1844 treatise on European public international law, *A. W. Heffter* speaks of the territorial principle (*ius territorii*), that grants a “right to integrity or inviolability of states”.<sup>2</sup> It also entered into the practice of states. In the 1856 “General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia” the signatory states committed to “respect the independence and territorial integrity of the Ottoman Empire”.<sup>3</sup>

After World War I, the principle of territorial integrity was further codified. In his “Fourteen Points” – a speech given in a joint session of the two houses of the US Congress in January 1918 – US President *W. Wilson* called for a peaceful post-war Europe to be established, *inter alia*, through “specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike”.<sup>4</sup> The seminal legal document that included the concept then was the Covenant of the League of Nations. Article 10 of the Covenant obliged the members to respect and preserve the territorial integrity and existing political independence of all members of the League against external aggression.

In the United Nations (UN) Charter we now find the protection of territorial integrity specifically mentioned as a crucial component of the prohibition of the use of force as provided for in Article 2 (4): “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.”

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<sup>1</sup> In some earlier references the concept was approached based on a logic that we nowadays exclusively attribute to the field of private law. According to this understanding, it was a nation’s ownership of a certain territory that granted exclusive rights and prohibited others from violating this ownership title. See *G. F. Martens*, *Einleitung in das positive Europäische Völkerrecht*, 1796, § 65.

<sup>2</sup> *A. W. Heffter*, *Das Europäische Völkerrecht der Gegenwart*, 1844, § 33: “Aus dem Begriff der Staatssouveränität fließt endlich noch das Recht der freien Bewegung und Unabhängigkeit, welches wesentlich in einer freien inneren Selbstentwicklung des Staates und in der von keiner fremden Gewalt gehinderten Ausübung aller Machtbefugnisse der Staatsgewalt besteht. Es zeigt sich in seiner Vollendung in der völligen Abschließung eines eigenthümlichen Staatsgebietes (als *ius territorii*, Territorialprinzip) und somit in der Zurückweisung jedes fremden Einflusses von den diesseitigen Gebietsgrenzen, in dieser Beziehung auch Recht auf Integrität oder Unverletzbarkeit der Staaten genannt. Keiner auswärtigen Staatsgewalt, keinem einzelnen legislativen oder executiven Act derselben ist man demnach im diesseitigen Gebiet Raum zu vergönnen schuldig, keinem unter fremder Staatsautorität entstandenen Rechtsverhältnis unmittelbare Vollziehbarkeit zuzugestehen.”

<sup>3</sup> General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia (1855-1856), 30.3.1856, CTS 114, 409, Article 7.

<sup>4</sup> *W. Wilson*, 65<sup>th</sup> Cong., 2d sess., *Congressional Record* Vol. 56, 8.1.1918, 681.

The drafting history of Article 2 (4) is noteworthy. The initial draft of the UN Charter, the 1944 Dumbarton Oaks Proposal, only referred to the prohibition of the use of force<sup>5</sup> and it was on the initiative of less potent states that the reference to territorial integrity and political independence was included in the Charter.<sup>6</sup> This was meant to broaden the protection against the use of force by more powerful states.<sup>7</sup> This aspect has ever since remained a core feature of the concept of territorial integrity. The protection of the territory is an expression of the sovereign equality of all states. International law protects the territorial integrity of all states, no matter how powerful they are.

Since then, the concept of territorial integrity has been incorporated into a large number of UN resolutions<sup>8</sup> and multi- as well as bi-lateral treaties.<sup>9</sup> An agreement with a specific relevance in regard to the international obligations between Russia and Ukraine is the 1994 Budapest Memorandum – although it is contested whether this agreement constitutes legal obligations or merely expresses political commitments. In that document, Russia, the UK and the US committed to respect Ukraine's territorial integrity in return for Ukraine giving up its share of the Soviet nuclear arsenal. An indisputedly legal obligation is, however, contained in the 1997 "Treaty on Friendship, Cooperation, and Partnership" in which Ukraine and Russia reaffirmed their commitment to respect each other's territorial integrity and the inviolability of the borders existing between them.<sup>10</sup>

But what are the general implications of the concept of territorial integrity? In the first place the protection of a state's territorial integrity guaran-

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<sup>5</sup> See the Dumbarton Oaks Proposal for the Establishment of a General International Organization, UNCIO Vol. III, 1. The initial proposal for the provision that became Article 2 (4) of the UN Charter read: "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."

<sup>6</sup> Australia, Bolivia, Brazil, Czechoslovakia, Ecuador, Egypt, Ethiopia, Mexico, Peru, and Uruguay proposed the inclusion of the protection of states' territorial integrity into the Charter (see UNCIO, Vol. VI, 556 et seq.). Eventually, it was Australia's proposal that was largely incorporated into the UN Charter (see for this proposal UNCIO, Vol. VI, 557).

<sup>7</sup> I. Brownlie, *International Law and the Use of Force by States*, 1963, 267.

<sup>8</sup> See only UN General Assembly Resolution 3314 (XXIX) (Definition of Aggression), 14.12.1974; UN General Assembly Resolution 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), 24.10.1970.

<sup>9</sup> See e.g. United Nations Convention on the Law of the Sea, Article 301; Rome Statute of the International Criminal Court, Article 8 bis (2).

<sup>10</sup> Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, signed 31.5.1997 (translation available in: *Harvard Ukrainian Studies* 20 (1996), 319 et seq.), Article 2.

tees the continuing existence of a state in its current borders and renders unilateral changes of the territory by forceful means of third states a violation of international law.

However, the concept protects against more than mere changes to the borders between states. Territorial integrity is in almost all legal documents paired with the notion of political independence. The territory is recognized as more than just a necessary requirement of statehood. The law as it stands closely connects territorial integrity and political independence because the territory is recognized as the spatial framework and necessary condition for the realization of political independence. The territory is the exclusive zone in which the political independence of a state can find its expression and where foreign governments may not – as a matter of principle – interfere. As a consequence, territorial integrity requires more than protection against permanent changes to borders, but demands protection against all sorts of interventions into a state’s territory from the outside. Territorial integrity is, as *H. Lauterpacht* put it, “especially where coupled with ‘political independence,’ [...] synonymous with territorial inviolability”.<sup>11</sup>

This close link between the concepts of territorial integrity and political independence demonstrates the necessity for the potentially problematic determination of what the protected political will and its territory actually is. The conflict in Crimea has given rise to all conceivable claims regarding which political entity shall be entitled to demand territorial protection under international law. Crimean separatists have claimed that Crimea formed an independent territory; Russian politicians and scholars – also at the conference on which this symposium builds – have postulated that Crimea in fact belonged to the territory of Russia; and until recently the unquestioned conviction was that Crimea formed an integral part of Ukraine.

The case for a protection of Crimea as an independent territory is made based on the principle of the self-determination of peoples that would allow – so the argument goes – for a separation of Crimea from the territory of Ukraine. We can clearly see here that external self-determination and territorial protection can under such circumstances become opposing principles. While the former demands territorial protection for the separating entity, it undermines the territorial integrity of the overarching state and therefore sets in motion a potentially disintegrating logic. This is not the place to engage in the debate about external self-determination, which is dealt with in *T. Christakis’* contribution to this symposium.<sup>12</sup> It suffices here to state that

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<sup>11</sup> *L. Oppenheim*, *International Law*, in: *H. Lauterpacht* (ed.), *Disputes, War and Neutrality*, 7<sup>th</sup> ed. 1952, 154.

<sup>12</sup> See *T. Christakis* in this volume.

Crimea's territorial integrity is clearly not protected under international law, as a right to external self-determination does not exist under the given circumstances.<sup>13</sup>

The inherent role of political independence over and within a certain territory also continuously gives rise to historical arguments about who should legitimately exert control over a certain territory. International law tries to avoid these potentially endless and fruitless historical claims by regarding the *de facto* situation as decisive for territorial claims. The general principle of *uti possidetis* holds that the relevant territory is marked by the borders that existed when a state gained independence.<sup>14</sup> Of course, this principle is not suitable to settle all potential disputes since the frontiers at the time of independence can be unclear, but it excludes a whole range of historical arguments that could otherwise be invoked.

In the course of the current conflict, such historical arguments have also been brought up. Russian politicians and scholars have put forward the argument that Crimea, in fact, belonged to the territory of Russia. The background for this claim lies in the modalities of Crimea's – in historical terms – relatively recent incorporation into Ukraine. After a changeful history of Tatarian, Ottoman, and Russian rule over Crimea, the peninsula became the Crimean Autonomous Socialist Soviet Republic in 1921 and part of the Russian Soviet Federative Socialist Republic (Russian SFSR). Later on reorganized as an oblast of the Russian SFSR, it was eventually transferred to the Ukrainian Soviet Socialist Republic (Ukrainian SSR) in 1954 by decree of the presidium of the USSR's Supreme Soviet.<sup>15</sup> As regards the motivations for this often so-called gift by *N. Khrushchev* to Ukraine, different stories are told. An officially announced explanation was that this territorial change was meant to remember the 300<sup>th</sup> anniversary of Ukraine joining the Russian empire.<sup>16</sup> Others suggest that the decision was driven by *Khrushchev's* personal affinity to Ukraine,<sup>17</sup> and some believe it to be the consequence of the close infrastructural ties between Ukraine and Crimea that made a Ukrainian administration of the peninsula much more efficient than

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<sup>13</sup> C. Marxsen, *The Crimea Crisis – An International Law Perspective*, ZaöRV 74 (2014), 384 et seq.

<sup>14</sup> A. Cassese, *International Law*, 2<sup>nd</sup> ed. 2005, 84.

<sup>15</sup> See on the history of that transferal: R. Solchanyk, *Ukraine and Russia: The Post-Soviet Transition*, 2001, 162 et seq.

<sup>16</sup> See "Crimea", *Encyclopaedia Britannica Online Academic Edition*, 22.9.2014, <<http://www.britannica.com>>.

<sup>17</sup> See K. Calamur, *Crimea: A Gift to Ukraine Becomes A Political Flash Point*, *National Public Radio (NPR)*, 27.2.2014, <<http://www.npr.org>>.

one by Russian authorities.<sup>18</sup> The argument now goes that this 1954 incorporation of Crimea into Ukraine was in violation of the relevant Soviet constitutional provisions and therefore void.<sup>19</sup> This view had already been expressed by the Russian parliament in 1992, which issued a resolution that annulled the decree.<sup>20</sup>

However, notwithstanding whether there is any merit to the unconstitutionality claim, even supposed it were correct, the claim would be without relevance under international law. The borders between Ukraine and Russia as such were not disputed during the Soviet Union's existence – there had been an uncontentious state practice for more than 35 years. But even if the significance of that practice and the applicability of the principle of *uti possidetis* to the relations between Ukraine and Russia after the break-up of the Soviet Union were brought into question,<sup>21</sup> the post-Soviet events make clear that Crimea territorially belongs to Ukraine. Russia has accepted to respect the existing boundaries between Russia and Ukraine in a number of bi- and multilateral treaties that have been mentioned above. Consequently, there can be no doubt that Russia now is under an international legal obligation not to violate Ukraine's territorial claim over Crimea.

## II. The Law on Territorial Protection

### 1. Modalities of Violations

The principle of territorial integrity protects the sovereign state against all sorts of violations of its territory. It renders illegal acts of direct physical effect in the territory of another state as well as sovereign acts that one state carries out on the territory of another state.<sup>22</sup> The states' territorial sovereignty is protected against forceful as well as non-forceful interventions. Non-forceful illegal interventions that have been relevant in practice in-

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<sup>18</sup> See the statements of *N. Khrushchev's* son, quoted in *A. de Nesnera*, *Khrushchev's Son: Giving Crimea Back to Russia Not an Option*, *Voice of America*, 6.3.2014, <<http://www.voanews.com>>.

<sup>19</sup> See for details on the procedural arguments that were invoked: *R. Solchanyk* (note 15), 162.

<sup>20</sup> *S. Schmemmann*, *Russia Votes to Void Cession of Crimea to Ukraine*, *New York Times*, 22.5.1992.

<sup>21</sup> See on the application of the principle *A. Peters*, *The Principle of Uti Possidetis Juris – How Relevant Is It for the Issue of Secession?*, in: *C. Walter/A. von Ungern-Sternberg/K. Abushov*, *Self-Determination and Secession in International Law*, 2014, 104 et seq.

<sup>22</sup> *J. Delbrück/R. Wolfrum*, *Völkerrecht*, 2<sup>nd</sup> ed. 2002, Vol. I/3, 793.

clude, for example, violations of borders in the attempt to arrest a suspect or state vessels or aircrafts entering into the territorial waters or airspace without permission.<sup>23</sup>

More severe and therefore in the center of the political and academic debate are violations of the territory that are carried out by the use of force. Article 2 (4) UN Charter expressly prohibits such violations. This provision clearly prescribes states (“all members shall refrain ...”) to respect another’s territorial integrity. However, the conflict between Russia and Ukraine is not a classical conflict between states in which one state’s army attacks another state’s military positions. By contrast, there is a blurry *mélange* of local paramilitary forces, allegedly foreign-controlled militias, and of sometimes open, but mostly hidden and intransparent state involvement. It is therefore crucial to settle on an understanding of who the principle of territorial protection actually addresses.

## 2. Does the Concept of Territorial Integrity Apply to Non-State Actors?

The classical understanding of the concept of territorial integrity addresses states alone. Under that view, states are seen as the entities whose territorial integrity is supposed to be protected and states are, at the same time, the addressees of the norm not to violate the territorial integrity of other states. This classical view is explicitly held by the International Court of Justice (ICJ), which has, in a number of decisions, insisted on the state-centered character of the rules on the prohibition of the use of force and self-defense.<sup>24</sup> In the Kosovo advisory opinion it has explicitly pointed out that “the scope of the principle of territorial integrity is confined to the sphere of relations between States”.<sup>25</sup>

In contrast to these general and clear words of the ICJ, there are constellations in which state practice has been much more open to either regard non-state actors as being confined by the concept of territorial integrity or has accepted a limited claim for territorial protection of sub-state entities. Such an extension of the concept goes along with an overall tendency in in-

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<sup>23</sup> See for more cases: *J. Delbrück/R. Wolfrum* (note 22), 792.

<sup>24</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Territories*, I.C.J. Reports 2004, 194 (para. 139); see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, 222 (paras. 146–147).

<sup>25</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, I.C.J. Reports 2010, 437 (para. 80).

ternational law to transcend the Westphalian state focus and to include non-state actors as subjects and addressees of international law.<sup>26</sup> There is no crystal clear hard law on the issue, but in a number of constellations a development of international law on territorial protection towards the inclusion of non-state actors is strongly suggested. In the 1960 “Declaration on the Granting of Independence to Colonial Countries and Peoples”,<sup>27</sup> for example, the General Assembly saw it as an expression of the right to self-determination of peoples that the territorial integrity of dependent territories and colonies shall be respected. Also, there are General Assembly resolutions and treaties that suggest that sub-state entities are bound to respect the territorial integrity of states. The “United Nations Declaration on the Rights of Indigenous Peoples”, for example, explicitly excludes that the declaration would be used by “any State, *people, group or person*” to construct a right for action against “the territorial integrity or political unity of sovereign and independent States”.<sup>28</sup> The Rome Statute of the International Criminal Court establishes that the rules set forth in regard to non-international armed conflicts shall not undermine a government’s responsibility to defend the unity and territorial integrity of the state by all legitimate means.<sup>29</sup> This points out that the protection of territorial integrity constitutes a relevant principle even within non-international armed conflicts and therefore in relation to non-state actors that are involved herein.<sup>30</sup>

There is yet another important constellation in which sub-state entities are recognized to fall under the protection of Article 2 (4) UN Charter. This is the case when a group has established a stabilized rule over a certain territory that nevertheless is also claimed by a state so that the state character of the entity remains unclarified under international law.<sup>31</sup> Take the example of

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<sup>26</sup> See C. Kreß, Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force, *Journal on the Use of Force and International Law* 1 (2014), 40 et seq.

<sup>27</sup> UN General Assembly Resolution 1514 (XV), 14.12.1960, para. 4: “All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.”

<sup>28</sup> UN General Assembly Resolution 61/295, 13.9.2007, Article 46 (emphasis added): “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.”

<sup>29</sup> Rome Statute of the International Criminal Court, Article 8 c).

<sup>30</sup> A. Peters, Das Kosovo-Gutachten und Globaler Konstitutionalismus, in: P. Hilpold, *Das Kosovo-Gutachten des IGH vom 22. Juli 2010*, 2011, 232.

<sup>31</sup> See J. A. Frowein, *De Facto Regime*, MPEPIL, 2013, para. 2.

Taiwan – it is contested whether Taiwan can, in fact, be regarded as a state, but as a *de facto* regime it enjoys protection under Article 2 (4) UN Charter against any violations of its borders from the outside.<sup>32</sup> The necessary requirement for such protection is – as *J. A. Frowein* points out – that the entity is in a “pacified international position”.<sup>33</sup> Under these circumstances, international law acknowledges this *de facto* control and treats those regimes as partial subjects of international law,<sup>34</sup> protected under Article 2 (4) UN Charter.<sup>35</sup>

All these considerations make clear that the legal situation with regard to the application of the principle of territorial protection to non-state actors remains highly contested.<sup>36</sup> There are a number of constellations in which an extensive reading has been put forward in state practice, but it remains an issue of controversy whether this actually allows to assume that the scope of the principle of territorial integrity has generally broadened. Whether the law on territorial protection has changed, depends on the standards regarding the establishment of new rules in international law.<sup>37</sup> The question that comes up but goes beyond the scope of this paper is: How universal and wide-spread does the state practice have to be and how explicit shall the *opinio juris* of states be? The ICJ has, in any case, taken a very restrictive reading by pointing out that the concept of territorial protection only applies in the relations between states.

However, at least part of these conflicting tendencies can be reconciled if we read the ICJ’s seemingly strong state focus within the context of the Kosovo opinion. The Kosovo opinion is concerned with the actions of *internal* non-state actors and whether these can violate the territorial integrity of the existing state from which they aim to secede. In regard to Kosovo the question was whether Kosovar separatists could violate Serbia’s territorial integrity and it was in relation to that case that the court pointed out the neutral-

<sup>32</sup> *B. Ahl*, Taiwan, MPEPIL, 2008, para. 22.

<sup>33</sup> *J. A. Frowein*, Das de facto-Regime im Völkerrecht, 1968, 69 (translation by C.M., German original: “befriedete internationale Stellung”).

<sup>34</sup> *C. Walter*, Subjects of International Law, MPEPIL, 2007, para. 8; see also *A. Cassese* (note 14), 125 et seq.

<sup>35</sup> See *J. A. Frowein* (note 33), 69; see for example in regard to the territorial protection of the Taliban regime: *R. Wolfrum/C. Philipp*, The Status of the Taliban: Their Obligations and Rights under International Law, Max Planck UNYB 6 (2002), 585.

<sup>36</sup> Generally in favor of the ICJ’s narrow interpretation: *O. Corten*, Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law, LJIL 24 (2011), 87; *O. Corten*, The Law Against War – The Prohibition on the Use of Force in Contemporary International Law, 2010, 159; critical: *A. Peters* (note 30), 232.

<sup>37</sup> See *O. Corten*, Territorial Integrity (note 36), 89 et seq.

ity of international law towards such “internal” non-state actors.<sup>38</sup> Taking this context seriously, we can draw a distinction between the application of the principle of territorial protection against internal separatist movements on the one hand, and against external aggressors on the other. The former is the constellation for which the ICJ has reaffirmed the Westphalian approach and rejected a wider reading. Accordingly, the principle of territorial integrity does not apply to non-state actors internal to a state and thus does not impose any restriction on them.

In the latter, international law appears to be more open to accepting an extended application of the principle and this setting was not the one that the ICJ dealt with in the Kosovo opinion. Non-state actors that have established a stabilized control that resembles a state, fall under the protection of Article 2 (4) UN Charter. They are therefore protected in their territorial integrity against outside aggressors and are at the same time bound to respect the territorial integrity of other states. Under the established law there is, however, no strong argument to be made that also actors without such a stabilized territorial control would fall under the scope of the principle of territorial integrity.

### 3. Direct Violations of Territorial Integrity

When we therefore now raise the question how state action can violate a state’s territorial integrity, we have to differentiate between two principal ways of violation: namely *direct* and *indirect* violations. Direct violations are those where the use of force can be attributed to another state. Such an attribution follows the customary law on state responsibility as largely expressed in the International Law Commission’s Draft Articles on State Responsibility.<sup>39</sup>

Directly attributable to a state are, in particular, acts by its organs, mostly relevant obviously by its military. Organs are characterized by the fact that they act in complete dependence on a state<sup>40</sup> and based on the International

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<sup>38</sup> But see the constitutionalist criticism in *A. Peters* (note 30), 232.

<sup>39</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, YBILC 2001, Vol. II, Part Two, 26.

<sup>40</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 2007, 205 (para. 392).

Law Commission's draft articles this status is to be determined in accordance with the internal laws of the state.<sup>41</sup>

The second possibility of direct attribution is given when the state has directed irregular fighters, such as militias or armed groups or where such fighters were acting under a state's effective control.<sup>42</sup> In contrast to an organ status, such an effective control does not require complete dependence of the actors.<sup>43</sup> The International Court of Justice has put forward the requirement that a state needs to have a steering influence on the concrete acts carried out by the non-state actor. It held that it:

“must however be shown that this ‘effective control’ was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations”.<sup>44</sup>

Herewith, the court has rejected the less strict “overall control test”, applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case.<sup>45</sup>

A more precise understanding of what sort of actions can constitute a direct violation of a state's territorial integrity can be derived from the 1974 Definition of Aggression, which enumerates relevant examples. The resolution mentions invasion, occupation, annexation, bombardment, blockade of ports, as well as the use of foreign forces stationed within the territory of a state beyond what has been agreed upon between the troop-sending and the troop-receiving state.<sup>46</sup> The latter alternative of violating a stationing agreement is especially relevant in view of the Black Sea Fleet stationed on Ukrainian territory. The Definition of Aggression also covers constellations

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<sup>41</sup> Draft Articles on State Responsibility (note 39), Article 4; but see also the ICJ that treats also such actors as organs of a state that act in complete dependence of it, ICJ, *Genocide* case (note 40), 205 (para. 392).

<sup>42</sup> See Draft Articles on State Responsibility (note 39), Article 8, which the ICJ has declared to express customary international law (see ICJ, *Genocide* case [note 40], 207-08 [para. 398]).

<sup>43</sup> ICJ, *Genocide* case (note 40), 208 (para. 400).

<sup>44</sup> ICJ, *Genocide* case (note 40), 208 (para. 400).

<sup>45</sup> See ICTY, Appeals Chamber, *Tadić*, 15.7.1999, (Case No. IT-94-1-A), para. 131: “In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”

<sup>46</sup> Definition of Aggression (note 8), Article 3.

in which non-state actors are acting under a state's effective control. It qualifies as aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State".<sup>47</sup>

#### 4. Indirect Violations of Territorial Integrity

The second type of violations is *indirect violations*. Such indirect violations are those where the actual military activities against the territorial integrity are not as such attributable to the state, because the potential offender state has neither used its organs nor has it sent or controlled irregular fighters. In comparison to direct violations that will usually constitute an armed attack, the International Court of Justice describes these indirect forms as "less grave forms of the use of force".<sup>48</sup>

However, international law also prohibits these forms of intervention. This has already been expressed in the International Law Commission's 1949 Draft Declaration on Rights and Duties of States,<sup>49</sup> in the 1965 UN General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty<sup>50</sup> and most importantly also in the General Assembly's Friendly Relations Declaration. The International Court of Justice has held that the latter declaration expresses customary international law and that the underlying principles expressed herein are therefore binding upon all states.<sup>51</sup> The Friendly Relations Declaration points out:

"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of

<sup>47</sup> Definition of Aggression (note 8), Article 3 (g).

<sup>48</sup> *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, 101 (para. 191); this differentiation has also been taken up in the *Case concerning Oil Platforms*, I.C.J. Reports 2003, 187 (para. 51).

<sup>49</sup> YBILC 1949, 287, Article 4: "Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."

<sup>50</sup> UN General Assembly Resolution 2131 (XX), 21.12.1965: "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 or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

<sup>51</sup> *Armed Activities on the Territory of the Congo* (note 24), 62 et seq. (para. 162).

such acts, when the acts referred to in the present paragraph involve a threat or use of force.”<sup>52</sup>

Under reference to this resolution, the ICJ has held in its *Nicaragua* judgment that the arming and training of rebels is prohibited under the principle of the non-use of force.<sup>53</sup> Generally speaking, a state may not support activities within another state’s territory that involve the use of force and therefore violate the state’s territorial integrity. Moreover, a state may also not allow activities on its own territory that are directed to the use or threat of force against another state. States may therefore neither provide support in the form of weapons or training to rebels that are acting in the territory of another state, nor may they allow their own territory to be used as a base from which military actions against another state’s territory emanate.

To conclude, international law protects the territorial integrity of states and creates the obligation for states to respect each other’s boundaries. Non-state actors are generally not addressed by the principle though under some circumstances, especially where non-state actors have established a stable rule within a certain territory, the principle does apply to them. In cases other than that, a violation of territorial integrity has to be established in relation to states. Such violations can either occur directly, which is the case when the use of force is attributable to a state. Or they can occur indirectly in the form of the provision of support to rebels.

### III. Violations of Ukraine’s Territory

With these dimensions of territorial protection in mind, we can now turn to the task of applying these notions to the conflict between Russia and Ukraine. This application shows us three things: first, the acting militias as such have not violated international law (1.). Second, Russia has directly violated Ukraine’s territorial integrity by using military force (2.). Third, indirect violations are also likely to have occurred but the facts remain insufficiently explored to give a full account (3.).

1. Starting from late February 2014, Crimea was taken over by the so-called “green men”. These green men were in many cases Russian speaking, sometimes using official Russian military vehicles and equipment and so it remained unclear whether these groups were actually Russian soldiers hid-

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<sup>52</sup> Friendly Relations Declaration (note 8).

<sup>53</sup> ICJ, *Nicaragua Judgment* (note 48) 118-119 (para. 228).

ing their identity or well-equipped local and foreign militias. *Putin* insisted for quite some time that these troops were local “self-defense units”<sup>54</sup> but has, as will be pointed out below, in the meantime acknowledged the presence of Russian soldiers. The realistic scenario appears to be that both sorts of actors played a role – Russian soldiers and also local militias.

If this were true and local militias in fact played a significant role, we could nevertheless not assume that these militias as such were violating international law. As internal non-state actors they would not be addressed by the law on territorial protection. As isolated non-state actors joining the conflict from outside Ukraine without a stabilized *de facto* control over a certain territory, they would also not be addressed by the principle. Consequently, there is no violation of the law by the acting militias themselves.

2. A violation of Ukraine’s territorial integrity, therefore, has to be established in relation to Russian state action. As regards a direct involvement of Russian military forces the factual situation has long been and to some extent remains unclear. In view of an apparent strategy of disinformation by the parties to the conflict and, at the same time, a lack of sufficient neutral fact-finding efforts, the factual foundation for an evaluation under international law remains chronically incomplete and, therefore, preliminary. It has to build on a factual basis established by press-reports, declarations of politicians and other observers. A cautious evaluation was long warranted, especially because *Putin* denied any direct Russian involvement.<sup>55</sup> However, in the meantime he has admitted that Russian troops played a crucial role in Crimea. In an interview broadcasted on the Russian TV channel “RT” *Putin* admitted that “Crimean self-defense forces were of course backed by Russian servicemen”.<sup>56</sup> According to *Putin*, “[t]hey acted very appropriately, [...] decisively and professionally” and their involvement was, as *Putin* claimed, necessary “to protect people from even the slightest possibility of weapons being used against civilians”.<sup>57</sup>

After all, the argument could still be made that “backing” the self-defense forces does not necessarily require a physical presence of Russian troops in Crimea. However, a realistic interpretation of all the pieces of evidence for a direct Russian involvement no longer renders it speculative to assume that Russian troops were acting directly in Crimea. Numerous press reports

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<sup>54</sup> V. *Putin*, Vladimir Putin Answered Journalists’ Questions on the Situation in Ukraine, Kremlin Press Conference, 4.3.2014, transcript accessible at <<http://www.kremlin.ru>>.

<sup>55</sup> V. *Putin* (note 54).

<sup>56</sup> RT, Putin Acknowledges Russian Military Servicemen Were In Crimea, 17.4.2014, published together with a video documentation of *Putin*’s statements with simultaneous translation into English at <<http://www.rt.com>>.

<sup>57</sup> RT (note 56).

about the use of official Russian military equipment and now also the statement of president *Putin* clearly indicate that Russian armed forces were acting on the ground. As pointed out at the beginning of this paper, any use of armed troops on Ukrainian territory would constitute a violation of the territory. Establishing an account of the precise extent of Russia's involvement will be important to get a full picture of the conflict, but given the evidence publicly available, even without it we may assume the direct military involvement of Russia.

3. Indirect forms of the use of force through the provision of support to rebels are also quite likely to have occurred. Moreover, allegedly Russia has not prevented irregular fighters in support of the separatists to organize on Russian territory and join the conflict in Crimea. All these facts, however, require further investigation in order to arrive at a clear understanding of the situation.

After all, the evidence to hand clearly suggests that Russia has violated Ukraine's territorial integrity.

#### IV. The Limits of Territorial Integrity

International law does not protect a state's territorial integrity without restraint, but sets certain limits. A first limitation is the possibility for Security Council Action under Chapter VII of the UN Charter. In order to maintain or restore international peace and security, the Security Council may use forceful measures in the territories of the states involved in a conflict.<sup>58</sup> Further, a state's territorial integrity would not be violated if the acting state responded to an armed attack and were therefore acting in self-defense under Article 51 of the Charter. Both of these limits are, however, obviously not relevant with regard to Crimea because Ukraine has not attacked Russia and Security Council action under Chapter VII has not been taken.

Another legal justification for foreign military presence on the territory of another state exists when the receiving state has agreed to that military presence. A so-called intervention upon invitation does not violate the political independence and territory of a state because it is in accordance with the will that the organs of this state have expressed.<sup>59</sup> This justification for the presence of troops has been invoked within the Crimean crisis. Though

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<sup>58</sup> See Article 42 UN Charter.

<sup>59</sup> See Draft Articles on State Responsibility (note 39), Article 20, which states that the valid consent by a state precludes wrongfulness of an act.

*Putin* initially kept claiming that Russian troops were not present on Crimea, he justified the hypothetical presence of Russian troops under reference to an invitation letter issued by *V. Yanukovych*.<sup>60</sup> However, for reasons spelled out in *V. Bilková's* contribution to this symposium<sup>61</sup> *Yanukovych's* invitation cannot justify Russia's use of force.<sup>62</sup>

A further argument that has been brought up in the political debate was that the Russian intervention is necessary to protect the Russian-speaking minority living in Crimea.<sup>63</sup> Essentially this argument invokes the responsibility of states to protect their citizens from massive human rights violations and claims a right and possibly also a duty of foreign states to intervene in case this responsibility is not met. However, this argument is deficient for two reasons. First, there is *de facto* no evidence for such large-scale human rights violations in Crimea.<sup>64</sup> Secondly, international law, as it stands, clearly does not regard the concept of humanitarian intervention to be a self-standing justification for the use of force.<sup>65</sup> The 2005 World Summit Outcome has made clear that the legal concept of a responsibility to protect does not substitute Security Council authorization for the use of force, but rather requires it.<sup>66</sup>

In the political and academic discourse, the argument has been occasionally put forward that the violation of Ukraine's territory is justified or at least not a serious matter because it was necessary to enforce the alleged right of the Crimean population to self-determination.<sup>67</sup> However, this argument is not valid because international law does not provide, as has been pointed out above, a right to self-determination in the Crimean case.

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<sup>60</sup> *V. Putin* (note 54).

<sup>61</sup> See *V. Bilková* in this volume.

<sup>62</sup> See also *C. Marxsen* (note 13), 374 et seq.

<sup>63</sup> See the statements of the Russian Federation Council's chairperson *V. Matviyenko* quoted in ITAR-TASS Press Report, *Putin's letter On Use of Russian Army in Ukraine Goes to Upper House*, 1.3.2014 <<http://itar-tass.com/en>>.

<sup>64</sup> An UNHCR report from April 2014 concluded that some attacks on the "ethnic Russian community" occurred, but that these "were neither systematic nor wide-spread". See UNHCR, *Report on the Human Rights Situation in Ukraine*, 15.4.2014, para. 7.

<sup>65</sup> Only very few states actually claim a right to a humanitarian intervention under international law. The strongest proponent here is the United Kingdom, which has lately again taken the respective position in regard to Syria. See Prime Minister's Office, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, 29.8.2013 <<http://www.gov.uk>>; see for an overview of the current debate: *C. J. Tams*, *Prospects for Humanitarian Uses of Force*, in: *A. Cassese, Realizing Utopia: The Future of International Law*, 2012, 359.

<sup>66</sup> U.N. General Assembly, *2005 World Summit Outcome A/RES/60/1*, 16.9.2005, para. 139.

<sup>67</sup> See e.g. *R. Merkel*, *Die Krim und das Völkerrecht – Kühle Ironie der Geschichte*, *Frankfurter Allgemeine Zeitung*, 7.4.2014 <<http://www.faz.net>>.

Consequently, there are limits to territorial protection but they do not affect the protection of Crimea as a part of Ukrainian territory.

## V. Possible Reactions to Violations of a State's Territorial Integrity

Ultimately, the question remains how states may react to violations of their territory in accordance with international law. The crucial and primary instrument that the UN Charter offers is Article 51, which references the “inherent right of individual or collective self-defence.” This right to self-defence is triggered by an armed attack, which requires the use of force of a certain gravity. The gravity of the use of force has to be assessed based on the concrete circumstances, taking into account the specificities of the situation.<sup>68</sup> Mere small-scale border incidents will usually not amount to an armed attack.<sup>69</sup> On the other hand, armed attacks do not have to consist of large-scale invasions, as this would unduly limit the possible legal reactions for states against violations of their territory. In the *Oil Platforms* case the ICJ has, for example, explicitly not excluded “the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’”<sup>70</sup>

We should now take a look at the types of violations of a state's territory that have been discussed above, and at what the law on self-defence provides for these situations. First, it is highly contested whether acts by non-state actors can be interpreted as armed attacks. The ICJ holds that self-defence is possible “in the case of armed attack by one State against another State”<sup>71</sup> and implicitly suggests that self-defence is *only* possible in this case.<sup>72</sup> It is highly controversial whether the latter view, in fact, reflects the current state of international law,<sup>73</sup> especially as there is significant state

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<sup>68</sup> O. Corten, *The Law Against War* (note 36), 403.

<sup>69</sup> See ICJ, *Nicaragua Judgment* (note 48), 103 (para. 195).

<sup>70</sup> ICJ, *Oil Platforms* case (note 48), 195 (para. 72).

<sup>71</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 24), 194 (para. 139).

<sup>72</sup> The ICJ holds: “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.” (*Wall Opinion* (note 71), 194 (para. 139); see also *Armed Activities on the Territory of the Congo* (note 24), 222 et seq. (para. 146-147).

<sup>73</sup> A. Randelzhofer/G. Nolte, Article 51, in: B. Simma et al., *The Charter of the United Nations*, 3<sup>rd</sup> ed., Vol. II, 2012, margin number 36-37; see for a discussion of the issue and an

practice in which military actions against non-state actors have been justified as self-defense under either endorsement or at least lack of clear rejection by other states.<sup>74</sup> Within the debate on the application of the principle of self-defense to non-state actors it is especially controversial whether and under which circumstances a state may also take action against non-state actors on the territory of another state.<sup>75</sup> While this is, in general, a theoretically and practically crucial problem, it does not pose specific challenges in regard to Crimea. Ukraine would in any case have had the right to use armed force against the separatists as a policing measure against internal unrest, covered by its sovereign rights. A problematic constellation would then only be reached when actions against non-state actors would also have affected the territory of another state (i.e. Russia) – a highly hypothetical discussion, however, that shall not be followed up here.

Second, there is the dimension of self-defense against Russia's intervention and in that regard the situation becomes more complicated. Here we have to take up the differentiation made above between direct and indirect violations. With regard to direct violations, i.e. those that are attributable to the conduct of another state, there is an established international law that allows for self-defense. This is obvious in cases where the territorial integrity is violated by a state's regular military forces, but it is also accepted where the violation is carried out by non-state actors under the state's effective control.<sup>76</sup>

Having arrived at the conclusion earlier that such a direct violation of Ukraine's territory has occurred, the crucial question for the Crimean case, therefore, is only whether Russia's use of force reaches the gravity threshold of an armed attack. Since we do not know the details of the concrete forms of Russian involvement, the required evaluation faces factual uncertainties. However, all the evidence suggests that the Russian involvement in Crimea was not isolated and limited, resembling the prototype of a mere border incident. Rather, it was large-scale and systematic, demonstrating military superiority and ensuring that Ukrainian military forces would not dare to oppose the military actions taken in Crimea. Creating a scenario in which Ukraine would no longer be in a position to oppose the separatists has been

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overview on the scholarly debate: *N. Lubell, Extraterritorial Use of Force Against Non-State Actors*, 2010, 30 et seq.

<sup>74</sup> *Y. Dinstein, War, Aggression and Self-Defence*, 5<sup>th</sup> ed. 2012, 227 et seq.

<sup>75</sup> See for the current state of the debate the discussion of the "Bethlehem principles" in the *American Journal of International Law*. See for the "Bethlehem principles": *D. Bethlehem, Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, *AJIL* 106 (2012), 769 and for the discussion a number of contributions in *AJIL* 107 (2013), 378 et seq.

<sup>76</sup> See ICJ, *Nicaragua Judgment* (note 48), 103 et seq. (para. 195).

the declared aim. In the already quoted press interview *Putin* pointed out the necessity of the use of Russian military forces as it “was impossible in any other way to ensure the open, honest and decent way for people [in Crimea, C.M.] to express their opinion”.<sup>77</sup> Subject to further factual findings, all that points in the direction that the threshold of an armed attack clearly has been met. Russian military forces played a crucial role in blocking Ukrainian military units and therefore hindered the exertion of Ukraine’s sovereign rights. For the sake of effective protection of territorial integrity, the threshold of an armed attack cannot be set too high. The adequate level of response will then have to be determined according to the criteria of necessity and proportionality that every action in self-defense needs to fulfill. Consequently, international law would have granted Ukraine the right to self-defense against the intervening Russian military forces.

This is, however, just the law. Whether it would have been politically advisable to resort to self-defense is a completely distinct question that shall not be put up for discussion here.

Third, international law does not allow self-defense against indirect violations of the territorial integrity. While the offender state violates the victim state’s territorial integrity by providing support to rebels, it does not exert a sufficient degree of control to consider the use of force by third groups an armed attack by the state.<sup>78</sup> However, the state that has become victim of the use of force that does not amount to an armed attack may nevertheless engage in counter-measures “analogous to the right of collective self-defense”.<sup>79</sup> The ICJ has avoided taking a clear position on whether these counter-measures may involve the use of force.<sup>80</sup> However, the better arguments are in favor of such a right to resort to – as *B. Simma* puts it – “defensive military action ‘short of’ full-scale self-defense”.<sup>81</sup> In lack of such a right, a state would not be able to take effective actions against the use of force against its territory at all. The difference of these counter-measures and a full-fledged right to self-defense then is a matter of scale. The right to take counter-measures is less comprehensive and a higher threshold must be applied in regard to the necessity and proportionality of the defensive action.<sup>82</sup>

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<sup>77</sup> RT (note 56).

<sup>78</sup> See ICJ, *Nicaragua Judgment* (note 48), 103 et seq. (para. 195).

<sup>79</sup> ICJ, *Nicaragua Judgment* (note 48), 110 (para. 210).

<sup>80</sup> See the critical separate opinion of Judge *Simma* in the *Oil Platforms* case (note 48), 332 (para. 12).

<sup>81</sup> Separate opinion of Judge *Simma*, *Oil Platforms* case (note 48), 332 (para. 12).

<sup>82</sup> See on the differences between self-defense and forceful counter-measures *Y. Dinstein* (note 74), 208 et seq.

## VI. Conclusion

The protection of territorial integrity forms a core principle of international law and is – together with the prohibition of the use of force – one of the foundations of the UN Charter’s attempt to secure international peace and stability. The content of the legal concept is largely uncontested, but problems come into play at the level of application of the principle to specific situations. We have seen that the concept of territorial integrity is internally linked to the idea of the expression of a political will over and within a certain territory. In concrete disputes over territories it is then often put into question how the relevant political community entitled to territorial control and protection shall be determined. As we have seen with regard to Crimea, this gives rise to historical arguments over such titles and to secessionist claims that aim at redefining the political community. International law, however, very much limits the possible arguments that can be invoked to challenge the existing territorial situation. The principle of *uti possidetis* determines the *de facto* boundaries at the time of independence as crucial and international law is also hostile towards recognizing territorial changes as the consequence of the self-determination of peoples. As for the case of Crimea, it has been shown that, based on these principles, it cannot be contested that Crimea enjoys (or – depending on the perspective – has to content itself with) territorial protection as part of Ukraine.

The second challenge in applying the concept of territorial integrity to Crimea has been the long uncertain role that Russian troops played in establishing the separatist rule on Crimea. Much of this uncertainty has, however, been removed as *Putin* has publicly acknowledged the involvement of Russian military forces. It may therefore be seen as established that Russia has directly violated Ukraine’s territorial integrity.