

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2014

Crimea and the International Legal Order

William W. Burke-White

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Human Rights Law Commons](#), [International Law Commons](#), [International Relations Commons](#), [Law and Politics Commons](#), [Peace and Conflict Studies Commons](#), and the [Soviet and Post-Soviet Studies Commons](#)

Repository Citation

Burke-White, William W., "Crimea and the International Legal Order" (2014). *Faculty Scholarship at Penn Law*. 1360.

https://scholarship.law.upenn.edu/faculty_scholarship/1360

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

1 **Crimea and the International** 2 **Legal Order**

3 William W. Burke-White

4 Crimea is Russia's. The March 2014 referendum and Russia's subsequent
5 annexation of Crimea are now events of history, even while the territorial
6 borders and political future of the rest of Ukraine remain contested. Yet, as
7 international attention has moved from Sevastopol to Kiev and more recent
8 crises elsewhere, a key balance between two of the most fundamental
9 principles of the post-Second World War international legal and political
10 order remains at stake.

11 In Crimea, Russia has cleverly embraced international law and, in so
12 doing, exploited the tension between a fundamental principle that prohibits
13 the acquisition of territory through the use of force and an equally
14 fundamental right of self-determination to take Crimea as its own. Russian
15 President Vladimir Putin has advanced a quite different balance between
16 these principles than that which prevailed for most of the past 70 years.
17 Russia's reinterpretation of these two principles could well destabilise the
18 tenuous balance between the protection of individual rights and the
19 preservation of states' territorial integrity that undergirds the post-Second
20 World War order. This interpretation sets potentially dangerous precedents
21 for troubled regions, from Iraq to Syria, destabilising the international legal
22 system at the very moment that it is adapting to a multipolar world.

23 In claiming the legality of its actions, but twisting the law in subtle (and
24 not so subtle) ways, Russia is taking a card straight from America's
25 playbook. For most of the past 70 years, and certainly since the early 1990s,
26 the United States has been able to lead the international legal system, often
27 in cooperation with Europe. It defined the rules, the exceptions to those
28 rules and often the enforcement of those rules.¹ The present redistribution of
29 power in the international political system has brought an end to that
30 transatlantic moment in international law.² In place of the era of US legal

1 hegemony and leadership, a multi-hub structure is emerging in which
2 growing number of states can and do play issue-specific leadership roles in
3 a far more flexible and fluid legal system.³ These states include, but are not
4 limited to, Brazil, Russia, India and China. In Crimea, Russia is, perhaps for
5 the first time since the fall of the Soviet Union, asserting itself as a renewed
6 hub for a particular interpretation of international law, one that in many
7 ways challenges the balance at the heart of the post-Second World-War
8 order and the ability of the US to lead that order.

9 Washington built the post-war order on an inherent tension, evident in
10 the Charter of the United Nations itself, between the preservation of states'
11 territorial integrity and the protection of individual rights, including, in
12 extraordinary circumstances, through the ultimate independence of
13 oppressed populations in acts of self-determination.⁴ This tension was
14 understood and debated in the drafting of the charter in 1945, and in the UN
15 General Assembly's efforts to clarify the right of self-determination in 1970.⁵
16 Similar questions arose during the late 1990s as Timor-Leste and Kosovo
17 sought independence in the wake of violence and oppression, and during
18 the early years of this decade as South Sudan followed a similar course. Yet,
19 while in 1999 the US was able to control the interpretation and enforcement
20 of international law to secure Kosovo's independence without legal
21 consequence, Washington finds itself in 2014 unable to fully counteract
22 Moscow's legal argument that its support for, and ultimate annexation of,
23 Crimea is equally grounded in international law.

24 Russia's ability to exploit the legal ambiguities shared by Crimea and
25 Kosovo arises in large part because of the inherent tension between two oft-
26 conflicting principles that have been at the heart of the international legal
27 and political systems since 1945. The first of these principles is that
28 countries cannot use force against one another and, particularly, cannot
29 secure territorial gains through the use of force. The principle is embodied
30 in Article 2(4) of the UN Charter: 'all Members shall refrain in their
31 international relations from the threat or use of force against the territorial
32 integrity or political independence of any state.'⁶ It was reaffirmed in 1970,
33 when the UN General Assembly proclaimed that 'no territorial acquisition
34 resulting from the threat or use of force shall be recognized as legal'.⁷ This

1 principle united the broad coalition that repelled Iraqi President Saddam
2 Hussein from Kuwait in 1991.

3 The second principle is that of self-determination. It provides that a post-
4 colonial or severely oppressed population has the right to freely determine
5 its future government and status in the international community. In
6 extraordinary circumstances, such as systematic crimes against humanity or
7 genocide, the principle entitles the population to secure political and legal
8 independence, even where doing so undermines the territorial integrity of
9 another state. This principle, too, finds its roots in the UN Charter, which
10 sets as an objective of the international system 'respect for the principle of
11 equal rights and self-determination of peoples.'⁸ Often honoured in the
12 breach, this is the principle that led to the independence of Timor-Leste in
13 2002, Kosovo in 2008 and South Sudan in 2011.

14 The relationship between these principles is critically at stake in Crimea.
15 Is the Russian-speaking population there entitled to its own state, due to a
16 systematic oppression by the Kiev government? Is Russia entitled to assist
17 its co-nationals in achieving independence? Or is Ukraine as a sovereign,
18 independent state entitled to the inviolability of its borders? More generally,
19 under what circumstances may a population claim a right of international
20 independence and to what degree are third states entitled to assist, even
21 where doing so may violate another state's territorial integrity?

22 In the Crimea crisis, Putin articulated a masterfully crafted, albeit
23 revisionist, legal argument that exploited the tension between self-
24 determination and territorial integrity. Through that argument, Russia may
25 well seek not only to justify its actions in Crimea, but also to reassert its role
26 as a leader in a multi-hub international legal order.

27 Putin's legal argument was framed in his 18 March speech to the Russian
28 Duma, two days after the referendum in Crimea. Understood in context, he
29 claims a broad right of intervention in protecting Russian-speakers in
30 Crimea (some of whom have long had or recently been given Russian
31 citizenship) and a very low standard for the degree of oppression necessary
32 to trigger the right of self-determination and subsequent independence. In
33 so doing, Putin shifts the balance between territorial integrity and self-

1 determination far in the direction of the latter, rendering international
2 borders more permeable and the international system itself far less secure.

3 With respect to the first principle, the prohibition on the use of force to
4 acquire territory, Putin adopted strategic denial: 'Russia's Armed Forces
5 never entered Crimea; they were there already in line with an international
6 agreement.'⁹ Significantly, he denied that the actions of the unidentified
7 forces in Crimea, so evident in the pictures broadcast around the world,
8 were those of the Russian Federation. He could do so because of a relatively
9 forgiving, and likely outdated, legal standard for the attribution of actions
10 by non-state actors to a government that supports them. Back in 1984, when
11 the US had provided assistance to the Contra rebels in Nicaragua, the
12 International Court of Justice (ICJ) found that 'for this conduct to give rise to
13 the legal responsibility of the United States, it would in principle have to be
14 proved that that State had effective control of the military or paramilitary
15 operations'.¹⁰ In that case, the ICJ concluded that 'the United States'
16 participation, even if preponderant or decisive, in the financing, organizing,
17 training, supplying, and equipping of the *contras* ... and the planning of the
18 whole of its operation' was insufficient to attribute the acts to the US.¹¹

19 Putin cleverly exploited this lax standard for attribution, recognising that
20 it would be extremely difficult, if not impossible, to prove that these
21 unidentified militias were under his effective control, and that, even if they
22 were funded and directed by Russia, Moscow would still not be legally
23 responsible for their actions. As a result, he could pressure the Ukrainian
24 government and seize control of key infrastructure in Crimea without
25 incurring international legal responsibility, so long as Russia preserved
26 some plausible deniability as to the effective control of the forces on the
27 ground.

28 More subtly, however, Putin's approach claims an affirmative right of
29 military intervention to protect Russian nationals abroad. In his 18 March
30 remarks, he asserted Russia's interest in Ukraine, making a less-than-subtle
31 threat:

32 Millions of Russians and Russian-speaking people live in Ukraine and will
33 continue to do so. Russia will always defend their interests using political,
34 diplomatic and legal means. But it should be above all in Ukraine's own interest

1 to ensure that these people's rights and interests are fully protected. This is the
2 guarantee of Ukraine's state stability and territorial integrity.¹²

3 That threat of military intervention, should Ukraine fail to protect
4 Russian nationals in its territory, is all the more telling in light of Moscow's
5 other legal positions. Russia justified its 2008 armed incursion into Georgia
6 partly as a legitimate act of self-defence intended to protect Russian
7 nationals.¹³ The use of military force for the protection of nationals abroad,
8 while rooted in the historical origins of the use of force, is contested.¹⁴ Yet
9 Moscow's ambassador to the UN described the Georgian attacks on Russian
10 nationals as an 'illegal use of military force against the Russian Federation'
11 that triggered Russia's inherent right of self-defence due to the presence of
12 'citizens of the Russian Federation' in South Ossetia.¹⁵ Russian legislation
13 and judicial interpretations confirm Moscow's view that the right of self-
14 defence includes the protection of its nationals abroad.¹⁶ Russia has sought
15 to reinterpret these provisions, challenging existing interpretations in an
16 effort to establish an alternative framework for the use of force in its sphere
17 of influence.¹⁷

18 Ultimately, Putin advances an international legal precedent that would
19 significantly expand the possibility for intervention by unknown forces –
20 the 'little green men' who appeared in Crimea in February and March – by
21 making it harder to link their actions to a home state, and that would justify
22 overt intervention by a state's military when its nationals, broadly defined,
23 were under any threat.

24 Secondly, Putin's 18 March speech advocates a broad, rapid and easy-to-
25 trigger right of self-determination. He covers Russia's actions with the
26 mantle of international law and, simultaneously, tips the balance between
27 territorial integrity and self-determination far in the direction of the latter.
28 In defence of Crimea's declaration of independence, Putin referenced both a
29 decision of the International Court of Justice and a UN Security Council
30 Resolution providing that 'general international law contains no prohibition
31 on declarations of independence'.¹⁸ He invoked the legal principle of self-
32 determination repeatedly, noting that the 'Supreme Council of Crimea
33 referred to the United Nations Charter, which speaks of the right of nations
34 to self-determination'. And he noted the US position during the Kosovo

1 conflict that 'declarations of independence may, and often do, violate
2 domestic legislation. However, this does not make them violations of
3 international law.'¹⁹

4 In advancing the argument for Crimea's right of self-determination,
5 Putin ticked all the relevant legal boxes: those seeking self-determination
6 constitute a distinct people who have been subject to systematic oppression,
7 and who have chosen their future status legitimately, through a democratic
8 process.²⁰ He argued that the residents of Crimea constitute a separate and
9 distinct people: 'the total population of the Crimean Peninsula today is 2.2
10 million people, of whom almost 1.5 million are Russians, 350,000 are
11 Ukrainians who predominantly consider Russian their native language, and
12 about 290,000-300,000 are Crimean Tatars, who ... also lean towards
13 Russia.'²¹ Furthermore, he claimed that these ethnic Russians, who included
14 some Russian citizens, had been subjected to the kind of systematic
15 oppression that triggers the right of self-determination under international
16 law, calling the members of the Ukrainian government 'nationalists, neo-
17 Nazis, Russophobes and anti-Semites' who had introduced 'a draft law to
18 revise the language policy, which was a direct infringement on the rights of
19 ethnic minorities' and were the 'ideological heirs of [Stepan] Bandera,
20 Hitler's accomplice during World War II.'²² Finally, Putin completed the
21 legal triumvirate to argue that the Russian peoples of Crimea had freely and
22 fairly chosen to join with Russia: 'the referendum was fair and transparent,
23 and the people of Crimea clearly and convincingly expressed their will and
24 stated that they want to be with Russia.'²³

25 In ticking-off the international legal boxes of self-determination, Putin
26 simultaneously sought to expand those boxes. Under the international legal
27 rules that have been in place since 1945, the right of self-determination is
28 extremely narrow. It is only triggered by either emergence from a period of
29 colonial rule or, in the words of the Supreme Court of Canada, 'alien
30 subjugation, domination, or exploitation'.²⁴ At the very least, in determining
31 that the people of Quebec had not been subject to such oppression, the
32 Canadian court observed that there would have to be a showing of a
33 'massive violation ... of fundamental rights.'²⁵

1 In suggesting that ‘a draft law to revise the language policy’ in Ukraine
2 (an admittedly unfortunate law, but one that was never adopted or
3 enforced) constitutes the kind of ‘massive violation of human rights’
4 necessary to trigger the right of self-determination or even the
5 Responsibility to Protect, Putin’s legal argument transforms self-
6 determination from an unusual and extraordinary remedy for severely
7 oppressed peoples to a potentially regular occurrence that could be
8 applicable to almost any minority around the world. The right of self-
9 determination in international law has been so limited precisely because of
10 the destabilising effects it can have when generalised. That is why self-
11 determination is, according to the UN General Assembly, to be balanced
12 with the prohibition on ‘any action which would dismember or impair,
13 totally or in part, the territorial integrity or political unity of sovereign and
14 independent States conducting themselves in compliance with the principle
15 of equal rights and self-determination of peoples’.²⁶ Imagine, without that
16 check, the potentially competing claims for self-determination in Syria, Iraq
17 and Turkey alone.

18 So, too, under traditional international law, is the right of self-
19 determination subject to the requirement of a free, fair and democratic
20 choice as to the political future of the self-determining territory. When a
21 population exercises this right through a referendum, the process must be
22 well organised, free of corruption and preceded by a period of thoughtful
23 deliberation. That is why, for example, the independence vote in Timor-
24 Leste occurred after one year of administration by the UN, and Kosovo’s
25 formal independence only came many years after the original conflict.
26 During the intervening period, the people of the self-determining territory
27 can and must frame, consider and debate their future, which could include
28 greater self-government within an existing federation, statehood or joining
29 some other, contiguous state.

30 Putin affirms that ‘the [Crimea] referendum was fair and transparent,
31 and the people of Crimea clearly and convincingly expressed their will and
32 stated that they want to be with Russia.’²⁷ Yet, in reality, there was little
33 debate as to what was to be decided in the referendum, even had the mere
34 days before the vote allowed the people of Crimea enough time to digest

1 that choice. The referendum simply asked voters to choose whether to
2 reunify 'Crimea with Russia as a subject of the Russian Federation' or to
3 restore 'the 1992 Crimea constitution and the status of Crimea as part of
4 Ukraine'.²⁸ The framing of such a choice is critical and, in this case, the ballot
5 omitted other choices, including that of remaining part of Ukraine under the
6 current constitutional structure, as well as the possibility of independent
7 statehood. It is, in part, on these grounds that the UN General Assembly
8 condemned the referendum as 'having no validity', and the Security
9 Council would have passed a resolution consistent with this position, but
10 for a Russian veto.²⁹

11 Again, Moscow has invoked the rhetoric of a valid right in international
12 law – that of the Crimean people to choose their own future – but in the
13 process has twisted and expanded that right. Putin admits that Russia has
14 taken steps to 'create conditions so that the residents of Crimea for the first
15 time in history were able to peacefully express their free will regarding their
16 own future', but has done so in a way that actually deprived them the real
17 chance to deliberate and debate that future.³⁰ At least to the degree Russia
18 assisted with (or perhaps forced) the speed of the referendum and the
19 framing of the ballot, it again challenged the bedrock principle of non-
20 intervention and the illegality of territorial acquisition through the use of
21 force.

22 Of course, from Putin's perspective, Russia's actions in Crimea are nearly
23 indistinguishable from those of the US in Kosovo: 'a precedent our western
24 colleagues created with their own hands in a very similar situation'. In his
25 view, if a distinction can be drawn between the two cases, it rests on the fact
26 that in Crimea not a 'single shot [was] fired'.³¹

27 In many ways, Putin has joined a tradition of great-power interaction
28 with international law: reinterpreting and redefining legal rules to serve
29 present interests.³² Russia's international legal actions in Crimea are similar
30 to those of the US throughout most of the past 70 years. America, too, has
31 sought to expand the right of self-determination in Kosovo and, more
32 recently, South Sudan. And Washington has been happy to exploit, and
33 even expand, the lax standards of attribution in international law in places
34 ranging from Nicaragua in the 1980s to Libya in 2011.

1 Since the Kosovo conflict in 1999, however, the nature of the
2 international legal system has fundamentally changed. In the past few
3 years, it has quickly transitioned from a unipolar legal order into a multi-
4 hub system. As part of this new structure, many more states can act as hubs,
5 leading an international legal process or articulating legal norms that set
6 precedents and attract followers. The US now confronts a legal system in
7 which other states are asserting legal leadership and, at times, successfully
8 contesting Washington's interpretation of legal rules. Beyond Russia's
9 claims regarding Crimea's right of self-determination, China has sought to
10 reinterpret the legal rules governing the scope of permissible military
11 activity in a state's exclusive economic zone, and both India and Brazil have
12 questioned standard interpretations of medical-patent protections under the
13 Agreement on Trade-Related Aspects of Intellectual Property Rights.³³

14 Putin's 18 March address should be read as more than a mere
15 justification of Russia's annexation of Crimea. It is a renewed claim for the
16 country's status as a hub of the emerging international legal order.
17 Indicative of that leadership, Putin calls the US to task for its own past
18 violations: 'they say we are violating norms of international law. Firstly, it's
19 a good thing that they at least remember that there exists such a thing as
20 international law – better late than never.'³⁴ He also put forward this claim
21 in a September 2013 article for the *New York Times*, writing to warn against
22 US military action in Syria

23 We need to use the United Nations Security Council and believe that preserving
24 law and order in today's complex and turbulent world is one of the few ways to
25 keep international relations from sliding into chaos. The law is still the law, and
26 we must follow it whether we like it or not.³⁵

27 There is little, if anything, that the US or Europe can do to turn back the
28 clock in Crimea. Russia has not only secured the territory as its own, it has
29 also set a precedent of lasting significance, one that is all the more important
30 in a legal order in which many states will vie for leadership and contest the
31 interpretation and application of international legal rules. While there are
32 key steps that can be taken to minimise the weight of that precedent, current
33 US strategy has failed to recognise the very different dynamics of the multi-
34 hub international legal system in which we are operating today. The US

1 response has largely been to claim that Russian actions violate international
2 law and, jointly with Europe, impose sanctions on Russia. In US President
3 Barack Obama's words shortly before to the March referendum, 'the
4 proposed referendum on the future of Crimea would violate the Ukrainian
5 constitution and violate international law ... we are well beyond the days
6 when borders can be redrawn over the heads of democratic leaders.'³⁶

7 In so doing, the US has followed its traditional approach to international
8 law, which worked reasonably well in an era of US and European legal
9 hegemony: articulate and enforce your own preferred view of the rule in
10 question. In the new multi-hub structure of the international legal system,
11 however, the US view – even if legally correct – will not control outcomes in
12 and of itself. Articulated unilaterally, it may even be counterproductive.
13 There will be a number of states that support Russia's advocacy of a more
14 lenient standard of intervention and a more readily available right of self-
15 determination. These states may include some of the 11 UN members that
16 voted against the General Assembly resolution condemning Russia's actions
17 in Crimea, and, more importantly, some of the 58 that abstained and the 24
18 that were, perhaps intentionally, absent for the vote.³⁷ To the degree that
19 these states follow Russia's international legal leadership on this issue, the
20 alternate norms on intervention and self-determination gain credence.

21 Instead of merely asserting and enforcing their own view of the law, the
22 US and Europe must build a broad coalition of emerging and potential hub
23 states in the international legal system that are willing to collectively
24 reaffirm the traditional balance between self-determination and territorial
25 integrity. The nature of today's multi-hub legal order is such that there are
26 far more partners and potential partners available to the Washington and
27 Brussels, with whom they can build a coalition of shared legal interest.

28 Several key rising powers who, like Russia, now wield far greater
29 influence in the international legal system, share the US interest in
30 maintaining the traditional balance between self-determination and
31 territorial integrity. Specifically, China has deep concerns about wider
32 invocation of self-determination, precisely because the principle could be
33 used by China's ethnic minorities (or even the Taiwanese) to claim
34 independence. By reaffirming a narrow interpretation of self-determination

1 as an exceptional remedy and emphasising the extraordinary nature of the
2 oppression necessary to trigger it, the US may be able bring China fully on
3 board. India too has significant worries about the acquisition of territory by
4 force, given its long and oft-contested borders with both Pakistan and
5 China. By reaffirming the illegality of territorial acquisition by force, the US
6 may convince India too to join. Brazil, under presidents Luiz Inácio Lula da
7 Silva and Dilma Rousseff, has emphasised the importance of the legitimacy
8 of the international system, as well as an end to the bipolar era of the Cold
9 War and the unipolar period of US dominance. If the objections to Russia's
10 current action are framed in terms of the legitimacy of process and the
11 emergence of a new multi-hub system, there is good reason to think that
12 Brazil too could be brought on board.

13 Notably, each of these states abstained in the General Assembly vote on
14 Crimea and China abstained from voting on similar resolution (ultimately
15 vetoed by Russia) in the Security Council. If the US and Europe are to
16 successfully counteract the precedent Russia has set in Crimea, at least some
17 of these other hub states must be persuaded to join a coalition of shared
18 legal interest.

19 Admittedly, the potential alignment of the hubs of the US, the EU, Brazil
20 India and China may paper over real differences between them as to when,
21 if ever, self-determination or intervention should be allowed. But, at a
22 fundamental level, these hub states do and should share a common interest
23 in the preservation of the balance between territorial integrity and self-
24 determination that has kept the international system relatively stable for the
25 past 70 years **[rephrase 'relatively stable'? There were a lot of invasions,
26 massacres, genocides and, I think, changes to borders in those 70 years]**.
27 But, to preserve that balance in light of Russia's actions in Crimea, the US
28 and Europe must realise that they are operating in an international legal
29 order very different to that of the past. It is an order in which many states
30 have loud voices and lasting precedential impact. It is an order in which
31 coalitions will shift and reform, but in which no single state can entirely
32 control legal outcomes. And it requires a very different legal and political
33 strategy.

1 In building this admittedly unusual coalition, the US and its potential
2 partners would be well served to highlight three key legal issues, which
3 would narrow the possibilities for future exploitation of the inherent tension
4 between territorial integrity and self-determination.

5 Firstly, such a coalition must reaffirm that, while the right of self-
6 determination exists, it is only triggered by clear and compelling evidence
7 of systematic oppression. It is that legacy of oppression, of ethnic-cleansing
8 and of crimes against humanity that most clearly separates Crimea from
9 Kosovo, South Sudan and Timor-Leste. It is the weakest link in Putin's legal
10 argument. Of course, not all the potential members of such a coalition will
11 want to recognise a right of self-determination, even in the wake of such
12 oppression. But, by striking the right balance and reaffirming self-
13 determination as an exceptional last resort, the US and Europe have the
14 chance to stand firm for both human rights and for the stability of the
15 international system, ideally shaping the development of international law
16 in the process.

17 Secondly, the principle of self-determination must be modified so that a
18 state that assists a population exercising the right of self-determination is
19 expressly prohibited from subsequently annexing that population's
20 territory. While the right of self-determination usually implies that the
21 oppressed population may choose any governmental structure it wishes,
22 including accession to that of an adjacent state, that rule must be altered to
23 exclude the possibility of annexation by an intervening state. In context,
24 such a prohibition would have precluded Timor-Leste from choosing to join
25 Australia, but would not have blocked the right of self-determination itself.
26 It would have forbidden Russia from taking Crimea through legal and
27 political sleight of hand. It would ensure that states seeking to help
28 oppressed populations exercise self-determination have clean hands and
29 honest motives.

30 Thirdly, this admittedly unlikely coalition may be able to spur the
31 evolution of the standards of attribution in international law that allowed
32 Russia to deny responsibility for the actions of the unidentified militias in
33 Crimea. The current leniency stems from the 1984 International Court of
34 Justice standard that required a state to have 'effective control' – a very high

1 threshold – of non-state actors in order for that state to incur legal
2 responsibility. Over the years, some have suggested stricter standards that
3 would more readily hold states liable for actions they provoke or assist, but
4 no consensus view has emerged. In a world of far more diffuse power, in
5 which many states are able to catalyse non-state actors abroad, a new
6 political consensus around a stricter standard of attribution may be possible.
7 Such a standard was suggested by the International Criminal Tribunal for
8 the Former Yugoslavia in the 1999 trial of Dusko Tadic, which looked not to
9 ‘effective control’, but instead to ‘overall control’. Far more than a semantic
10 difference, under the overall-control standard, ‘participation in the general
11 direction, coordination, and supervision’ of a militia or other non-state actor
12 would therefore be sufficient to make the sending state responsible.³⁸ In
13 other words, Russia would, most probably, be responsible for the actions of
14 many of the militias or unidentified soldiers in Crimea.

15 Admittedly, it may not always be in the immediate interests of the US to
16 have an international legal system in which the right of intervention is
17 exceptionally narrow, self-determination is a truly exceptional remedy and
18 governments can be more readily held responsible for the actions of non-
19 state actors. In such a system, it would be more legally difficult for the US to
20 intervene elsewhere, and perhaps harder for truly oppressed populations to
21 achieve self-determination. But that may be a necessary cost of operating in
22 a multi-hub international legal system. When the US was able to both make
23 and interpret international law, broad exceptions to legal rules were
24 beneficial. In a multi-hub world, in which other states’ interpretations of the
25 law may determine outcomes, those same broad exceptions may become
26 dangerous, both to Washington and to the stability of the international
27 system itself.

28 In determining the precedent that will be followed from events in
29 Crimea, the US has a choice. Within the emergent multi-hub international
30 legal system, Washington can continue to embrace international legal
31 exceptionalism, recognising that in the future those exceptions will be open
32 to exploitation by other states, including those well beyond Russia. Or it can
33 seek to build coalitions that, at least in this case, narrow exceptions and
34 reaffirm the principles of the modern international order. In many ways,

1 Putin's embrace of international law provides the US with an opportunity to
 2 respond in kind, using the Crimea crisis to build a very different kind of
 3 legal and political coalition, one that is far more effective in a multi-hub
 4 international legal order.

5

6 **William W. Burke-White** is Richard Perry Professor and Inaugural Director, Perry World House,
 7 University of Pennsylvania.

8 Notes

- 1 For this classic critique of international law, see Hans J. Morgenthau, 'Positivism, Functionalism, and International Law', *American Journal of International Law*, vol. 34, no. 2, April 1940.
- 2 See Jim O'Neill, *The Growth Map: Economic Opportunity in the BRICs and Beyond* (London: Portfolio Penguin, 2011); Daniel W. Drezner, 'The New New World Order', *Foreign Affairs*, vol. 86, no. 2, March–April 2007; Fareed Zakaria, *The Post-American World: Release 2.0* (New York: W.W. Norton & Company, 2011); John B. Bellinger III, 'Reflections on Transatlantic Approaches to International Law', *Duke Journal of Comparative & International Law*, vol. 17, no. 2, Spring 2007; Daniel Bethlehem, 'Remarks by Daniel Bethlehem', in American Society of International Law, *Proceedings of the Annual Meeting*, vol. 103.
- 3 For a discussion of this, see William W. Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism', *Harvard International Law Journal*, forthcoming in 2014.
- 4 For a broader description of that order that sounds similar themes, see G. John Ikenberry, 'Illusions of Empire: Defining the New American Order', *Foreign Affairs*, vol. 83, no. 2, March–April 2004.
- 5 UN General Assembly, 'Resolution Adopted by the General Assembly: 2734 (XXV). Declaration on the Strengthening of International Security', 16 December 1970, <http://www.un-documents.net/a25r2734.htm>.
- 6 UN, 'Charter of the United Nations', Article 2(4), <http://www.un.org/en/documents/charter/>.
- 7 UN General Assembly, 'Resolution Adopted by the General Assembly'.
- 8 UN, 'Charter of the United Nations', Article 1(2).
- 9 Kremlin, 'Address by President of the Russian Federation', 18 March 2014, <http://eng.kremlin.ru/news/6889>.
- 10 International Court of Justice, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)', 27 June 1986, Paragraph 116, <http://www.icj-cij.org/docket/files/70/6503.pdf>.
- 11 *Ibid.*, Paragraph 115.
- 12 Kremlin, 'Address by President of the Russian Federation'.

-
- ¹³ Article 61(2) of the Constitution of the Russian Federation states that ‘the Russian Federation shall guarantee its citizens defense and patronage outside its borders.’
- ¹⁴ Michael Akehurst, ‘The Use of Force to Protect Nationals Abroad’, *International Relations*, April 1977, vol. 5, no. 5; David J. Gordon, ‘Use of Force for the Protection of Nationals Abroad: The Entebbe Incident Note’, *Case Western Journal of International Law*, vol. 9, 1977 (noting the ‘restrictionist’ view of Article 51).
- ¹⁵ UN, ‘Letter Dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council’, 11 August 2008, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20S%202008%20545.pdf>.
- ¹⁶ See ‘Russian Federal Law on the State Policy in Regard to the Fellow Citizens Residing Abroad’, 1999, available at <http://www.loc.gov/law/help/russian-georgia-war.php#t41>. This provides that ‘if a foreign state violates recognized norms of international law and human rights in regard to Russian expatriates, the Russian Federation shall undertake efforts authorized by international law to defend their interests’. The chief justice of the Russian Constitutional Court also justified the intervention on these terms in an August 2008 article in *Rossiyskaya Gazeta*. Valery Zorkin, ‘Peace Enforcement and Human Rights’, *Rossiyskaya Gazeta*, 13 August 2008, <http://www.rg.ru/2008/08/13/zorkin.html>.
- ¹⁷ See Gordon B. Smith, ‘Russian Exceptionalism? Putin’s Assertion of Sovereignty at Home and Abroad’, paper presented to the conference ‘Sovereignty and the New Executive Authority’, University of Pennsylvania Law School, Philadelphia, PA, 19–20 April 2013, <https://www.law.upenn.edu/live/files/1882-gordon-smith-russian-exceptionalism.pdf>. Moscow has made systematic efforts to provide Russian citizenship to ethnic Russians in various post-Soviet states, with a view to creating the possibility of such a right of intervention. See Igor Zevelev, ‘Russia’s Policy Toward Compatriots in the Former Soviet Union’, *Russia in Global Affairs*, no. 1, March 2008, http://eng.globalaffairs.ru/number/n_10351.
- ¹⁸ Kremlin, ‘Address by President of the Russian Federation’.
- ¹⁹ *Ibid.*
- ²⁰ Supreme Court of Canada, ‘Reference re Secession of Quebec’, 20 August 1998, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>.
- ²¹ Kremlin, ‘Address by President of the Russian Federation’.
- ²² *Ibid.*
- ²³ *Ibid.*
- ²⁴ Supreme Court of Canada, ‘Reference re Secession of Quebec’.
- ²⁵ *Ibid.*
- ²⁶ UN, ‘Resolution adopted by the General Assembly 2734 (XXV). Declaration on the Strengthening of International Security’, 16 December 1970, <http://www.un-documents.net/a25r2734.htm>.
- ²⁷ Kremlin, ‘Address by President of the Russian Federation’.

-
- ²⁸ 'Crimea Referendum: What Does the Ballot Paper Say?', BBC, 10 March 2014, <http://www.bbc.co.uk/news/world-europe-26514797>.
- ²⁹ UN, 'Resolution Adopted by the General Assembly on 27 March 2014', 1 April 2014, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262.
- ³⁰ Kremlin, 'Address by President of the Russian Federation'.
- ³¹ *Ibid.*
- ³² For a discussion of hegemony and international law, see Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', *European Journal of International Law*, vol. 16, no.3, 2005.
- ³³ Jing Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone Under UNCLOS', *Merkourios*, vol. 28, no. 74, 2012; Amy Kapczynski, 'Engineered in India — Patent Law 2.0', *New England Journal of Medicine*, 8 August 2013, vol. 369, no. 6.
- ³⁴ Kremlin, 'Address by President of the Russian Federation'.
- ³⁵ Vladimir V. Putin, 'A Plea for Caution from Russia', *New York Times*, 11 September 2013, <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.
- ³⁶ White House, 'Statement by the President on Ukraine', 6 March 2014, <http://www.whitehouse.gov/the-press-office/2014/03/06/statement-president-ukraine>.
- ³⁷ Louis Charbonneau, 'U.N. Will Treat Crimea as Part of Ukraine, Not Russia: U.S.', Reuters, 2 April 2014, <http://uk.reuters.com/article/2014/04/02/us-ukraine-crisis-un-idUSBREA311TD20140402>.
- ³⁸ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, 'Prosecutor v. Dusko Tadic', 15 July 1999, <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.