

St. John's University School of Law

## St. John's Law Scholarship Repository

---

Faculty Publications

---

2009

### The Language of Law and the Practice of Politics: Great Powers, Small States, and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia

Christopher J. Borgen

*St. John's University School of Law*

Follow this and additional works at: [https://scholarship.law.stjohns.edu/faculty\\_publications](https://scholarship.law.stjohns.edu/faculty_publications)



Part of the [International Law Commons](#)

---

#### Recommended Citation

Borgen, Christopher J., "The Language of Law and the Practice of Politics: Great Powers, Small States, and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia" (2009). *Faculty Publications*. 115.

[https://scholarship.law.stjohns.edu/faculty\\_publications/115](https://scholarship.law.stjohns.edu/faculty_publications/115)

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia

Christopher J. Borgen\*

“When the President [Woodrow Wilson] talks of ‘self-determination’ what unit has he in mind? Does he mean a race, a territorial area, or a community?” It was a calamity, [Secretary of State Robert] Lansing thought, that Wilson had ever hit on the phrase. “It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until it was too late to check those who attempt to put the principle into force.”<sup>1</sup>

“ . . . to imagine a language means to imagine a form of life.”<sup>2</sup>

## I. INTRODUCTION

If international law is all but irrelevant to international relations, as some skeptics maintain, why do states spend so much time and effort justifying their actions under international law? Saddam Hussein attempted to justify Iraq’s invasion of Kuwait in 1990. George W. Bush attempted to justify the US’s

---

\* Associate Professor of Law, St. John’s University School of Law. This essay benefited from comments and suggestions from Lori Outzs Borgen, Katharina de la Durantaye, Paul Kirgis, Peggy McGuinness, Michael Perino, Rosemary Salomone, Michael Simons, and Brian Tamanaha. I am also grateful to the editors and staff of the *Chicago Journal of International Law*, and especially Articles Editor Nathan Richardson, staff members David Creasey and Christopher Lentz, Topics & Submissions Editor Travis Kennedy, Executive Editors Emma Mittelstaedt and Justin Donoho, and Editor-in-Chief Jon Jurich for their suggestions and fine editorial work. Any mistakes are solely my own. The main text of this article was completed in April, 2009.

<sup>1</sup> Margaret MacMillan, *Paris 1919: Six Months that Changed the World* 11 (Random House 2002) (quoting Secretary of State Robert Lansing).

<sup>2</sup> Ludwig Wittgenstein, *Philosophical Investigations* 8 (MacMillan 3d ed 1959) (G.E.M. Anscombe and R. Rhees, trans).

invasion of Iraq in 2003. Vladimir Putin attempted to justify the Russian invasion of Georgia in 2008.

The immediate reaction by many is to dismiss this as “cheap talk,” a rhetorical fig leaf or simple bluster of little consequence. This Article aims to debunk the notion that the rhetoric surrounding international law is of little consequence. Rather than mere cheap talk, the rhetoric of international law is at times (but not always) used by great powers (and other states) in an attempt to gain tactical, if not strategic, advantages.

This Article seeks to elucidate what is acceptable and what is not in modern diplomatic discourse and the relation of this acceptability to state practice. In this sense, international law serves as both a vocabulary and a grammar for diplomacy. International law is a vocabulary in that it defines the words that can or cannot be used in diplomatic discourse, the terminology that is or is not acceptable. For example, no state declares, “we choose to act as aggressors,” as it would not only be admitting to illegality, but it would also be politically unacceptable.

Similarly, international law provides a grammar for international relations by setting the rules by which words fit together—essentially, how ideas can be expressed. For example, “we will use our right to attack you” does not fit into the grammar of international law or international politics (barring some questionable readings by the Bush Administration). As Nico Krisch has argued, many of the central tenets of international law have remained stable over a century or so and thus international law itself is “a prime source of legitimacy.”<sup>3</sup> It tells us which constructions are permissible.

By cabining what can be said in international relations, international law defines norms, shapes expectations, sets the boundaries of what can be legitimized and, ultimately, can make it more or less likely that certain state actions will be successful.

I will use one topic area—arguments over self-determination—and two cases—Kosovo and South Ossetia—to explore this relationship between the language of law and the practice of politics.

This Article begins by briefly setting the background of the Kosovar and South Ossetian conflicts. Section III is a quick primer on the evolution of the concept of self-determination and its at-times difficult coexistence with the concepts of sovereignty and territorial integrity. Section IV turns to the analysis of how legal argumentation was used by Russia, the US, and the EU in the cases of Kosovo and South Ossetia. Although I note the relative strengths and weaknesses of the arguments, I am less interested in who was right or wrong as

---

<sup>3</sup> Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *Eur J Intl L* 369, 377 (2005).

opposed to what strategy was used (if any) in deploying the language of international law. I am especially interested in how Russia, in particular, has used the language of international law as a tool of public diplomacy in an attempt to spin the perceptions or “control the narratives” related to both Kosovo and South Ossetia. Finally, Section V considers how the rhetorical use of international legal argumentation goes beyond managing perceptions and can actually affect the evolution of the substance of international law.

Language as a social interaction defines and reinforces norms which, in turn, are fundamental to what becomes effective law. In the case of international law and international relations, the words used by hegemonic, or “great,” powers are especially influential. Great powers may not only use the language of law to legitimize their actions but also to propose new definitions for existing terms and, in time, change international law itself. For this reason alone, law talk by the great powers is not cheap talk. It is an attempt to change the rules of the game.

## II. A TALE OF TWO CRISES

While this Article is too brief to give a full recounting of the complex facts in both the Kosovar and South Ossetian conflicts, it is important to at least describe the general background of these crises since much of the subsequent legal argumentation is based on differing interpretations of the facts.

### A. KOSOVO

On February 17, 2008, the Assembly of Kosovo declared Kosovo’s independence from Serbia.<sup>4</sup> Kosovo had been a majority Albanian province (with a Serb minority) within Serbia and its predecessor states. Kosovo became an autonomous province in 1963<sup>5</sup> and remained as such until 1989, when Slobodan Milosevic rescinded Kosovo’s autonomy. Throughout the 1990s, Kosovar Albanians sought either a restoration of autonomy or independence.

In 1998, the Serb government initiated police and military actions in the province, resulting in widespread atrocities. After political negotiations failed to resolve the status of Kosovo and the rights of the Kosovar Albanians, in March 1999, the North Atlantic Treaty Organization (“NATO”) launched a controversial air campaign to force the Serb government to withdraw the police and military. In the aftermath of NATO’s intervention, the UN Security Council passed Resolution 1244,<sup>6</sup> which authorized the UN’s administration of Kosovo

---

<sup>4</sup> Kosovo Declaration of Independence (2008), 47 ILM 467 (2008). See also Christopher J. Borgen, *Introductory Note to Kosovo’s Declaration of Independence*, 47 ILM 461 (2008).

<sup>5</sup> Tim Judah, *Kosovo: What Everyone Needs to Know* 130 (Oxford 2008).

<sup>6</sup> Security Council Res No 1244, UN Doc S/RES/1244 (1999).

and set out a general framework for resolving the final political and legal status of Kosovo. For roughly the next nine years, the UN participated in the administration of Kosovo, while political negotiations over the final status of the territory were largely inconclusive. In December 2007, the mediators announced the process had ended in an impasse.

On February 17, 2008, the Assembly of Kosovo issued a statement declaring “Kosovo to be an independent and sovereign state.”<sup>7</sup> The Parliament pledged compliance with the process envisioned in the Ahtisaari Plan.<sup>8</sup> The Declaration also stated: “[W]e shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244.”<sup>9</sup>

While the US, the UK, France, Germany, and a host of other countries formally recognized Kosovo as a sovereign state, Serbia, Russia, Romania, Moldova, Cyprus, and other states have argued that Kosovo’s secession and/or the recognition of that secession would be a breach of international law. The majority of states have positions somewhere in between these two poles. As of the time of this writing, fifty-eight states have recognized Kosovo’s independence.<sup>10</sup>

## B. SOUTH OSSETIA

In the months leading up to Kosovo’s declaration, South Ossetia and Abkhazia, two separatist enclaves within the former Soviet Republic of Georgia, became more emphatic in their own calls for independence. South Ossetians are ethnically distinct from Georgians and have comprised a semi-autonomous community within Georgia for seven hundred years. In the Soviet era, they were an “autonomous region,” a status that granted certain limited autonomy within Georgia, which was a hierarchically superior “Union Republic” with greater rights of sovereignty.<sup>11</sup> In the aftermath of the breakup of the Soviet Union, Georgia—as with all other Union Republics of the former USSR—was recognized internationally as a sovereign state with the same borders that it had as a Union Republic. Tensions between the South Ossetian community and the government of Georgia, which had flared at times under the Soviet Union, rose

---

<sup>7</sup> Kosovo Declaration of Independence, ¶ 1 (cited in note 4).

<sup>8</sup> For a brief description of the Ahtisaari Plan, see Judah, *Kosovo* at 113–15 (cited in note 5).

<sup>9</sup> Kosovo Declaration of Independence, art 12 (cited in note 7).

<sup>10</sup> For an updated list, see *Who Recognized Kosova as an Independent State?*, available online at <<http://www.kosovothankyou.com>> (visited May 5, 2009).

<sup>11</sup> See Edward Ozhiganov, *The Republic of Georgia: Conflict in Abkhazia and South Ossetia*, in Alexei Arbatov, et al, eds, *Managing Conflict in the Former Soviet Union: Russian and American Perspectives* 341, 345–47 (MIT 1997).

to a new high after independence. A civil war erupted and Russia intervened, assisting South Ossetia. Since 1992, South Ossetia has been effectively separated from the rest of Georgia; the same holds true for Abkhazia since 1993. Russia has maintained a military presence in South Ossetia and in Abkhazia since the cease-fire in each region. At no point until 2008 did any UN member state recognize South Ossetia or Abkhazia as sovereign states.

Over the course of the spring and summer of 2008, tensions once again increased between the government of Georgia and Abkhazia and South Ossetia. The events came to a head in August 2008. The facts are shrouded by the fog of war and contradictory claims.<sup>12</sup> Russia contends that in the first week of August, Georgia began unprovoked shelling of cities in South Ossetia. Georgia, for its part, maintains that prior to its commencement of shelling, South Ossetian forces had used mortars and other artillery against Georgian villages and that this was just the latest in a series of provocations which included the shoot-down of Georgian unmanned aerial vehicles, roadside bombs targeting Georgian police, and South Ossetian gunfire targeting Georgian villages.<sup>13</sup> During that same period South Ossetian fighters made repeated incursions into the rest of Georgia, attacking Georgian forces and then retreating into South Ossetian cities. Georgia claimed there was first a mortar attack by South Ossetians which was then responded to by Georgian shelling. Russia argued that the Georgian shelling targeted, among other things, Russian peacekeepers in the region. The Georgian leadership responded that Russian troops were not targeted but notes that the Russian troops often actively supported South Ossetian forces.

What is clear is that on August 8, 2008, the Russian military crossed out of South Ossetia in force and began a two-week military campaign that ranged through much of Georgia, attacking major ports and cities and coming within kilometers of Tbilisi, the Georgian capital. After a brokered cease-fire, Russian forces returned to their bases in South Ossetia. On August 26, 2008, Russia

---

<sup>12</sup> For a recent attempt to sort out what had occurred, see C. J. Chivers and Ellen Barry, *Accounts Undercut Claims by Georgia on Russia War*, NY Times A1 (Nov 7, 2008).

<sup>13</sup> Regarding South Ossetia and/or Russia first using artillery, see id. For an account of other alleged Russian and South Ossetian provocations, see Vladimir Socor, *The Goals Behind Moscow's Proxy Offensive in South Ossetia*, Eurasia Daily Monitor (Aug 8, 2008), available online at <[http://www.jamestown.org/programs/edm/single/?tx\\_ttnews%5Btt\\_news%5D=33872&tx\\_ttnews%5BbackPid%5D=166&no\\_cache=1](http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=33872&tx_ttnews%5BbackPid%5D=166&no_cache=1)> (visited Apr 26, 2009). Regarding the alleged shoot-down by Russia of a Georgian unmanned aerial vehicle, see the May 26, 2008 entry in Alexis Crow, *Georgia-Russia Conflict Timeline (includes South Ossetia and Abkhazia)*, available online at <<http://www.rusi.org/go.php?structureID=S433ACCE7CB828&ref=C48A08074B93E4>> (visited Apr 26, 2009).

officially recognized both South Ossetia and Abkhazia as sovereign states.<sup>14</sup> In September it signed Treaties of Friendship, Cooperation and Mutual Assistance with each.<sup>15</sup> Nicaragua has also recognized the statehood of these territories. As of this writing Nicaragua and Russia are the only two states to recognize South Ossetia or Abkhazia.

### C. COMPARING CASES

In both Kosovo and South Ossetia the separatists claimed a right to self-determination that included secession as a remedy. In both cases at least one great power—the US and its NATO allies in Kosovo and Russia in South Ossetia—intervened militarily and politically, easing the path to secession. Yet, despite the similarities of the roles that they have played, the US and Russia have taken positions in each case that are diametrically opposed to each other. Moreover, they have each, in varying degrees, attempted to claim legitimacy by cloaking their actions with the terminology of international laws and rights.

In order to assess the role of the language of law in the world of realpolitik—and how this may actually affect the substance of the law, if not the practice of states—we must first turn briefly to how the law of self-determination has evolved.<sup>16</sup>

### III. A RIDDLE, WRAPPED IN A MYSTERY, INSIDE AN ENIGMA, OR THE TROUBLE WITH CONCEPTUALIZING SELF- DETERMINATION IN INTERNATIONAL LAW

Although self-determination is a concept with its roots in the French Revolution, it first came to global prominence in the midst of the great power negotiations following the First World War. With the fate of imperial holdings at stake, Woodrow Wilson turned self-determination into a guiding principle. The problem was that no one knew exactly what it meant.

---

<sup>14</sup> *Russia Recognizes South Ossetia and Abkhazia to Save People's Lives*, Pravda (Aug 26, 2008), available online at <[http://english.pravda.ru/russia/kremlin/26-08-2008/106214-russia\\_ossetia\\_abkhazia-0](http://english.pravda.ru/russia/kremlin/26-08-2008/106214-russia_ossetia_abkhazia-0)> (visited Apr 26, 2009).

<sup>15</sup> See, *Russia in Georgia Separatist Pact*, BBC News (Sept 27, 2008), available online at <<http://news.bbc.co.uk/2/hi/europe/7620972.stm>> (visited Apr 26, 2009).

<sup>16</sup> I discuss the evolution and application of the law of self-determination to issues of secession at greater length in The Special Committee on European Affairs, *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 61 Rec Assn Bar City NY 196 (2006) (“Moldova Report”), a draft of which is available online at <<http://ssrn.com/abstract=920151>> (visited Apr 26, 2009). See also Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"*, 9 Or Rev Intl L 477 (2007).

As exemplified in the epigraph to this Article, Woodrow Wilson's Secretary of State, Robert Lansing, was prescient in framing the issues that would spin forth from the principle of self-determination. Who has a right to self-determination? Who does not? As a matter of right, to what lengths can one go in seeking self-determination? Secession? War? These questions plagued the American negotiators after the First World War. In late 1919, in an address to Congress, Wilson seemed to regret having made a right to self-determination one of his key points: "When I gave utterance to those words [that 'all nations had a right to self-determination'], I said them without the knowledge that nationalities existed, which are coming to us day after day."<sup>17</sup> Wilson was imagining a new language but it was not clear how these new terms would affect world affairs.

While Woodrow Wilson's Fourteen Points highlighted the ideal of self-determination—as ambiguous as it may be—the UN Charter began the process of transforming the concept into something more than mere political rhetoric. The UN Charter placed self-determination in Article 1, linking it to the purpose of the organization.<sup>18</sup> But, while self-determination was transforming into something more than just rhetoric, it was still undefined.

The concept of self-determination definitively moved from an aspirational ideal to a recognized right when it was included in Article 1 of both the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the cornerstone treaties of international human rights law. Article 1 of these treaties states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>19</sup>

While these treaties legalized the concept of self-determination, there was still the question of what the scope of this right would be—who can claim a right to self-determination and what does that right entail?

Perhaps the single-most contested issue concerning self-determination is assessing what is meant by the self-determination *of peoples*. At various points in international legal history, the term "people" has been used to signify citizens of

---

<sup>17</sup> MacMillan, *Paris 1919* at 12 (cited in note 1).

<sup>18</sup> Article 1, paragraph 2 of the Charter states: "The Purposes of the United Nations are: . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace . . ." United Nations Charter, art 1. The UN reiterated its commitment to self-determination again in article 55. *Id.*, art 55.

<sup>19</sup> International Covenant on Civil and Political Rights (1966), 999 UN Treaty Ser 171 (1967); International Covenant on Economic, Social and Cultural Rights (1966), 993 UN Treaty Ser 3 (1967).



a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, and ethnic groups.

According to Hurst Hannum of The Fletcher School of Law and Diplomacy, self-determination, as understood in the 1960s, was simply another term for decolonization. The idea of self-determination during this time was not that *all* peoples had a right to self-determination but rather that all *colonies* had a right to be independent.<sup>20</sup>

This analysis was reiterated by the Québec Commission, a group of experts convened by a committee of the National Assembly of Québec to provide advice concerning the legal issues implicated by a hypothetical secession of Québec, which stated in its findings that the right to self-determination is context dependent, that different definitions of “peoples” lead to different applications of the right to self-determination, and that secession is only recognized as a remedy in the case of decolonization.<sup>21</sup>

In other situations, as long as a state allows a minority group the right to speak its language, practice its culture in a meaningful way, and effectively participate in the political community, then that group is said to have internal self-determination. In modern diplomatic practice, secession, or external self-determination, is strongly disfavored. From the birth of the UN, diplomats and jurists emphasized that a right of self-determination was not a general right of secession.<sup>22</sup> Allowing secession would clash with the territorial integrity of states, a cornerstone of the UN framework as stated in Article 2(4) of the Charter.<sup>23</sup>

However, one also cannot say that international law makes secession illegal. If anything, international law is largely silent regarding secession, and attempted secessions are, first and foremost, assessed under domestic law.<sup>24</sup>

---

<sup>20</sup> Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession*, Peaceworks no 7 at 3–4 (US Inst Peace 1996). But see Antonio Cassese, *Self-Determination of peoples: A legal reappraisal* 51 (Cambridge 1995) (stating that by the time the self-determination language of Article 1 of the International Covenant of Civil and Political Rights was adopted in 1955, few states argued that the principle only applied to colonial rule).

<sup>21</sup> T. M. Franck et al, *The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty*, in Anne F. Bayefsky, ed, *Self-Determination in International Law: Quebec and Lessons Learned* 241, 248, 279–80 (Kluwer 2000).

<sup>22</sup> See Cassese, *Self-Determination of Peoples* at 40 (cited in note 20) (stating that self-determination does not mean a right to secede).

<sup>23</sup> The territorial integrity of states is ensured in the UN Charter, Article 2 of which states in part: “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.” United Nations Charter, art 2, ¶ 4.

<sup>24</sup> Concerning the silence of international law, see, for example, Patrick Daillier, Alain Pellet, and Nguyen Quoc Dinh, *Droit International Public*, § 344-1 at 526 (LGDJ 7th ed 2002) (“la sécession

Nonetheless, a secessionist dispute may implicate international law under specific circumstances, including, among others: (a) when a new entity seeks recognition as a sovereign state (in which case there are rules for recognition or nonrecognition); (b) if there is a threat to international peace and security (which would thus likely become an issue for the UN Security Council); and, (c) if there is an intervention by another state in support of the separatists (which may be illegal under the UN Charter).

In general, the consensus view of the law of self-determination is summarized as follows:

- Self-determination for a colonized people allows for the ability to separate the colony from the colonial state so that the colony may gain independence and become a sovereign state;
- For a state as a whole, self-determination means the right to be free from external interference in its pursuit of its political, economic, and social goals;
- For communities that are not colonies and are within existing states, self-determination means internal self-determination, the pursuit of minority rights within the existing state.<sup>25</sup>

In addition, some conclude that in noncolonial cases, “[a] right to *external* self-determination . . . [including at times the assertion of a right to unilateral secession] arises *in only the most extreme cases and, even then, under carefully defined circumstances.*”<sup>26</sup> This, in the words of Professor Malcolm Shaw, is “the subject of much debate.”<sup>27</sup>

Looking at secessionist conflicts since the end of the Second World War, only three—Bangladesh, Eritrea, and now possibly Kosovo—are possible examples of secessions contested by the preexisting states that were both successful on the ground and recognized by a significant portion of the

---

n’est pas prise en compte en elle-même par le droit international,” that is, “secession in itself is not taken into account by international law”).

<sup>25</sup> See James Crawford, *The Creation of States in International Law* 127–28 (Oxford 2d ed 2006).

<sup>26</sup> *In re Secession of Quebec* [1998] 2 SCR 217, ¶ 126 (Canada) (second emphasis added).

<sup>27</sup> Malcolm N. Shaw, *International Law* 271 n 140 (Cambridge 5th ed 2003). Jurists who interpret the law of self-determination in this way generally contend that any attempt to claim secession as a remedy must at least show that: “(a) the secessionists were a ‘people,’ (b) the state in which they are currently part brutally violates human rights, and, (c) there are no other effective remedies under either domestic law or international law.” Moldova Report, 61 Rec Assn Bar City NY at 239 (cited in note 16). I discuss this framework at greater length in the Moldova Report at Section III.C.

international community.<sup>28</sup> By contrast, in that period there have been at least twenty (as yet) unsuccessful attempted secessions.<sup>29</sup>

It goes without saying that the conflicts in Kosovo and South Ossetia, and the decisions of states to recognize or not recognize the independence of these entities, are best described as a mix of self-interest and strategy. In the next section, we will look at how the use of legal argument does (or does not) play a role in the strategy of great powers involved in secessionist disputes.

#### IV. ALL LAWYERED UP AND NO PLACE TO GO: THE USE OF LEGAL ARGUMENTS IN SECESSIONIST DISPUTES

Both cases we are considering have, to varying degrees, three related but distinct threads of legal argumentation: (a) whether international law supports (or at least does not deny) a claim of secession; (b) whether a separatist entity should be recognized as a state; and, (c) the legality or illegality of the military and/or political assistance provided by a great power to a separatist entity.<sup>30</sup> Each argument will be considered in relation to each of these two cases.

---

<sup>28</sup> But see Crawford, *Creation of States* at 415 (cited in note 25) (only stating that Bangladesh was a successful secession). Crawford disqualifies Eritrea because the Transitional Government of Ethiopia supported Eritrean independence after a plebiscite; I view this as a successful secession because the overthrow of the previous Ethiopian government and the installation of the Transitional Government can be viewed as part of the overall conflict. Regarding Kosovo, Crawford wrote his analysis prior to the events discussed in this article. Instances of secession outside of the colonial context since the Second World War include: Senegal (1960); Singapore (1965); Bangladesh (1971); Latvia, Lithuania, and Estonia (1991); the eleven successor states of the USSR (1991); the five successor states of Yugoslavia (1990s); the Czech Republic and Slovakia (1993); and Eritrea (1993). Crawford did not include Kosovo (as the Kosovar declaration had not yet occurred). See *id.* at 391. However, Crawford notes that in the cases of Senegal, Singapore, the Czech Republic, and Slovakia, each was separated pursuant to separation agreements or operations of their domestic constitutions. Moreover, the USSR capitulated on the secession of the Baltic States (Latvia, Lithuania, and Estonia) and, as of September 6, 1991, no longer contested their departure. The successor states of the USSR and those of Yugoslavia were formed due to dissolution of the preexisting states, not secession. *Id.* at 392–402.

<sup>29</sup> See *id.* at 403. The list includes: Nagorno Karabakh (Azerbaijan); Republika Srpska (Bosnia/Herzegovina); The Karen and Shan States (Burma); Tibet (China); Katanga (Congo); Turkish Federated State of Cyprus (Cyprus); Abkhazia (Georgia); South Ossetia (Georgia); East Punjab (India); Kashmir (India); Kurdistan (Iraq/Turkey); Anjouan (the Islamic Republic of the Comoros); Gagauzia (Moldova); Biafra (Nigeria); Bougainville (Papua New Guinea); Chechnya (Russian Federation); Somaliland (Somalia); Tamil Elam (Sri Lanka); South Sudan (Sudan); and, Democratic Republic of Yemen (Yemen). I would add to this list the incomplete secession of Transnistria from Moldova.

<sup>30</sup> I set aside the competing interpretations of Resolution 1244 as they have ended in deadlock. The EU and the US interpret the resolution as silent to the final status of Kosovo, while Serbia and Russia argue that the resolution rejects unilateral secession. For a discussion, see Borgen, 47 *ILM* at 461 (cited in note 4).

## A. GREAT POWERS AND LAW TALK IN THE CASE OF KOSOVO

### 1. Sui Generis or Precedent?

The day after Kosovo's Assembly declared the independence of Kosovo, Secretary of State Condoleezza Rice announced that the US recognized Kosovo as an independent state and further explained:

The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.<sup>31</sup>

Similarly, in a statement to the UN Security Council on the same day, the UK Ambassador, Sir John Sawers, said: “[T]he unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented United Nations administration of Kosovo make this a sui generis case that creates no wider precedent—a point that all EU member States agreed upon today.”<sup>32</sup>

There is little or no reference to international law in the statements from the US and the UK. As of yet, I have seen no official statement by any state supporting Kosovar sovereignty explicitly making the argument that Kosovo is seceding as a matter of right.

By contrast, Russia (which in many ways took the lead in arguing this issue before the UN) and Serbia immediately made use of the language of international law. Even prior to the declaration of independence, Russian Foreign Minister Sergei Lavrov called a potential Kosovar secession a “subversion of all the foundations of international law, . . . [a] subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence.”<sup>33</sup>

Russia's position on Kosovar independence needs to be understood in relation to its concerns that if NATO's intervention in Serbia and Kosovo's declaration were legally justified under international law, Russia could face similar issues concerning one or more of its own twenty-one republics, including

---

<sup>31</sup> Rice Statement on Recognition of Kosovo as Independent State, America.gov (Feb 18, 2008), available online at <<http://www.america.gov/st/texttrans-english/2008/February/20080218150254bpuh5.512637e-02.html>> (visited Apr 26, 2009). See also Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazija*, 8 Chinese J Intl L 2, 2–5 (2009) (arguing the uniqueness of a case is in the eye of the beholder).

<sup>32</sup> UN SCOR 63rd Sess, 5839th mtg at 14, UN Doc S/PV.5839 (2008).

<sup>33</sup> Paul Reynolds, *Legal Furore Over Kosovo Recognition*, BBC News (Feb 16, 2008), available online at <<http://news.bbc.co.uk/2/hi/europe/7244538.stm>> (visited Apr 26, 2009).

Chechnya and North Ossetia.<sup>34</sup> Similarly, many of the other vocal opponents to Kosovo's independence that invoked international law were states that had their own concerns about secessionist conflicts. The Romanian Defense Minister said that such a declaration "is not in keeping with international law."<sup>35</sup> The Cypriot Foreign Minister warned against the EU "breaking international law"<sup>36</sup> by recognizing Kosovo, and so on.

## 2. To Recognize or Not to Recognize

In arguments over attempted secessions, the issue of legality often shifts from the question of the legality of the secession itself (about which, as mentioned earlier, international law is largely silent; it is only clear that secession is not a right), to the question of the legality of the recognition of the secession, a subtly different question.<sup>37</sup> The general understanding is that recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts (or "declares") the factual occurrence of the establishment of a new state. Nonetheless, no state is required to recognize an entity claiming statehood. To the contrary, a good argument may be made that states should not recognize a new state if such recognition would perpetuate a breach of international law. *Oppenheim's (Ninth)* states that "[r]ecognition may also be withheld where a new situation originates in an act which is contrary to general international law."<sup>38</sup>

---

<sup>34</sup> Concerning Russian reactions to NATO's 1999 bombing of Serbia, see Ted Hopf, *Social Construction of International Politics: Identities & Foreign Policies, Moscow 1955 and 1999* 249 (Cornell 2002) (quoting Grigorii Vanin and Aleksandr Zhilin for the proposition that if NATO could claim a new "legal" basis for humanitarian intervention, then Russia or any other former Soviet Republic was at risk of "dismemberment and destruction"). Concerning the twenty-one republics in Russia, see Judah, *Kosovo* at 130 (cited in note 5). Regarding Chechnya, see Hopf, *Social Construction of International Politics* at 247 (stating that "Kosovo was read through Chechnia").

<sup>35</sup> Mu Xuequan, ed, *Romania Not to Recognize Unilateral Kosovo Independence, Says Minister*, China View (Dec 12, 2007), available online at <[http://news.xinhuanet.com/english/2007-12/12/content\\_7231934.htm](http://news.xinhuanet.com/english/2007-12/12/content_7231934.htm)> (visited Apr 23, 2009). Romania has historical issues concerning the status of the Hungarian population of Transylvania.

<sup>36</sup> Harry de Quetteville and Bruno Waterfield, *EU-US Showdown with Russia over Kosovo*, Telegraph (Dec 12, 2007), available online at <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/12/11/wkosovo111.xml>> (visited Apr 26, 2009). Cyprus has its own frozen conflict over the status of the breakaway Turkish Republic of Northern Cyprus.

<sup>37</sup> Daniel Thürer, *Self-Determination*, in Rudolf Bernhardt, ed, 4 *Encyclopedia of Public International Law* 364, 371 (North-Holland 2000) ("Rather than formally recognizing a right of secession... international law only became subsequently relevant within the context of recognition.").

<sup>38</sup> Sir Robert Jennings and Sir Arthur Watts, eds, 1 *Oppenheim's International Law* § 54 at 183 (Longman 9th ed 1992).

State practice evinces that, absent a clear indication of illegality, in matters of state recognition there is considerable deference to the political prerogatives of outside states to decide whether or not to recognize an aspirant state.

Russia and Serbia argue that, inasmuch as Serbia did not consent to an alteration of its territory and borders, there can be no legal recognition of Kosovar independence. In the case of Kosovo, Russia has taken on the role of defender of international law, using the tropes of legal rhetoric in many, if not most, of its public statements concerning the situation in Kosovo. While not denying the importance of self-determination, it has instead argued that self-determination can never dismember a state without the consent of that state. Its arguments return to the prerogatives of sovereignty as the cornerstone of the international system and to territorial integrity as the cornerstone of both the modern conception of sovereignty and the UN itself.

Moreover, beyond using a vocabulary based on legal concepts, Russia and Serbia focused on the process of decisionmaking. Time and again they contrasted the unilateral declaration of Kosovo with the multilateral, negotiated solution sought by Serbia, with the help of Russia.

By contrast, the US and the EU did not engage the legal issues; they simply repeated that Kosovo was a unique case and could not be used as precedent. Although the US referred to the ethnic cleansing as an example of the uniqueness of the case, it did not take up possible arguments that, as a matter of international law, a special exception for secession exists for serious cases of human rights abuse.

Why the reticence to engage in law talk? One simple reason could have been that the Bush Administration was disdainful of international law and did not want to use it as a prominent part of foreign policy. But this does not explain the EU's reticence.

One factor that may have motivated both the US and the EU was the concern about emboldening separatists in countries like Azerbaijan, Georgia, Romania, and Spain. Some diplomats may have been concerned that if the US and EU were seen as opening the door to secession, even by just saying that secession in-and-of-itself was *not* illegal under international law, then the situation would worsen in other secessionist conflicts.

Finally, while law talk by great powers can sometimes change the views of others on international law, one must keep in mind that the fineries of legal analysis would have as much chance of surviving in the midst of the heat of a possible secession as a snowflake in a blast furnace. Serbia and Russia could use legal rhetoric because they used simple and understandable concepts: you cannot dismember a state without the consent of that state, and so on. It is unlikely that a response by the US and the EU that went into the ambiguities of international law regarding the definition of peoples and possible remedies under customary

international law would have persuaded many states, regardless of the accuracy of their legal analysis.

### 3. Referral to the International Court of Justice

Nonetheless, as time progressed and the debate over the legality of the declaration and the recognitions became more and more prevalent in diplomatic discourse, recognitions of Kosovo began to arrive at a slower and slower rate. Then, on October 8, 2008, at the request of Serbia, the UN General Assembly by a vote of 77 for, 6 against, and 74 abstaining, referred the following question to the International Court of Justice (“ICJ”) for an advisory opinion: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”<sup>39</sup>

Consider this vote in light of the fact that, at the time, almost fifty states had already recognized Kosovo. Nonetheless, only six states voted against the resolution. The US voted against the resolution, arguing that it was more

---

<sup>39</sup> General Assembly Res No 63/3, UN Doc A/RES/63/3 (2008). The voting record is as follows:

*In favour:*

Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Belarus, Bolivia, Botswana, Brazil, Brunei Darussalam, Cambodia, Chile, China, Congo, Costa Rica, Cuba, Cyprus, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, El Salvador, Equatorial Guinea, Eritrea, Fiji, Greece, Guatemala, Guinea, Guyana, Honduras, Iceland, India, Indonesia, Iran (Islamic Republic of), Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Liechtenstein, Madagascar, Mauritius, Mexico, Montenegro, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Philippines, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Timor-Leste, United Republic of Tanzania, Uruguay, Uzbekistan, Viet Nam, Zambia, Zimbabwe.

*Against:*

Albania, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, United States of America.

*Abstaining:*

Afghanistan, Andorra, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bulgaria, Burkina Faso, Cameroon, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Grenada, Haiti, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lebanon, Lithuania, Luxembourg, Malaysia, Malta, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Oman, Pakistan, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Saint Lucia, Samoa, San Marino, Saudi Arabia, Senegal, Sierra Leone, Slovenia, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Vanuatu, Yemen.

UN GAOR 63rd Sess, 22d mtg at 10, UN Doc A/63/PV.22 (2008).

political than legal.<sup>40</sup> The US was only able to persuade Albania, Marshall Islands, Micronesia, Nauru, and Palau to join it in voting against the resolution. Even though twenty EU states had already recognized Kosovo at that time, most of the EU abstained, and those that did not abstain voted in favor of the referral.

Even if the ICJ advises that Kosovo's declaration was illegal, it is highly unlikely that states will withdraw recognition. So what is the political strategy behind seeking a referral?

By persuading the General Assembly to refer the issue to the ICJ, Serbia and Russia may have taken the wind out of the sails of recognition (at least until the ICJ either decides not to issue an opinion or issues an opinion in favor of independence). One would assume that early recognition of an entity claiming statehood in a contested secession is costly talk—it not only changes your legal obligations to that entity but possibly places you into a rivalry with the preexisting state that is contesting the sovereignty of the new state, and it sends a strong signal to the international community as a whole about your intentions. However, with each additional recognition, it becomes harder for the preexisting state to retaliate (as there are so many parties against which to retaliate), and the claims of statehood become more grounded by the very fact that more and more members of the international community agree to treat the new entity as a state. At some point, it may actually be costly *not* to recognize the new state, which is now part of international organizations, treaty regimes, etc. So, as the number of recognitions increases, each additional recognition reduces the cost for further recognitions. As the cost of recognition decreases, additional states are more likely to recognize as a state that entity seeking recognition.

However, the situation can change such that recognition will require additional costs. That is what asking for a referral to the ICJ did. States suddenly had the additional cost not only of recognition but also of being seen to denigrate the world court, international law, and the sovereign right to territorial integrity. Among the statements made prior to the vote by states that recognized Kosovo but voted for a referral of the issue to the ICJ, the most common reasons cited for supporting the referral were support for international law as a regime, support for the ICJ as an institution, and respect for the sovereign prerogative of a state to make its case before the ICJ.<sup>41</sup> Thus, even states that

---

<sup>40</sup> See UN Doc A/63/PV.22 at 4–5 (cited in note 39 **Error! Reference source not found.**); see also *UN Seeks World Court Kosovo View*, BBC News (Oct 9, 2008), available online at <<http://news.bbc.co.uk/2/hi/europe/7658103.stm>> (visited Apr 26, 2009).

<sup>41</sup> See generally UN Doc A/63/PV.22 (2008) (cited in note 39) By way of examples, see the statements of the representatives from Mexico, Romania, Slovakia, Panama, Egypt, Spain, and Greece. Id at 5–8.



had recognized Kosovo found it too costly to vote against a referral (with the exception of the US and a few small states). And those which had not yet recognized Kosovo were suddenly in a position of recognition becoming costly once again because they would have to choose to recognize an entity even though the issue was a pending matter before the ICJ. To do this before the ICJ had the opportunity to render its opinion could be seen by many as flouting the prerogatives of the UN, and of the ICJ in particular.<sup>42</sup>

Nonetheless, with fifty-eight states recognizing Kosovo, including almost all of the EU, Kosovo will likely be able to act as a sovereign state, albeit on a smaller stage, even if it has an adverse advisory opinion. The main result of such an opinion effectively would be to deny Kosovo's entrance into the UN (and, likely, other global institutions) and to force it to be a perpetual ward of the EU and the US.

Meanwhile, as Russia was arguing that Kosovo's declaration was an affront to the territorial integrity of Serbia, Russia invaded Georgia, assisting the secession of South Ossetia and Abkhazia. And in a rhetorical high wire act, it invoked international law as a justification for its actions.

## B. LEGAL ARGUMENTS AND ARTILLERY BARRAGES IN SOUTH OSSETIA

In 2006, while he was still Russia's President, Vladimir Putin asked: "If people in Kosovo can be granted full independence . . . why then should we deny it to Abkhazia and South Ossetia?"<sup>43</sup> In trying to follow this line of reasoning, while still maintaining its legal arguments in regards to Kosovo, Russia first sought to justify its intervention based on the concept of self-defense, as well as more controversial arguments based on the defense of nationals in other countries and the responsibility to protect. It also staked out a case for South Ossetia and Abkhazia's secessions based on its interpretation of the interrelations of sovereignty and the "will of the people."<sup>44</sup> Russia's arguments exemplify three aspects of the use of international law by great powers: (a) how great powers can use legal ambiguity to their advantage; (b) how great powers can be powerful interpreters that attract other states who also wish to reinterpret international law in a similar manner; but also (c) the limits of

---

<sup>42</sup> Nonetheless there have been recognitions since the referral: Montenegro, Macedonia, the United Arab Emirates, Malaysia, Micronesia, Panama, Maldives, Palau, and Gambia have recognized Kosovo between October 8, 2008 and this writing. *Who Recognized Kosovo* (cited in note 10).

<sup>43</sup> Judah, *Kosovo* at 132 (cited in note 5).

<sup>44</sup> *France: Cease-fire, Not Peace Reached in Georgia*, CNN (Aug 12, 2008), available online at <<http://m.cnn.com/cnn/ne/europe/detail/152454/full;jsessionid=C9FD314B01097D84948AA65564E6C32E>> (visited Apr 26, 2009).

attempting reinterpretation when the views of the broader community are too well entrenched.

### 1. The Best Defense . . .

The moment Russia invaded another UN member state, the US and the EU were able to refer to clear, simple international legal rules (as Russia had done in the case of Kosovo). The US, for example, focused on classic statist issues such as the defense of territorial integrity, independence, and sovereignty.<sup>45</sup>

By contrast, Russia was now in the position of having to explain a foreign military adventure into a small, poor, neighboring country in support of separatists at the same time that it was condemning NATO countries for facilitating the secession of Kosovo from Serbia. Yet, rather than eschewing legal talk, as the US had done in the case of Kosovo, Russia embraced legal arguments regarding South Ossetia. In the first paragraph of his January 16, 2009 address looking back on 2008, Russian Foreign Minister Sergey Lavrov said:

The year past was very complicated, at times dramatic, packed with major contradictory events which most gravely impacted the situation . . . [including] the unilateral—contrary to international law—recognition of Kosovo’s independence; and, of course, Georgia’s aggression against South Ossetia, which did not achieve its goals thanks only to the actions of Russia, which fully in line with our international obligations suppressed this illegal move.<sup>46</sup>

Russia’s basic argument justifying its use of military force was one of self-defense.<sup>47</sup> A secondary argument was that Russia was acting as a guarantor of peace in the region and had intervened to protect both South Ossetian civilians from the Georgian military and ethnic Georgians from South Ossetian reprisals. At times, Russian officials also made comments justifying the intervention in order to protect Russian citizens in South Ossetia.

---

<sup>45</sup> Secretary of State Condoleezza Rice, *Remarks after the Meeting of the North Atlantic Council at the Level of Foreign Ministers* (Aug 19, 2008), available online at <[http://sarajevo.usembassy.gov/georgia\\_20080819.html](http://sarajevo.usembassy.gov/georgia_20080819.html)> (visited Apr 26, 2009).

<sup>46</sup> Russian Minister of Foreign Affairs Sergey Lavrov, *Remarks and Response to Questions at Press Conference on 2008 Foreign Policy Outcomes at MFA*, Ministry of Foreign Affairs of the Russian Federation (Jan 16, 2009), available online at <[http://www.mid.ru/brp\\_4.nsf/0/AF09FEECD4A871A8C3257540005AECE3](http://www.mid.ru/brp_4.nsf/0/AF09FEECD4A871A8C3257540005AECE3)> (visited Apr 23, 2009).

<sup>47</sup> *Breakaway Republics Only Trust Russian Peacekeepers—Medvedev*, Russia Today 1:55–2:20 (Aug 15, 2008), available online at <<http://www.russiatoday.com/news/news/29067/video>> (visited Apr 26, 2009).

By referring to the right of self-defense, Russia justified its actions on one of the cornerstones of the UN system.<sup>48</sup> At the heart of this claim is the factual contention that Georgian forces fired first and they specifically targeted Russian troops in South Ossetia. Its credibility will turn on the factual issue as to who fired first and on whether the Russian response was proportional to the threat faced. While Georgia's assertion that its shelling came only after the Russian attack has been "shown to be highly questionable,"<sup>49</sup> Russia still has a problem when one takes into account proportionality. German Chancellor Angela Merkel, among other world leaders, has called Russia's use of force disproportionate.<sup>50</sup>

Thus, cornerstone of international law or not, self-defense may not be a persuasive legal justification for Russia's actions. In August 2008, Russia tried to obtain political support from the Shanghai Cooperation Organization ("SCO"), a nascent security organization consisting of Russia, China, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan. This attempt was largely unsuccessful,<sup>51</sup> perhaps evincing a reticence to ratify the extent to which force was used by Russia. It is significant that Russia was not able to muster significant support from SCO members for its interpretation of international law. This implies that there was concern that once an interpretation becomes accepted in the international community and becomes authoritative, other states, including in

---

<sup>48</sup> See United Nations Charter, art 51, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . ." See also *Russian Minister of Foreign Affairs Sergey Lavrov's Article 'Russian Foreign Policy and a New Quality of the Geopolitical Situation' for Diplomatic Yearbook 2008* (Ministry of Foreign Affairs of the Russian Federation), available online at <[http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93?OpenDocument)> (visited Apr 26, 2009) ("*Lavrov's Article*");

By its answer to the Georgian aggression Russia has established a standard for responding which is fully in line with current international law, including the right to self-defense under Article 51 of the Charter of the United Nations and our concrete obligations regarding the settlement of this conflict, and with the principles of moderateness and proportionality. Russia's actions pursued no aims other than those dictated by the necessity of providing effective guarantees of non-resumption of aggression against the Republic of South Ossetia and the Republic of Abkhazia.

<sup>49</sup> Charles King, *The Five-Day War: Managing Moscow after the Georgia Crisis*, 87 *Foreign Aff* 2, 9 (Nov/Dec 2008).

<sup>50</sup> *Breakaway Republics* at 5:28–5:43 (cited in note 47). See also Rice, *Remarks* (cited in note 45):

[t]he behavior of Russia in this most recent crisis is isolating Russia from the principles of cooperation among nations of the communities of states when you start invading small neighbors, bombing civilian infrastructure, going into villages and wreaked [sic] havoc and wanton destruction of this infrastructure. That's what isolates Russia.

<sup>51</sup> King, 87 *Foreign Aff* at 6 (cited in note 49).

this case the states of the SCO, would be bound by that interpretation. Just as Russia was concerned that the justification of NATO's intervention in Serbia could lead to further interventions in the Russian "near abroad," it is likely that members of the SCO were worried that ratifying Russia's interpretation of the use of force would open the door to further Russian interventions throughout the region.

Russia's second argument, invoking its role as a regional guarantor, probably tried to call to mind NATO actions regarding Kosovo. However, reliance on a set of events that included the NATO bombing campaign is tricky, given that Russia does not want to ratify the NATO activities. At one point, Russia claimed that its troops were in Gori and other Georgian cities to protect the Georgians from South Ossetian reprisals.<sup>52</sup>

Although Russia (until this point) had been generally referred to as a "peacekeeper" in South Ossetia, there are a few problems with this analogy. Russia is less a neutral peacekeeper than a "mediator-cum-supporter-cum-combatant."<sup>53</sup> Russia has consistently supported the separatists in South Ossetia and Abkhazia since about 1992. At times, this support has included actual military action—like shooting down a Georgian surveillance drone in the summer of 2008 (prior to the start of the war). This assistance and diplomatic support has increased dramatically since Kosovo's declaration of independence. Secretary Rice noted, after the signing of the cease-fire in Georgia, that, "it's quite clear that Russia has become a party to this conflict."<sup>54</sup>

Moreover, calling to mind that secessionist conflicts are internal conflicts and that third-party states need to respect the sovereignty of the state attempting to resolve its internal conflict, there is a strong argument that Russia acted precipitously and well beyond what could be expected under the circumstances.

Russia's third justification for its military intervention was that it was in defense of co-nationals. Russia was mindful that there were twenty million ethnic Russians who, after the dissolution of the USSR, suddenly found themselves to be living in new states throughout the region, usually as an ethnic minority.<sup>55</sup> As Foreign Minister Lavrov wrote:

---

<sup>52</sup> See Michael Elliot and James Traub, *Russia vs. Georgia*, The Brian Lehrer Show 2:59–3:44 (Aug 14, 2008), available online at <<http://www.wnyc.org/shows/bl/episodes/2008/08/14/segments/105887>> (visited Apr 26, 2009).

<sup>53</sup> Dov Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De Facto States* 21 (US Inst Peace 2004).

<sup>54</sup> Rice, *Remarks* (cited in note 45).

<sup>55</sup> Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives* 89 (Basic Books 1997).

We can't understand why those who are talking about the responsibility to protect and about security of the person at every turn, forgot it when it came to the part of the former Soviet space where the authorities began to kill innocent people, appealing to sovereignty and territorial integrity. For us, the issue in South Ossetia was to protect our citizens directly on the borders of Russia, not in the Falkland Islands.<sup>56</sup>

Setting aside that there is little support among states for formalizing a "responsibility to protect" that would allow the unilateral intervention of one state into the domestic affairs of another state, even the more specific concept of protection of nationals is problematic in this case. For one thing, the number of Russian citizens in South Ossetia is due to the fact that Russia had proactively given citizenship to many residents of South Ossetia.<sup>57</sup> It may be more accurate to describe these people not so much as Russian citizens but as Russian passport holders. While there are many ethnic Russians in these regions, it was Russia's handing out of passports to people living in South Ossetia and Abkhazia, regardless of their backgrounds, that had given Russia the fig leaf of claiming that it was acting in support of Russian "nationals."

But, as will be discussed later, what is perhaps most surprising about Russia's legal arguments supporting its intervention is that they seemed to persuade so many people, especially in the Russian "near abroad."

## 2. Self-Determination and Sovereignty

As in the case of Kosovo, besides the legal issues concerning external assistance to, or recognition of, the separatist entity, there was also a series of arguments concerning the underlying concept of self-determination. Here, the US and the EU were able to use the relatively clear and straightforward rhetoric of the importance of territorial integrity.

Russia needed to find a mode of rhetoric that abided by the grammar of international law and yet somehow allowed it room for maneuver in South Ossetia. Rather than overturning accepted concepts like state sovereignty and territorial integrity or seemingly ignoring them (as the US had done in the case of Kosovo), Medvedev attempted to reframe the concepts, stating that "sovereignty is based on the will of the people' and 'territorial integrity can be demonstrated by the actual facts on the ground.'"<sup>58</sup> He further explained that Russia was not denying the principle of territorial integrity as one of the fundamental principles of international law, it was just recognizing the "specific

---

<sup>56</sup> *Lavrov's Article* (cited in note 48).

<sup>57</sup> King, 87 Foreign Aff at 5 (cited in note 49).

<sup>58</sup> *France: Cease-fire* (cited in note 44).

situation” that it is unlikely that the South Ossetians can live in a single state with the Georgians.<sup>59</sup>

Perhaps reading between the lines of President Medvedev’s comments about respecting the will of South Ossetians as well as Georgians and understanding that some contradictions cannot be reconciled, German Chancellor Angela Merkel, who was speaking at the same press conference, dryly remarked that not every nation can become a separate state.<sup>60</sup>

Some commentators have interpreted Russia’s argument as mimicking the US stance regarding Kosovo and as claiming that the situation in South Ossetia is unique (as well). Another possible implication of this argument is that if a state does not have effective control over part of its territory then, with the passage of time, it may lose juridical sovereignty over that territory.<sup>61</sup>

This argument concerning Georgia’s loss of de facto sovereignty or territorial integrity is an interesting juxtaposition to the phrase, “sovereignty is based on the will of the people.” The key question is “which people?” This has been at the heart of debates over what it means for a people to have a right of self-determination.<sup>62</sup> By his comments, the implication is that, in the case of the disposition of the territory of South Ossetia, Medvedev believes that “people” refers to South Ossetians (an ethnic sub-state group) while Georgian President Mikheil Saakashvili would probably say that it refers to the collective will of all the people of the state of Georgia.

If we accept the international borders of Georgia at the time of the dissolution of the USSR, then the relevant self-determination unit would be the state of Georgia and the “people” are all the people of Georgia (including South Ossetia and the rest of Georgia). Even if we were to define the inhabitants of South Ossetia as a separate people, inasmuch as South Ossetia is recognized as part of Georgia, then the traditional view is that self-determination allows for only minority rights within the existing state, not secession from that state. Thus,

---

<sup>59</sup> *Breakaway Republics* at 10:00–10:18 (cited in note 47).

<sup>60</sup> *Id.* at 13:03–13:18.

<sup>61</sup> Effectiveness in fact should not be confused with legality as a matter of right. See *In re Secession of Quebec*, [1998] 2 SCR ¶ 146.

See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 284–85 (Cambridge 2005). Foreign Minister Lavrov made a similar point to President Medvedev. See *Georgia’s Territorial Integrity Limited—Lavrov*, Interfax (Aug 14, 2008):

The territorial integrity of Georgia is limited de facto because of the war, and this matter can only be resolved by finding mutually acceptable paths,” Lavrov told Ekho Moskvyy on Thursday. “Georgia is de facto and not exercising power in any of these cases [in Abkhazia and South Ossetia] and is a party to a negotiation process [to determine the status of those territories].”

<sup>62</sup> See *Moldova Report*, 61 Rec Assn Bar City NY at 264 (cited in note 16).

for Medvedev's implied argument to be correct, even if South Ossetians are a people for the purpose of the law of self-determination, one would also have to agree that "external self-determination" or secession can be a remedy in cases besides decolonization. In such a case, the South Ossetians would need to show that they suffer extreme and persistent abuses by the government in Tbilisi and that there is no other option for resolving this crisis. This may be the Russian claim. As Lavrov wrote:

The possession of sovereignty presupposes the duty of a state to refrain from any forcible action which deprives people living on its territory of their right to self-determination, freedom and independence. By giving an order to bomb Tskhinval and planning to use force against Abkhazia, the Saakashvili regime trampled underfoot this norm of international law, enshrined in the 1970 UN Declaration, and itself undermined the territorial integrity of its state.<sup>63</sup>

Russia seems to be arguing for the view that secession can be a legal remedy in extreme cases. This interpretation of international law would also support Russia's decision to formally recognize South Ossetia and Abkhazia. Foreign Minister Lavrov stated, regarding recognition, that (as paraphrased by the Serbian media) "Georgia's territorial integrity was destroyed by Georgian President Mihkeil [sic] Saakashvili himself when he decided to order a bombardment of a peaceful town in South Ossetia last summer."<sup>64</sup>

While it is beyond the scope of this Article to assess all of the legal arguments set out by Russia in relation to the Georgian War and its aftermath, what is particularly relevant for our purposes is how Russia invoked the language of the law. Concerning Russia's intervention, Russian officials set out arguments ranging from relatively solid legal concepts (although there were disputed facts), such as its decision to claim that the Russian action was in self-defense, to relatively controversial legal concepts (the withering of Georgia's sovereignty due to its shelling of South Ossetia). States could thus support Russia's actions even if they only found one argument that they agreed with. Concerning Russia's recognition of the separatist enclaves as full states, President Medvedev applied a formulation ("sovereignty is based on the will of the people") that implied a certain result (South Ossetians should be able to vote for their secession) and clothed it in quasi-legal language even though that result would actually overturn much accepted international law, or at least paper over some sharp disagreements. The genius of Russia's arguments is that, although they sounded almost commonsensical, they actually were controversial at a deeper level. But

---

<sup>63</sup> *Lavrov's Article* (cited in note 48).

<sup>64</sup> *Russia Steadfast on Kosovo*, (B92 Feb 17, 2009), available online at <[http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=02&dd=17&nav\\_id=57224](http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=02&dd=17&nav_id=57224)> (visited Apr 26, 2009).

that deeper level of legal argumentation rarely comes to light in the hurl-and-burl of politics. So Russia was left with plausible-sounding arguments that, if left unchallenged, could give it leeway to undertake significant interventions in its near abroad.

### 3. The ICJ and Seizing the Diplomatic Narrative

Perhaps taking a page from Serbia and Russia's playbook, Georgia attempted to seize control of the legal narrative by filing suit against Russia before the ICJ. Georgia's case contends that the Russian Federation has breached various obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), including (among others) launching a war of aggression against Georgia for purposes linked to racial or ethnic discriminatory policies and the denial of self-determination; "widespread and systematic discrimination" against ethnic Georgians in South Ossetia and Abkhazia during the conflicts of 1991–94, 1998, 2004, and 2008; denial of the rights of ethnic Georgian internally displaced persons; and sponsoring and supporting ethnic discrimination by the de facto regimes in South Ossetia and Abkhazia.<sup>65</sup>

Among other responses, Russia argued that this suit is not really about racial discrimination—the subject matter of the treaty—but rather military intervention.

Georgia requested—and received—an order of provisional measures from the ICJ.<sup>66</sup> Of particular interest, operative paragraph 3 of the Order states that the Parties must:

[D]o all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin,

- (i) security of persons;
- (ii) the right of persons to freedom of movement and residence within the border of the State;
- (iii) the protection of the property of displaced persons and of refugees . . . .<sup>67</sup>

Given the state of conflict at the time of the application, this is practically an order to cease-fire. Georgia's strategy used the institutions of international law to make its claims better heard. Outmanned and outgunned, they turned to the figurative court of public opinion and to the ICJ in an attempt to gain some

---

<sup>65</sup> See *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, 47 ILM 1013, 1016 (ICJ Oct 15, 2008). See generally International Convention on the Elimination of All Forms of Racial Discrimination (1966), 660 UN Treaty Ser 195 (1966).

<sup>66</sup> See generally *Georgia v Russian Federation*, 47 ILM 1013.

<sup>67</sup> *Id.* at 1040.



leverage. A suit arising out of alleged violations of the UN Charter or of customary international law would not have provided Georgia with the necessary jurisdictional hook to bring Russia before the ICJ. Consequently, Georgia filed a suit under the CERD because Russia has accepted, via article 22 of the CERD, the ICJ's jurisdiction in resolving disputes arising from that treaty.

The result, as of this writing, is an order that Russia provide for certain basic rights for Georgians and South Ossetians, which once again focuses the world on the actual responsibilities of Russia, as opposed to the responsibilities that Russia defines for itself.

### C. COMPARISON OF RUSSIAN AND AMERICAN USE OF INTERNATIONAL LEGAL ARGUMENTS

The difference between when and how the US uses legal rhetoric versus its use by Russia is striking. Whereas both use law talk when the concepts are relatively simple to describe—the US defending Georgia's territorial integrity and right to nonintervention and Russia doing the same for Serbia—only Russia also used legal argumentation when the case was a harder one to make (the defense of its invasion of Georgia on legal grounds). Although the US and NATO briefly used legal language to defend the Kosovo intervention, they discarded this tactic upon seeing how controversial it was and instead focused on the moral importance of stopping ethnic cleansing.

Regarding Kosovo's declaration, the US could have argued that, as a matter of law, Kosovo could have a remedy of secession, as this was an extreme case with persistent human rights abuses and no other solution. The US would have been adopting an argument similar to what Russia said regarding South Ossetia and, in any case, a legal interpretation that was highly controversial. Rather than do this, it shied away from any legal discussion and instead simply stated that Kosovo was "unique."<sup>68</sup> It expressly rejected any relation to legal precedent. As in the case of NATO's intervention, this strategy may have been to avoid setting a troublesome legal interpretation of the right of self-determination that could have been applied elsewhere.

Alternatively, the United States could have simply said that while there is no right to remedial secession, neither is secession illegal. Consequently, Kosovo's declaration was not illegal under international law. However, it did not make this argument, either.

---

<sup>68</sup> See, for example, Embassy of the United States to Georgia, *Press Release: Kosovo is a Unique Case* (Feb 18, 2008), available online at <<http://georgia.usembassy.gov/pr02182008.html>> (visited Apr 26, 2009).

By contrast, even where Russia had an objectively weak legal argument (at least, under the standards of dominant interpretations of international law), it nonetheless placed the legal argument front-and-center. As a result, Russia, in terms of its public diplomacy, maintains a rhetoric that shows its concern for the norms of international law. By contrast, the US seems to try to duck the issue of legality when the law does not suit its purposes. (This was especially true during the Bush Administration, and the extent this changes in the new Administration remains to be seen as of the time of this writing.) To this extent, Russia's mode of argumentation appears more internally consistent than that of the US, despite the jurisprudential difficulties of many Russian arguments—difficulties which many people never hear about since they go unchallenged. Thus, Russia has taken neither the moral high ground nor the jurisprudential high ground, but it has used international law in an attempt to seize the narrative high ground.

As the US under President Bush began withdrawing from participating in international legal regimes or refusing to join new regimes, Russia has embraced using the language and rhetoric of international law. It perceived a weakness in the US diplomatic stance and exploited it.

In a recent major statement on foreign policy, President Medvedev set out the guiding principles on foreign policy. This has come to be called the "Medvedev Doctrine." The first principle states: "Russia recognizes the primacy of the fundamental principles of international law, which define the relations between civilized peoples. We will build our relations with other countries within the framework of these principles and this concept of international law."<sup>69</sup>

Russia uses such international legal rhetoric in its public diplomacy strategy to juxtapose itself with the US. By contrast, in 2005 the National Defense Strategy promulgated by the US Department of Defense warned that: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."<sup>70</sup> It was surprising to see the government of the US list "international fora" along with "terrorism" as strategies of the weak who are attempting to challenge the strength of the US. Of course, this was also in the era of torture memos and neoconservative commentators denigrating the very idea of international law.

Now consider what Russian Foreign Minister Lavrov wrote in early 2009:

---

<sup>69</sup> George Friedman, *The Medvedev Doctrine and American Strategy*, Stratfor Global Intelligence (Sept 2, 2008), available online at <[http://www.stratfor.com/weekly/medvedev\\_doctrine\\_and\\_american\\_strategy](http://www.stratfor.com/weekly/medvedev_doctrine_and_american_strategy)> (visited Apr 26, 2009).

<sup>70</sup> Department of Defense, *The National Defense Strategy of the United States of America* 5 (2005), available online at <<http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf>> (visited Apr 26, 2009).

We will never agree to legal nihilism in world affairs, with the attitude towards international law as a “draft pole” and as the “fate of the weak” or with any attempts to “cut corners” to the detriment of international legality, which is the embodiment of the moral principle in relations among states. Indeed, international law is our ideology in international affairs. To use Fyodor Tyutchev’s phrase, we want “once and for all to establish the triumph of law, of historical legality over the revolutionary mode of action.”<sup>71</sup>

This rhetorical tactic has played well in the Russian near abroad. As Charles King wrote:

[A] military operation that the West denounced as an act of aggression was seen in Russia and beyond as laudable, proportionate, and humanitarian.

These views are not simply the product of Kremlin-led propaganda efforts. They reflect deeply held beliefs about the United States’ role in the Black Sea region and about basic concepts such as self-determination and democracy.<sup>72</sup>

Russia has used the language of international law to play to the audiences with which it is concerned: the publics and leaders of the former Soviet states. The paradoxical result is that these leaders and publics are now cheering on an interpretation of international law that actually puts them at greater risk of unilateral Russian intervention. But, rather than a threat, they see it as upholding international law and confronting the crony regime of the US—a deft diplomatic move by Russia.

King also explains: “[T]here are plenty of other countries, from China and Venezuela to Iran and Syria, that share Russia’s view of the global order.”<sup>73</sup> Consequently, Russia’s interpretations of international law find a ready and willing audience—or perhaps more of a clique than an audience. As King emphasizes: “Russia is not alone in questioning the consistency of the United States’ responses to territorial conflicts around the world or the evenhandedness with which the West doles out labels such as ‘democratic,’ ‘terrorist,’ or ‘rogue state.’”<sup>74</sup>

And so, when Russia speaks, many states listen very carefully. Russia’s arguments have been most successful with states with similar normative proclivities. Russia’s actions seem to exemplify its realization that the language of international law can be used to rally the support of like-minded states that have been outside the mainstream of international law. And so, as the US pulled back from basing its rhetoric on international law during the Bush Administration,

---

<sup>71</sup> *Lavrov’s Article* (cited in note 48).

<sup>72</sup> King, 87 *Foreign Aff* at 10 (cited in note 49).

<sup>73</sup> *Id* at 3.

<sup>74</sup> *Id* at 4.

Russia actually increased its use of the language of international law as a way to frame its foreign policy and organize support among its regional neighbors and other like-minded states. Thus, paradoxically, Russia has increased its use of international legal rhetoric *because* it was becoming increasingly skeptical of political cooperation with the West.

But, how successful has Russia's use of legal rhetoric been? Russia's actions to keep Kosovo within Serbia may have slowed the rate of recognitions. However, although some have argued that Kosovo's declaration is a failure for having garnered "only" fifty-eight recognitions (as of this writing), this is a much larger level of recognition than what has been accomplished by South Ossetia, Abkhazia, Turkish Republic of Northern Cyprus, Transnistria, Nagorno Karabakh and other incomplete secessions. Those secessionist entities have held territory anywhere from fifteen to thirty or more years and, at best, have one or two states that recognize them. The secessionists may control territory, but they are political pariahs. In this light, Kosovo is closer to the "successful" secessions of Bangladesh and Eritrea than to the failed or "frozen" secessions. This may be in part due to the willingness of many EU states to recognize Kosovo.<sup>75</sup> This decreased the cost of recognition, somewhat, for other states.

By contrast, while the campaign for South Ossetia was a military victory for Russia, it has not delivered South Ossetia's international recognition. Russia has built a narrative that has been persuasive to an extent in the Russian near abroad, particularly on the issue of Russian intervention. But, besides Nicaragua, it has not actually garnered recognition for these entities as states.<sup>76</sup>

This exemplifies the limits of the use of international legal rhetoric by great powers. As described in Section III above, the international community is highly skeptical of secession and has built a legal regime that disfavors secession. In some instances, where there is significant political backing by multiple states, a significant number of states may recognize a secessionist entity like Kosovo. But this is the exception to international politics. As of the time of this writing, Russia has seemingly been unable to persuade more than one other state to recognize the entities trying to secede from Georgia. Even great powers have

---

<sup>75</sup> See, for example, Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule*, Cleveland-Marshall College of Law Research Paper 09-163 at 22 (Feb 2009), available online at <<http://ssrn.com/abstract=1337172>> (visited Apr 26, 2009) (arguing that "without the political support of the Great Powers and the Great Powers' willingness to recognize Kosovo as a new state, the Kosovars would not have been able to assert their independence from Serbia as easily and as flawlessly as they did in February 2009"). However, as I argue here, while US and EU support assisted in garnering a certain level of recognition, push back by Russia and other states has made Kosovo's recognition process neither easy nor flawless.

<sup>76</sup> As of this writing, there is an open issue as to whether Belarus will recognize South Ossetia and/or Abkhazia.

difficulty finding traction when they are trying to push against well-entrenched international legal norms, like the norm against secession.

However, this does not mean that great powers cannot change international law with their rhetoric, just that it is difficult to do so in the face of persistent norms. Fostering change is only one reason why great powers make concerted use of legal rhetoric. The final section of this Article will return to the broader question of the relation of the language of international law to the practice of politics.

## V. WHEN TALK IS NOT CHEAP

Of what use is international law? Some might say that all that we see is an attempt to make bad acts seem not so bad. While it is obvious that great powers use legalistic vocabulary for political ends, there is nothing simple about it. Great powers (and other states) use—or do not use—legal arguments based on a calculation of their political goals that include issues of reputation and future credibility, as well as interests in maintaining or undermining the relevant legal regime. In this last section I will consider certain implications of this observation.

### A. I DO GIVE A DAMN ABOUT MY BAD REPUTATION

On one level, states cloak their actions in legalese to foster reputations of being lawful actors. Andrew Guzman has written extensively on the role of reputation as a prod towards compliance to international rules. He explains that: “A reputation for compliance with international law is valuable because it allows states to make more credible promises to other states. This allows the state to extract greater concessions when it negotiates an international agreement.”<sup>77</sup> Without going too deeply into the rich literature on the relation of reputation and compliance, one can respond that even if a reputation for compliance can at times be beneficial to states, that does not mean that states will actually comply with a legal rule. They may simply seek to conceal their noncompliance or, if that is not possible, to differentiate their activities, in an attempt to maintain that the legal rule they are allegedly breaching does not, in fact, apply.<sup>78</sup>

Yet, while this is undoubtedly correct, this is not the whole story of when states use legal language: it is not that states are either trying to maintain their reputation through a good faith interpretation or, at least, decrease reputational loss through the use of lousy legal arguments as a fig leaf. Rather, if we consider

---

<sup>77</sup> Andrew T. Guzman, *Reputation and International Law*, 34 *Ga J Int'l & Comp L* 379, 383 (2006).

<sup>78</sup> Robert O. Keohane, *International Relations and International Law: Interests, Reputation, Institutions*, 93 *Am Socy Int'l L Proceedings* 375, 377 (1999).

the insights of constructivist legal scholars and international relations theorists, we come to realize that the act of arguing about interpretations of international law can ultimately change the law, without actually changing the wording of a single treaty or court case.

## B. FROM LANGUAGE TO NORMS TO LAWS

If we take the constructivist turn in legal scholarship seriously, then we know that norms matter. Constructivists argue that individuals “do not exist independently from their social environment and its collectively shared systems of meanings.”<sup>79</sup> Our use of language—what is or is not a right, what is “self-defense,” who are a “people,” and so on—plays an essential role in constructing our social environment.<sup>80</sup> Moreover, the rules that we set up for how we use these terms, the “rules of discourse,” inform actors as to which arguments may or may not be made legitimately.<sup>81</sup> Consequently, “actors can learn new patterns of reasoning and may . . . begin to pursue new state interests.”<sup>82</sup>

This process is especially powerful in international law for two reasons. First, the pluralist, polycephalic nature of international law means that in most cases there is no final interpreter of what law is. In certain instances the ICJ or another such institution may play an important role in resolving an interpretive dispute between two or more states. However, as a technical matter, these cases are only legally binding on the litigants, although they may be used as persuasive evidence in subsequent disputes among different parties. More generally, relatively few cases arrive before the ICJ and other international tribunals in comparison with the vast array of interpretive disputes that exist (although the number and variety of cases before international tribunals are increasing). Consequently, the most important interpreters of international law are the interpreters in the states themselves. Ian Johnstone applied Stanley Fish’s theory of “interpretive communities” to international law, writing: “Interpretative authority . . . resides in neither the text nor the reader individually, but with the community of professionals engaged in the enterprise of treaty interpretation

---

<sup>79</sup> Thomas Risse, “Let’s Argue!”: *Communicative Action in World Politics*, 54 *Intl Org* 1, 5 (2000).

<sup>80</sup> See John R. Searle, *The Construction of Social Reality* 59 (Free Press 1995) (stating that “language is essentially constitutive of institutional reality”).

<sup>81</sup> Risse, 54 *Intl Org* at 17 (cited in note 79). See also Koskenniemi, *From Apology to Utopia* at 11 (cited in note 61) (describing the concept of a legal “*langue*”).

<sup>82</sup> Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, in Peter M. Haas, ed., *Knowledge, Power, and International Policy Coordination* 1, 2 (South Carolina 1992). See Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L J* 621, 625–26 (2004). See generally G. John Ikenberry and Charles A. Kupchan, *Socialization and Hegemonic power*, 44 *Intl Org* 283 (1990).

and implementation.”<sup>83</sup> While international law skeptics would say that the use of legal language is determined by international politics, the insight of Johnstone and others is that how we interpret the words of international law is important to understanding the structure of international relations:

Law structures the relations among States by providing a common frame of reference. It is the language of international society: to present one’s claims in legal terms means to signal which norms one considers relevant and to indicate which procedures one intends to follow and would like others to follow.<sup>84</sup>

Second, since customary international law is formed by consistent state practice coupled with a sense of legal obligation, the consistent interpretation of a particular term, such as “self-determination,” can be viewed as a component of state practice. If other states follow a norm leader, such as a great power, and adopt the same interpretation and apply it more or less consistently, this could lead to the formation of customary international law. Constructivists have shown the legal academy that, in considering the formation of law, norms matter. However, the contributions of theorists particularly interested in communication and language have shown us that words matter. The language that we use plays a part in constructing the social reality of international law, which in turn affects the calculations of states as they define their foreign policies.

### C. GREAT POWERS AS POWERFUL INTERPRETERS (WITHIN REASON)

While some states are able to be influential norm makers, most states are resigned to usually be norm takers. In Wilhelm Grewe’s history of international law, he found that for the last five hundred years “[t]he hegemon in each case led the way in formulating the international law rules of the time.”<sup>85</sup> Crucial to the formulation of international legal rules are the public statements of a state, its explanations of how it understands its rights and responsibilities, its interpretation of treaties, and so on. How a state chooses to characterize a situation matters. For example, is it aggression or is it humanitarian intervention?

---

<sup>83</sup> Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 Mich J Intl L 371, 372 (1991). For a similar concept, see the discussion in international legal literature and in international relations literature of “epistemic communities.” See generally Haas, *Introduction* (cited in note 82). I discuss epistemic communities at greater length in Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 Geo Wash Intl L Rev 685 (2007).

<sup>84</sup> Johnstone, 12 Mich J Intl L at 376 (cited in note 82).

<sup>85</sup> Detlev F. Vagts, *Hegemonic International Law*, 95 Am J Intl L 843, 844 (2001), citing Wilhelm G. Grewe, *The Epochs of International Law* (de Gruyter 2000).

Weak states, when not banded together, tend to be norm takers. They also tend to defend international law as a system because they see it as a check against the unbridled use of power (even though the great powers had a primary role in defining international law). Small states also try to follow legal rules in order to be seen as trustworthy and to increase their reputations.

When the US was comparatively weak in the eighteenth and the early nineteenth centuries, it wanted to be perceived as respectful of international law. Under the Bush Administration, as a world-spanning power, the US tried to loosen itself from the strictures of international law and increase the indeterminacy of its rules. But these are norms to which it has socialized many—if not most—states of the international system since the Second World War. Now these states, who have internalized various norms like nonintervention, the territorial integrity of states, the importance of international tribunals, and so on, have become the defenders of the international legal system both for the system itself, and probably as a means to check the power of the US, Russia, and other great powers. As the US and Russia have realized in the tussles over Kosovo and South Ossetia, the “law-makers and subjects of international law are usually identical.”<sup>86</sup>

Thus, by taking up the rhetorical language of international law, great powers hope not only to legitimize their actions, but to actually change the rules of the game and, ultimately change law itself. Sometimes this last step would be a step too far. In the case of NATO’s intervention in Serbia in 1999, we have anecdotal evidence that the US and others backed away from their legal arguments justifying intervention for fear that this would lead to a new, more lenient, norm allowing military interventions. The same is likely to have occurred regarding the legal justification of Kosovo’s declaration. Even though the US and EU could access credible legal arguments in support of the declaration and of their recognitions, they did not want to support a broader conception of secession and so they did not engage in law talk but rather the vague rhetoric of “uniqueness.” Kosovo’s successes in the number of recognitions it has received is likely the result of: (a) certain states accepting—without explicitly stating so—that a population who faced the violence that the Kosovars did probably has no other viable alternative than secession; and (b) the fact that the EU is made up of twenty-seven states, most of which wanted the EU to speak with one voice, which assisted Kosovo in getting a relatively large number of recognitions in one fell swoop. This then decreased the cost to other states for choosing to recognize Kosovo.

In the case of South Ossetia, Russia found a set of legal concepts (concerning self-defense and the protection of nationals abroad) that, although

---

<sup>86</sup> Krisch, 16 *Eur J Intl L* at 378 (cited in note 3).



different in application from how most states would have interpreted international law, resonated with the views of a regional audience that Russia was targeting.<sup>87</sup> Thus, the primary way that Russia may be changing international law is not, at first, by convincing states of a different interpretation, but rather by providing voice to an interpretation that resonates with norms already accepted by a certain grouping of states. What Russia has really done is organize and rationalize a legal argument around existing norms that have been against the prevalent rules of international law and, possibly, started its own interpretive community that will legitimize its actions and, in certain aspects, allow it greater leeway.<sup>88</sup> However, this strategy has not been successful (as of this writing) when applied to actual recognition of separatist entities.

## VI. CONCLUSION

International law, perhaps more than anything else, has become a consensual vocabulary and grammar for how states talk about international relations. The process of normative change is, in part, a language game in which meanings, definitions, and constructions are contested. How we define the substance of international law can change the community's interpretation of what constitutes international law.

What drives a change in the vocabulary and grammar of international law is not monocausal but rather a feedback loop: international politics affect international law, which then affects international politics, and so on. So, while great powers may have a privileged position from which they may attempt to define international law, once a certain conception of law propagates through the international system, the erstwhile norm makers can also be held accountable to those norms that they have defined. The rules of self-determination that disfavor secession may be one of those areas where the accepted rules—the common grammar and vocabulary—are constraining the believability of Russian and American claims.

However, a great power may choose to push at the boundaries of the vocabulary by placing its actions in the grey zone between what is clearly accepted and what is definitely prohibited. If it does this and is also able to persuade other states to start interpreting words in the same way (or if it finds

---

<sup>87</sup> I analyze issues related to great power competition and normative regionalism in Christopher J. Borgen, *Whose Public, Whose Order?: Imperium, Region, and Normative Friction*, 32 *Yale J Intl L* 331 (2007).

<sup>88</sup> Regarding the application of a theory of dominant and subjugated discourses to international relations, see James F. Keeley, *Toward a Foucauldian Analysis of International Regimes*, 44 *Intl Org* 83, 91–92 (1990).

like-minded states that are already willing to do so), then it may lay the groundwork for significant legal change.

The US did this in the years following the First World War when it brought self-determination from the realm of political rhetoric and turned it—and its limits—into key concepts in modern international law. Apparently, the US does not want to frame Kosovo's independence as another such moment of redefinition (or even of clarification of definition).

Russia, for its part, may be pursuing such a definitional change in regards to its ability to intervene regionally. However, it has so far been largely unsuccessful in its attempts to foster recognition of the separatist entities it supports.

While the meanings of the words may not always be clear, they nonetheless can have significant effect on international law. When great powers talk, people listen.

